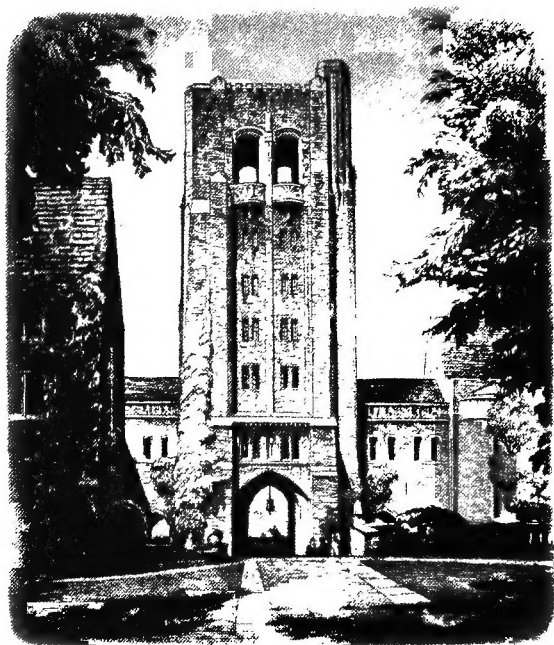


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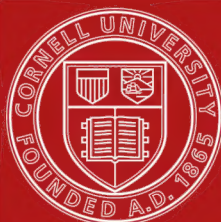
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COMMENTARIES
ON THE
LAW OF EVIDENCE
IN
CIVIL CASES

BY

BURR W. JONES

of the Wisconsin Bar

Professor of the Law of Evidence in the College of Law of the University
of Wisconsin

Fidesque acquirit eundo

—Verg. Aen.

WITH THE LAW APPLICABLE TO EACH SECTION OF THE ORIGINAL
TEXT, REWRITTEN, ENLARGED AND BROUGHT WITH
AUTHORITIES UP TO THE PRESENT DATE

BY

L. HORWITZ

of the San Francisco Bar

VOLUME II

SAN FRANCISCO
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1913

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§ 176 (174). Burden of proof—Definition—On whom does it lie.—The words “burden of proof” are so often used by different parties to convey such widely different ideas that no very satisfactory statement of their meaning can be made. A learned author in a very able discussion has well pointed out the confusion of ideas upon the subject and shown that the phrase “burden of proof” is used in three ways: (1) To indicate the duty of bringing forward argument or evidence in support of a proposition at the beginning or later; (2) to mark that of establishing a proposition as against all counter-argument or evidence; (3) an indiscriminate use in which it may mean either or both of the others.¹ The following is a simple illustration of what the burden of proof is. The reader will hear at some time and place the opening remarks of one about to narrate, we will suppose, a personal experience. His story begins with the utterance of a simple assertion, such as, “I was driving in my automobile yesterday,” when an interrupter puts in a point blank challenge of the assertion thus: “You haven’t got an automobile.” We want the reader to assume the conversation left just there. If no more is said, the first speaker is clearly stigmatized as romancing, while the interrupting assertion is accepted without proof. It is evident that if the first speaker is to render his narrative so that it shall be believed, it behooves him to refute the statement of the interrupter. That necessity casts on him the trouble of asseverating his original statement, with the addition

¹ Thayer, Prel. Treat. on. Ev., p. 355 et seq.; *Supreme Tent v. Stensland*, 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098. Refusal to charge as to the burden of proof, if not covered by the main charge, has been held reversible error in civil cases: *Schilling v. Town of Verona*, 88 Wis. 317, 321, 60 N. W. 272; *Cleveland C. C. & St. L. Ry. Co. v. Richey*, 43 Ill. App. 247; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 436; *Texas Ry.*

Co. v. Ayres, 83 Tex. 268, 18 S. W. 684. The rule is the same in criminal cases: *Reeves v. State*, 29 Fla. 527, 10 South. 901; *Hurd v. State*, 94 Ala. 100, 10 South. 528; *State v. Graham*, 96 Mo. 120, 8 S. W. 911; *Pierce v. State (Tex.)*, 22 S. W. 587; *Ginn v. Dolan*, 81 Ohio St. 121, 135 Am. St. Rep. 761, and note thereto on the subject, 18 Ann. Cas. 204, 90 N. E. 141.

of such other facts as will substantiate it, and thus is cast upon him the obligation to answer an assertion, which is the simplest form in every-day life of the burden of proving a statement.² Stephen thus states the rule which pre-

² From the note to *Ginn v. Dolan*, *supra*, we extract the following interesting description of the legal burden of proof: "We shall endeavor to define what is meant by perhaps the best known and worst treated phrase in legal use. Like most innocuous looking phrases, there is a great deal more in it than would warrant the supposition that it means just what it says—the burden or task of proving something, as a rule, an unsupported assertion. It carries with it in law a penalty for shirking the burden. While, logically considered, the mere fact that a challenged statement is left challenged draws after it no other consequence than the fact that the original statement is untested, and that it is only when the maker of the statement desires to establish its truth that the obligation to answer arises, in legal proceedings the party on whom the burden is saddled knows before he enters the arena of action or suit that he must carry his burden safely through, or better not have begun litigation. It is true, he may so shift the burden to suit his back and prevent the chafe of keeping the saddle in one place, but it is his burden all the while, just as his opponent may have to carry one for himself. We must bear constantly in mind that the object of going to law is to have ascertained by an officer specially appointed for that purpose certain facts which are in dispute between the parties. But the officer—the judge—has to do more than ascertain the facts. His main duty is to apply to the facts, when found, the true prin-

ciple of the law appropriate to the case in hand. The complaining party, the one with the grievance, presents to the court in writing his cause for seeking judicial redress. It requires only the exercise of reason to recognize that as he bases his complaint on certain grounds, which for uniformity and facility of comparison with other cases are framed in the language of the courts, he must ultimately show or prove them to be true, or the party complained against will not be called upon to answer at all. Clearly, then, when he has made an affirmative statement which is in issue by the denial of the one called upon to defend himself, the law calls upon him to prove his case, or, as we now term it, casts on him the burden of proof." The general rule undoubtedly is, that when an issue is properly joined, he who asserts the affirmative may prove it: *Simonton v. Winter*, 5 Pet. (U. S.) 141, 8 L. Ed. 75. It might seem to follow from this that the plaintiff would always have to carry the burden, but this is not so; for though the defendant, who has denied the plaintiff's averment of his wrongs, is, up to the trial of the case, in the same position as the plaintiff, yet as the plaintiff has invoked the law, it is for him at the day of trial to substantiate his statement of wrongs sought to be righted before the defendant shall be called upon to make proof of the facts supporting his denial of liability. From this simple form of allegation and denial, however, there spring many complications, when the party defending finds it necessary for his

vails in England for determining on whom the general burden of proof lies: "The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceedings go on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor."³ This rule has been generally approved in this country.⁴ By the *onus*

defense to make in his turn affirmations; and there has, therefore, been adopted by the courts a means for testing who shall bear the burden of proof in such cases. "An unfailing test adopted by the court for ascertaining upon which side the affirmative of an issue really lies is to consider which party would be successful if no evidence at all were given, or, which is substantially the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer, or the pleading, there would or would not be a defense of the action, or an answer to the previous pleading. This proposition has long passed from the sphere of legitimate debate or serious question, and is among the indisputable assertions of evidentiary law; it is supported by a series of well-considered decisions in which the doctrine is sustained with such vigor as to leave it a matter of serious doubt if the position can ever be successfully assailed": Rice on Evidence, secs. 67, 68; Brandon v. Cabiness, 10 Ala. 155; Shulman v. Brantley, 50 Ala. 81; Luckhart v. Ogden, 30 Cal. 547, 2 Morr. Min. Rep. 601; Johnson v. Gorman, 30 Ga. 612; Bennett v. O'Brien, 37 Ill. 250; Hyde v. Heath, 75 Ill. 381; Davidson v. Nicholson, 59 Ind. 411; West v. St. John, 63

Iowa, 287, 19 N. W. 238; Louisville & N. R. Co. v. Brown, 13 Bush (Ky.), 475; Friedlander v. Brooks, 35 La. Ann. 741; Dillingham v. Roberts, 77 Me. 284; Morgan v. Morse, 13 Gray (Mass.), 150; Broaders v. Toomey, 9 Allen (Mass.), 65; Beals v. Merriam, 11 Met. (Mass.) 470; Wright v. Wright, 139 Mass. 177, 29 N. E. 380; Gilmore v. Wilbur, 18 Pick. (Mass.) 517; Smith's Appeal, 52 Mich. 415, 18 N. W. 195; Karst v. St. Paul, S. & T. F. R. Co., 23 Minn. 401; Fox v. Hilliard, 35 Miss. 160; Kelsay v. Frazier, 78 Mo. 111; Kendall v. Brownson, 47 N. H. 186; Randolph v. Wilson, 38 N. J. Eq. 28; Wood v. Knapp, 100 N. Y. 109, 2 N. E. 632; Briceland v. Commonwealth, 74 Pa. 463; Craig v. Pervis, 14 Rich. Eq. (S. C.) 150; Cox v. Cock, 59 Tex. 521; Priest v. Whitacre, 78 Va. 151; The Argo, 1 Gall. 150, Fed. Cas. No. 516; United States v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336.

³ Steph. Ev., art. 95.

⁴ 1 Whart. Ev., § 357; Foster v. Reid, 78 Iowa, 205, 16 Am. St. Rep. 437, and note, 42 N. W. 649; Wetherell v. Hollister, 73 Conn. 622, 48 Atl. 826; McIntyre v. Ajax Min. Co., 20 Utah, 323, 60 Pac. 552, 20 Morr. Min. Rep. 142; McFerran v. McFerran, 21 Ky. Law Rep. 252, 51 S. W. 307. This is illustrated by many

probandi is meant the obligation imposed upon a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action to establish it by proof. It may be proved by the production of evidence in the usual way, or the law under certain circumstances, in certain cases, may presume its existence without proof. Whenever it may be presumed to exist in the absence of proof, the presumption may be repelled and overcome by evidence; and whenever the repelling proof leaves the fact to be established in doubt and uncertainty, the party making the allegation is to suffer, not his adversary.⁵ As a matter of law, the burden of proof in any case is determined by the issues, and it does not shift, but at the end, the party upon whom the burden rests by the pleadings must have sustained his position by a preponderance of evidence. The burden of proof is often spoken of as equivalent to the duty of introducing evidence to meet or overcome a *prima facie* case, and, in asking the court to instruct the jury that by the proof of certain facts the burden is cast on the defendants, the complainant in fact seeks to have the court tell the jury that such facts constitute a *prima facie* case for complainant.⁶ We have given enough of the judicial interpretation of the phrase to show that there exists some confusion in its use. It is sometimes used to signify the burden of making or meeting a *prima facie* case, and sometimes of producing a preponderance of evi-

cases cited in this chapter. See notes to *Goodwin v. Smith*, 37 Am. Rep. 148, to *Andenreid's Appeal*, 33 Am. Rep. 736, and to *Oldham v. Kerchner*, 28 Am. Rep. 308, for a discussion of burden of proof in general.

⁵ *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642, 15 How. Pr. (N. Y.) 503; *Simon v. Krimko*, 139 App. Div. 187, 123 N. Y. Supp. 697; *In re Falabella's Will*, 139 N. Y. Supp. 1003; *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048; *John Turl's Sons v. Williams Engineering & Cont. Co.*, 136 App.

Div. 710, 121 N. Y. Supp. 478; *Burns' Lumber Co. v. W. J. Reynolds Co.*, 148 Ill. App. 356; *Stitzel v. Farley*, 148 Ill. App. 635; *People v. Hulin*, 237 Ill. 122, 86 N. E. 666; *Palmer v. Huston*, 67 Wash. 210, 121 Pac. 452.

⁶ *Phelps v. Jenkins*, 4 Scam. (5 Ill.) 48; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273. See also, *Lobdell v. Northville*, 151 App. Div. 384, 136 N. Y. Supp. 113.

dence. These burdens are often on the same party, but not always. It is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, that he must therefore have a preponderance of evidence. A very good illustration is given in a California case. Suppose that upon an issue as to the performance of a contract sued upon, the plaintiff should testify to facts showing nonperformance. In such case, if the defendant produced no evidence, the plaintiff must prevail. This is often expressed by saying that the burden has shifted to the defendant. And so it has in one sense. But suppose that the defendant should take the stand and deny the truth of the facts testified to by the plaintiff—oath being opposed against oath. Would it be correct to say that the defendant must have a preponderance of evidence? It most certainly would not. And this, though the “burden of proof” had been transferred to him. Nor would it be correct to say that the burden had “shifted back” to the plaintiff if the burden of producing a preponderance of evidence was meant. For that never was on the defendant. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue.⁷ Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails. If he makes a *prima facie* case and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden or *onus* of proof is simply to consider *which party would be successful if no evidence were given*, or if no more evidence were given than has been given at a particular point of the case; for it is obvious that during the controversy in the litigation there are points at which the *onus* of proof shifts and at which the tribunal must say, if the case stopped there, that it must be decided in a particular manner. Such being the test,

⁷ *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871.

the burden cannot rest forever upon the one on whom it is first cast; but as soon as he in his turn brings evidence which *prima facie* rebuts the evidence against which he is contending, the burden shifts again until there is evidence which once more turns the scale.⁸ That being so, the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win.

§ 177 (175). — **Same—Shifting of the burden.**—Discrimination must be exercised in using the terms “burden of proof” and “weight of evidence.” While the burden of proof remains on the party affirming a fact in support of his case, and is not changed in any aspect of the cause, except by legal presumption, the weight of evidence shifts from side to side in the progress of the trial, according to the nature and strength of the evidence offered in support or denial of the main fact to be established.⁹ During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient, it may be, to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is, that there is a necessity for evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial.¹⁰ In Massachusetts there is a line of judicial decisions in which the attempt has been made to clearly *distinguish* between the terms “burden of proof” and “weight of evidence”;

⁸ *Albrath v. Northeastern Ry. Co.*, L. R. 11 Q. B. Div. 79, 11 App. Cas. 247. As to extent of burden in general, see the recent cases of *In re Lucke's Estate* (Or.), 123 Pac. 46; *Donovan v. Maloney* (Del. Super.), 84 Atl. 1032; *Vischer v. Northwestern etc. R. Co.*, 256 Ill. 572, 100 N.

E. 270; *North v. Jones* (Ind. App.), 100 N. E. 84.

⁹ *Delano v. Bartlett*, 6 Cush. (Mass.) 364; *Burnham v. Allen*, 1 Gray (Mass.), 496; *Central Bridge Corp. v. Butler*, 2 Gray (Mass.), 130; *Morrison v. Clark*, 7 Cush. (Mass.), 213; *Kendall v. Brownson*, 47 N. H. 186.

¹⁰ *Heinemann v. Heard*, 62 N. Y. 443.

it is there insisted that, while the latter shifts from side to side in the progress of a trial according to the nature and strength of the proof offered, the burden of proof does not shift or change in any aspect of the case.¹¹ While the Massachusetts cases are sometimes quoted with approval on this point in other states, this attempt to thus restrict the meaning of the term "burden of proof" does not seem to have met with general approval;¹² and the labored distinctions which in numerous cases have been made between the "weight of evidence" and the "burden of proof" have been of but little practical value. In those cases where the answer is a mere *general denial* and the defendant only assumes to rebut the plaintiff's proof, it may be properly said that the burden of proof is upon the plaintiff throughout and that it never shifts.¹³ Nor is the burden of proof shifted by the mere fact that evidence is offered against the defendant of his *admission* of the breach of duty charged against him. In an action for negligence where it was claimed that the default was admitted, the court said: "Upon this question the plaintiffs held the affirmative

¹¹ Central Bridge Co. v. Butler, 2 Gray (Mass.), 130; Powers v. Russell, 13 Pick. (Mass.) 69; Gay v. Bates, 99 Mass. 263; Nichols v. Munsel, 115 Mass. 567; Rapp v. Sarpy County, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Klunk v. Hocking Valley Ry. Co., 74 Ohio St. 125, 77 N. E. 752; Gibbs v. Bank, 123 Iowa, 736, 99 N. W. 703, 4 Harv. L. Rev. 45; Heinemann v. Heard, 62 N. Y. 448; Clark v. Hills, 67 Tex. 141, 2 S. W. 356.

¹² See discussion, Thayer, Prel. Treat. on Ev., p. 355 et seq., and cases cited.

¹³ Tennessee Coal, Iron & Ry. Co. v. Hamilton, 100 Ala. 252, 14 South. 167; Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261; Sullivan v. Capital Trac. Co., 34 App. D. C. 358; Williams v. Empire Mut. Annuity &

Life Ins. Co., 8 Ga. App. 303, 68 S. E. 1082; Mobley v. Lyon, 134 Ga. 125, 137 Am. St. Rep. 213, 19 Ann. Cas. 1004, 67 S. E. 668; Wilson v. Chicago City R. Co., 144 Ill. App. 604; Lafayette v. Wortman, 107 Ind. 404, 8 N. W. 277; Rothrock v. Perkinson, 61 Ind. 39; Jarboe v. Scherb, 34 Ind. 350; Lafayette Ry. Co. v. Ehman, 30 Ind. 83; Wilder v. Cowles, 100 Mass. 487; Berringer v. Lake Superior Iron Co., 41 Mich. 305, 2 N. W. 18; Ingalls v. Eaton, 25 Mich. 32; Alabama & V. R. Co. v. Groome, 97 Miss. 201, 52 South. 703; Dorrell v. Sparks, 142 Mo. App. 460, 127 S. W. 103; Stephens v. Fire Assn. of Philadelphia, 139 Mo. App. 369, 123 S. W. 63; Southwestern Tel. & T. Co. v. Luckett (Tex. Civ. App.), 127 S. W. 856; Koppe v. Koppe, 57 Tex. Civ. App. 204, 122 S. W. 68.

throughout the trial; and their relation to the question never changed. During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial."¹⁴ As we have said, the difficulty owes its origin and continuance to the failure of lawyers sufficiently to appreciate the difference between the burden of proof attaching from the inception of the case and the state of proof at different periods in the progress

¹⁴ In *Gibbs v. Farmers & Merchants' Bank*, 123 Iowa, 736, 99 N. W. 703, Chief Justice Deemer said: "It is clearly a misnomer of terms to say that the burden of proof swings like a pendulum from one side to the other during the progress of a trial. All that is meant is that the duty of introducing evidence to meet a *prima facie* case shifts back and forth: *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681. The burden of proof at all times rests upon him who affirms: 1 *Taylor on Evidence*, 9th ed., 276, Am. notes, 12; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776; *Heinemann v. Heard*, 62 N. Y. 448." A particularly fine statement of this rule will be found in *Powers v. Russell*, 13 Pick. 69. A late and clear utterance on the subject is in *Mobley v. Lyon*, 134 Ga. 125, 137 Am. St. Rep. 213, 19 Ann. Cas. 1004, 67 S. E. 668, wherein the court says: "Much confusion has arisen out of the fact that the expression 'burden of proof' has been used in two senses, viz.: (1) The necessity which rests upon a party

at any particular time during a trial to create a *prima facie* case in his own favor, or overthrow one when created against him. (2) The necessity of establishing the existence of a fact or state of facts by evidence which preponderates to a legally required extent. 16 Cyc. 926 . . . If in a trial the question is whether a certain person signed a certain instrument or not, the party who asserts that it was so signed and to whose case this is essential carries the burden of proving it. If he makes out a *prima facie* case, that would authorize the jury to find in his favor, if nothing further appeared. But, if the defendant introduces evidence tending to disprove the *prima facie* case thus made, all the evidence should be considered by the jury in finally determining where the preponderance lies; the burden being upon the person who alleged the fact of the signature, in the sense that such allegation must be supported by the preponderance of the evidence in order for the party making it to have a verdict in his favor."

of that case. The loose use of the expression is to be found in some of the excellent excerpts we have used in this chapter. At the risk of repeating ourselves, while we welcome freedom in the expression of thought, we must deprecate any such looseness of expression as may conduce to confusion. It is inaccurate to say the burden shifts from side to side, for it does not. The burden is carried by the responsible party throughout the case, and having established his case by *prima facie* or other evidence, he rests, and if the opposite party elects to contest the case at that stage, it is necessary for the other to resume his burden and carry it to the end. On the trial of an action against a railway company brought by a locomotive fireman for personal injuries received by him in consequence of a defect in the water-gauge glass attached to the locomotive upon which he was employed, an instruction that, to overcome the effect of the *prima facie* evidence of negligence arising from proof of such defect, "the defendant company is required to satisfy the jury by a preponderance of the evidence that it was not negligent," is erroneous. In such action the burden of proving, by a preponderance of the evidence, the particular negligence alleged is at all times upon the plaintiff, and while proof of facts, sufficient under the statute to create a *prima facie* presumption of negligence against the defendant, casts upon it the burden of producing evidence of equal weight or countervailing force, in order to control or destroy such presumption, yet proof of such facts does not impose upon the defendant the burden of establishing affirmatively, by a preponderance of the evidence, that it was not negligent. The rule is that he who affirms must prove, and when the whole of the evidence upon the issue involved leaves the case in equipoise, the party affirming must fail.¹⁵ It is to this undisciplined use of the phrase that the student searching

¹⁵ Ginn v. Dolan, 81 Ohio St. 121, 135 Am. St. Rep. 761, 18 Ann. Cas. 204, 90 N. E. 141; Klunk v. Hocking Valley Ry., 74 Ohio St. 125, 77 N.

E. 752; Best v. Rocky Mountain Nat. Bank, 37 Colo. 149, 7 L. R. A., N. S., 1035, 85 Pac. 1124.

for authoritative citations in support of his proposition will often discover a group of cases at foot of the proposition that in actions *on bills and notes* the burden of proving consideration is on the plaintiff, and another group affirming that the burden of proof is on the defendant. The grouping is right though the title is wrong. For the rule that the defendant must meet the *prima facie* case made out by the plaintiff there is ample authority.¹⁶ It is held that the burden of proof does not shift after the formal proof of a will is made where the issue is the *sanity of the testator*, but throughout the case the issue is the same and the burden of proof is upon the proponent. And in *criminal cases* it is the prevailing rule that the burden of proving the defendant's guilt upon the whole testimony remains on the prosecution throughout the case. The application of this general rule in cases where *insanity* is urged as a *defense* is discussed elsewhere. Where a defendant introduces

¹⁶ *Martin v. Foster*, 83 Ala. 213, 3 South. 422; *Ragsdale v. Gresham*, 141 Ala. 308, 37 South. 367; *Richardson v. Comstock*, 21 Ark. 69; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951; *Rowland v. Harris*, 55 Ga. 141; *Gallagher v. Kiley*, 115 Ga. 420, 41 S. E. 613; *Holmes v. Horn*, 120 Ill. App. 359; *Ewen v. Templeton*, 148 Ill. App. 46; *Beeson v. Howard*, 44 Ind. 413; *Luke v. Koenen*, 120 Iowa, 103, 94 N. W. 278; *Culbertson v. Salinger* (Iowa), 117 N. W. 6; *Sollenberger v. Stephens*, 46 Kan. 386, 26 Pac. 690; *Cox v. Cox's Exr.*, 25 Ky. Law Rep. 1934, 79 S. W. 220; *Bronston's Admr. v. Lakes*, 135 Ky. 173, 121 S. W. 1021; *Berwin v. Gauger*, 23 La. Ann. 647; *Sawyer v. Vaughan*, 25 Me. 337; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Jennison v. Stafford*, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; *Lombard v. Bryne*, 194 Mass. 236, 80 N. E. 489; *Holmes*

v. Farris, 97 Mo. App. 305, 71 S. W. 116; *Winfrey v. Ragan*, 136 Mo. App. 250, 117 S. W. 83; *Merchants' Nat. Bank v. Brisch*, 140 Mo. App. 246, 124 S. W. 76; *Coburn v. Odell*, 30 N. H. 540; *Harris v. Buchanan*, 100 App. Div. 403, 91 N. Y. Supp. 484; *Joveshof v. Rockey*, 58 Misc. Rep. 559, 109 N. Y. Supp. 818; *McArthur v. McLeod*, 51 N. C. 475; *Ginn v. Dolan*, 81 Ohio St. 121, 135 Am. St. Rep. 761, 18 Ann. Cas. 294, 90 N. E. 141; *Tinker v. Midland Valley Mercantile Co.*, 25 Okl. 160, 105 Pac. 333; *Flint v. Phipps*, 16 Or. 437, 19 Pac. 543; *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526; *Connemey v. Macfarlane*, 97 Pa. 361; *Pryor v. Coulter*, 1 Bail. (S. C.) 517; *South Dakota Cent. Ry. Co. v. Smith*, 22 S. D. 210, 116 N. W. 1120; *McCormick v. Kampmann* (Tex. Civ. App.), 109 S. W. 492; *First Nat. Bank v. Foote*, 12 Utah, 157, 42 Pac. 205; *Preas v. Vollintine*, 53 Wash. 137, 101 Pac. 706.

proof that he was not present when the alleged offense was committed, the burden of proof is not changed; it is the duty of the jury to consider all the evidence in the case, including that relating to the *alibi*, and to determine from the whole evidence whether it is shown beyond a reasonable doubt that the defendant committed the crime charged.¹⁷ The same reasoning applies when the defendant offers evidence of *self-defense*.¹⁸ A very interesting case upon the point was decided in California.¹⁹ Although section 1108 of the California Penal Code provides that upon a trial for murder, the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, it does not mean that he must prove such circumstances by a preponderance of the evidence; and he is only bound to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged.²⁰

¹⁷ See §§ 188, 192, *post*. As to *alibi*: *Schultz v. Territory*, 5 Ariz. 239, 52 Pac. 352; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137; *McNamara v. People*, 24 Colo. 61, 48 Pac. 541; *Peyton v. State*, 54 Neb. 188, 74 N. W. 597. See note on "Burden of Proof and Sufficiency of Evidence of *Alibi* in Criminal Cases," to *Glover v. United State*, 8 Ann. Cas. 1189.

¹⁸ *Henson v. State*, 112 Ala. 41, 21 South. 79; *State v. Shea*, 104 Iowa, 724, 74 N. W. 687; *Gravely v. State*, 38 Neb. 871, 57 N. W. 751.

¹⁹ *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549.

²⁰ Earlier California cases, *People v. Hong Ah Duck*, 61 Cal. 387, and *People v. Raten*, 63 Cal. 421, were overruled on this point. See, also, *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125, 18 Atl. 787; *Murphy v. State*, 31 Fla. 166, 12 South. 453; *Sikes v. State*, 120 Ga. 494, 48 S. E. 153; *Blandon v. State*, 6 Ga. App.

782, 65 S. E. 842; *Howard v. State*, 50 Ind. 190; *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430, 103 N. W. 137; *State v. Beasley*, 84 Iowa, 83, 50 N. W. 570; *State v. Ardoin*, 49 La. Ann. 1145, 62 Am. St. Rep. 678, 22 South. 620; *Commonwealth v. Choate*, 105 Mass. 451; *State v. Howell*, 100 Mo. 628, 14 S. W. 4; *Trujillo v. Territory*, 7 N. M. 43, 32 Pac. 154; *People v. Cantor*, 71 App. Div. 185, 75 N. Y. Supp. 68; *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455; *State v. Reitz*, 83 N. C. 634; *Commonwealth v. Gentry*, 5 Pa. Dist. 703; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561. The weight of authority overwhelms the few decisions to the contrary. In North Carolina the burden of proof of an *alibi* does not rest on the prisoner (*State v. Reitz, supra*), but that of self-defense does: *State v. Barringer*, 114 N. C. 840, 19 S. E. 275. This case

§ 178 (176). **Same—Form of pleadings.**—The whole scheme of the production of evidence in a trial is built upon the assumption of the burden of proof by the party holding the affirmative in presenting an issue. In actions for tort the burden is clearly upon the plaintiff to prove the charge, including the extent of the injury and the malice or other acts of aggravation, if exemplary damages are claimed; and throughout the trial the *onus* remains upon him to prove the acts complained of.²¹ In an action of deceit, *scienter* must not only be alleged, but proved; and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. But the plaintiff in such action has made out a *prima facie* case, without direct proof of deceitful intent, when he has proved that the defendant made a positive statement of a material fact, its falsity, and the circumstances under which it was made, tending to show a reckless assertion in conscious ignorance of the fact.²² When a plaintiff alleges

in turn is qualified by *State v. Castle*, 133 N. C. 769, 46 S. E. 1, in which exception was taken to the charge that the burden was upon the prisoner. The court in the last-named case said: Undoubtedly the general rule as stated by his honor is correct, but we think that he should have gone further, and said to the jury that, if the facts and circumstances accompanying the homicide were given in evidence by the state's witnesses, the defendants were not called upon to introduce other testimony, but could rely upon the state's evidence for mitigation of the grade of the homicide or for an acquittal: See *State v. Willis*, 63 N. C. 26. His honor said to the jury in conclusion: "But it is incumbent upon the defendants to satisfy you that these circumstances and state of facts have been shown to your satisfaction." We think that this was calculated to leave the impression upon

the minds of the jury that the defendants were required to introduce independent evidence to mitigate or excuse the homicide. As we have seen, if there was any evidence in the state's testimony which tended to establish the defense, it was the duty of the jury to consider it, as tending to sustain the plea of self-defense.

²¹ *Morrissey v. Chicago, B. & Q. Ry. Co.*, 38 Neb. 406, 56 N. W. 946; *Reagan v. El Paso & N. E. R. Co.*, 15 N. M. 270, 106 Pac. 376; *Mayer v. Lesh Paper Co.*, 45 Ind. App. 250, 89 N. E. 894, 90 N. E. 651; *Coates v. Marsden*, 142 Wis. 106, 124 N. W. 1057; *Booth v. State*, 134 Ga. 163, 67 S. E. 803; *Sullivan v. Capital Trac. Co.*, 34 App. D. C. 358; *New York Continental Jewell Filtration Co. v. District of Columbia*, 33 App. D. C. 377.

²² *Griswold v. Gebbie*, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673.

that an agreement, the subject matter of the action, was signed through fraud or mistake, the burden of proving such fraud or mistake lies on him.²³ The general rule is that when the defendant by his pleading merely denies the material averments of the complaint, the plaintiff must carry the burden of proof.²⁴ But if the defendant pleads a release, in abatement, a discharge in bankruptcy or other *substantive defense*,²⁵ the burden is shifted upon him to prove such affirmative defense, because it is his affirmative defense and forms no part of the plaintiff's averments.²⁶ By the law of Georgia a contract of insurance must be in writing, though the writing need not be delivered, if in other respects the contract is consummated. Where it is not delivered, an agent, whose duty it is to keep the property of his principal insured, is under obligation to see that in other respects the contract is consummated; and, on being sued for a breach of duty, the burden of proving that it was in fact consummated is on him. If he seeks to show this by evidence of a local custom, whereby it was the practice of insurance companies to renew any policy about to expire by sending out a new policy shortly before

²³ *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37.

²⁴ *Western R. Co. v. Williamson*, 114 Ala. 131, 21 South. 827; *Hudson v. Miller*, 97 Ill. App. 74; *Grimmell v. Warner*, 21 Iowa, 11; *Louisville etc. R. Co. v. McClain*, 23 Ky. Law Rep. 1878, 66 S. W. 391; *Taylor v. Guest*, 58 N. Y. 262; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621; *Mosher v. Post*, 89 Wis. 602, 62 N. W. 516.

²⁵ *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; *Blanchard v. Young*, 11 Cush. 341; *Moore v. Barber Asphalt Co.*, 118 Ala. 563, 23 South. 798; *Johnson v. Berdo*, 131 Iowa, 524, 106 N. W. 609; *Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. W. 475.

²⁶ *Sullivan v. Capital Trac. Co.*, 34 App. D. C. 358; *Sinsabaugh v. Cleve-*

land etc. R. Co., 149 Ill. App. 642; *Leslie v. Joliet Bridge & Iron Co.*, 149 Ill. App. 210; *Chapman v. Meiling*, 147 Ill. App. 411; *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N. E. 113, 93 N. E. 209; *Jamison v. Auxier*, 145 Iowa, 654, 124 N. W. 606; *Endicott v. Stump* (Ky.), 128 S. W. 76; *Herndon v. Louisville Nat. Banking Co.* (Ky.), 124 S. W. 835; *Chamberlain v. O'Leary*, 161 Mich. 670, 17 Det. Leg. N. 405, 126 N. W. 831; *Murphy v. Cooper*, 41 Mont. 272, 108 Pac. 576; *Guzick v. Ressler*, 67 Misc. Rep. 417, 123 N. Y. Supp. 78; *City of Cleburne v. Gutta Percha & Rubber Mfg. Co.* (Tex. Civ. App.), 127 S. W. 1072; *Gurley v. San Antonio & A. P. R. Co.* (Tex. Civ. App.), 124 S. W. 502.

the expiration of the former one, and presenting a bill for the premium within a month or two after such expiration, the burden is on him to establish that this custom was complied with in the particular instance.²⁷ When in an action for taking away a yacht the defendant admitted the taking and the plaintiff's title, his defense was dependent upon some right by way of justification to take and remove the yacht, and that was essentially matter to be pleaded by him to render evidence of the fact admissible as a defense. And the burden of proof by the issue so made, having been taken by the defendant, was not shifted to the plaintiff at the trial. As a rule, it remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect unless met by proof of the other party.²⁸ Inasmuch as the plaintiff took issue upon those allegations justifying the taking, therefore the affirmative of such issue was with the defendant. The burden was with the defendant to establish this affirmative defense of justification of the taking so alleged by him; and it was error for the court to charge the jury that the burden to prove the contrary was with the plaintiff.²⁹ In an action for injuries caused by being ejected from a train, the defense was that the plaintiff had no right to be on the train; that he refused to get off; that defendant's agent undertook to and did remove him; and that the force used was necessary to that end. McClellan, C. J., said: "The gist of this plea is its affirmative averment that the force was necessary to the performance of a lawful act. It involved no traverse of any fact alleged or necessary to be alleged by the plaintiff. It was not for him to allege or prove that the violence done to his person was not necessary to his removal from the train. Notwithstanding the plea, recovery could have been had by plaintiff without any *negation* of that necessity. It was a fact outside of his

²⁷ Thomas v. Funkhouser, 91 Ga. 478, 18 S. E. 312.

²⁸ Demick v. Chapman, 11 Johns. (N. Y.) 132; Blunt v. Barrett, 124

N. Y. 117, 26 N. E. 318; Heilman v. Lazarus, 90 N. Y. 672.

²⁹ Heinemann v. Heard, 62 N. Y. 448; Blunt v. Barrett, *supra*.

case, and only injected into the controversy by the defendant, who was not entitled to a verdict on account of it without proof of its existence."³⁰ On the other hand, if the formal execution of a release is admitted by the plaintiff, and if he claims that the *release* was obtained *by fraud*, the burden is again shifted upon him to prove the fraud which he alleges.³¹ So where the plaintiff replies to the plea of former recovery that the same was a voluntary nonsuit, the burden of proving this allegation is shifted back to the plaintiff.³² In actions against a *common carrier*, the

³⁰ Alabama, G. S. & R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303. To the same effect are Land Mtg. etc. Co. v. Preston, 119 Ala. 290, 24 South. 707; De Laval Dairy Supply Co. v. Steadman, 6 Cal. App. 651, 92 Pac. 877; Bliley v. Wheeler, 5 Colo. App. 287, 38 Pac. 603; Ceffarelli v. Landino, 82 Conn. 126, 72 Atl. 564; Bacon v. Green, 36 Fla. 325, 18 South. 870; Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Michels v. West, 109 Ill. App. 418; Swift v. Ratliff, 74 Ind. 426; Moffet v. Moffet, 90 Iowa, 442, 57 N. W. 954 (payment to agent); Kentucky L. etc. Ins. Co. v. Thompson, 18 Ky. Law Rep. 79, 35 S. W. 550; Teddie v. Riser, 121 La. 666, 46 South. 688; Gile v. Sawtelle, 94 Me. 46, 46 Atl. 786; Wylie v. Marinkofsky, 201 Mass. 583, 88 N. E. 448; Rosenthal v. Rosenthal, 151 Mich. 493, 115 N. W. 729 (decided upon the construction of Pub. Acts, 1901, p. 354, No. 225); Baumier v. Antiau, 79 Mich. 509, 44 N. W. 939; Day v. Raguet, 14 Minn. (14 Gil. 203) 273; Cain v. Moyse, 71 Miss. 653, 15 South. 115; Knoche v. Whiteman, 86 Mo. App. 568; Home F. Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047; Benton v. Burbank, 54 N. H. 583; Jewett v. Davis, 6 N. H. 518; Coffin v. Grand Rapids Hydraulic Co.,

136 N. Y. 655, 32 N. E. 1076; McQueen v. People's Nat. Bank, 111 N. C. 509, 16 S. E. 270; Boyce v. Modern Woodmen etc., 14 Okl. 642, 78 Pac. 322; Shmit v. Day, 27 Or. 110, 39 Pac. 870 (assignment of contract for work under which an injury occurred); Erb v. Erb, 50 Pa. 388; Gaugh v. Henderson, 2 Head (Tenn.), 628; Skipwith v. Hurt (Tex. Civ. App. 1900), 58 S. W. 192; Hopson v. Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312; Robertson v. Ephraim, 18 Tex. 118; Fuller v. Worth, 91 Wis. 406, 64 N. W. 995; Burton v. Blin, 23 Vt. 151; Robinson v. Tuscaloosa Mills, 183 Fed. 966, 106 C. C. A. 306; Gilmer v. Grand Rapids 16 Fed. 708; De Sobry v. Nicholson, 3 Wall. (U. S.) 420, 18 L. Ed. 263; The Agra and Elizabeth Jenkins, L. R. 1 P. C. 501, 36 L. J. P. & Adm. 16, 16 L. T., N. S., 755, 4 Moore P. C., N. S., 435, 16 Wkly. Rep. 735, 16 Eng. Reprint, 382; Hart v. Jones (K. B. 1834, Canada), 1 S. R. 589.

³¹ Robinson v. Hitchcock, 8 Met. (Mass.) 64; Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438; Reeve v. Liverpool Ins. Co., 39 Wis. 520; Feldman v. Gamble, 26 N. J. Eq. 494.

³² Barnard v. Babbitt, 54 Ill. App. 62; Meeh v. Missouri Pac. Ry. Co., 61 Kan. 630, 60 Pac. 319.

burden is first upon the passenger or shipper to prove injury or loss, but the *onus* then shifts to the other side to show that the loss or injury happened under such circumstances that no liability arose.³³ So in an action upon a contract, the burden is in the first instance upon the plaintiff to prove its execution unless it is admitted, but the burden then shifts upon the defendant to prove any substantive defense he may have.³⁴ For example, the admissions of the defendants, in a contract of indemnity given to a street railway company of the execution of a note by it, are sufficient evidence, *prima facie*, to sustain a finding that the note of the corporation was duly executed, and to throw the burden upon the defendants to show want of authority on the part of the officers of the corporation to execute it.³⁵ In the codes of most of the states it is provided that when the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment.³⁶ Where

³³ See § 183, *post*.

³⁴ Such as *usury*: *Cutler v. Wright*, 32 N. Y. 472; *Hough v. Hamlin*, 57 Iowa, 359, 10 N. W. 680; *payment*: *Crowninshield v. Crowninshield*, 2 Gray (Mass.), 524; *Powers v. Russell*, 13 Pick. (Mass.) 69; *De Land v. Dixon Nat. Bank*, 111 Ill. 323; *Harris v. Merz Iron Works*, 82 Ky. 200; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *North Pennsylvania Ry. Co. v. Adams*, 54 Pa. 94, 93 Am. Dec. 677; *McCormick v. Sadler*, 11 Utah, 444, 40 Pac. 711. See note on "Payment in Action on Bill or Note," to *Olson v. Day*, 20 Ann. Cas. 518; *settlement*: *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939; *record of instrument*: *Warner v. Warner*, 30 Ind. App. 578, 66 N. E. 760; *warranty*:

Johnson v. Bowman (*Johnston v. Johnston*), 26 Neb. 745, 42 N. W. 754; *release*: *Blanchard v. Young*, 11 Cush. (Mass.) 341; *rescission*: *Webber v. Dunn*, 71 Me. 331; *Gibson v. Vetter*, 162 Pa. 26, 29 Atl. 292; *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892; *Coffin v. President Grand Rapids Hydraulic Co.*, 136 N. Y. 655, 32 N. E. 1076; *false imprisonment*: *Ward v. Tucker*, 7 Wash. 399, 35 Pac. 126, 1086; *mistake in written contract*: *Christ Church v. Beach*, 7 Wash. 65, 33 Pac. 1053; *trespass*—plea of title in defendant: *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734.

³⁵ *Temple St. Cable Ry. v. Hellman*, 103 Cal. 634, 37 Pac. 530.

³⁶ *Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co.*, 178 N. Y. 219,

in an action for breach of contract the defense was that the plaintiff had failed and refused to keep or perform the terms and conditions of the agreement upon his part, and abandoned and forfeited the same, the abandonment and forfeiture, as pleaded in the case, must, according to all rules of practice, have been established by the defendants affirmatively; otherwise the rights of the plaintiff stood confessed. To require the plaintiff to prove a negative, and show that he had not forfeited or abandoned, or be subject to a nonsuit, was error.³⁷

§ 179 (177). Same—Plaintiff generally has the burden—Exceptions.—It is axiomatic to say that in the majority of cases the plaintiff has the burden of the proof. Of course the pleadings are the guide in the first instance; and pleadings are so framed that in most cases the plaintiff is the actor who must take the initiative and the one on whom the burden of proof rests. Ordinarily, in the absence of any evidence on either side, the plaintiff's action would fail, but this is not necessarily true. For example, in an action on contract, the defendant may admit the due execution of the contract but set up an independent defense. In such cases he becomes the actor; and it is incumbent upon him to establish the affirmative defense which he alleges.³⁸ This is well illustrated in actions on *insurance*

70 N. E. 501 (setoff or counterclaim). See, also, *McQueen v. People's Nat. Bank*, 111 N. C. 509, 16 S. E. 270; *Davis-Colby Ore Roaster Co. v. Rogers*, 191 Pa. 229, 43 Atl. 567.

³⁷ *Bliley v. Wheeler*, 5 Colo. App. 287, 38 Pac. 603; *Henderson v. City of Louisville*, 8 Ky. Law Rep. 957, 4 S. W. 187.

³⁸ Such as *accord and satisfaction*: *American v. Rimpert*, 75 Ill. 228; *warranty*: *Johnson v. Bowman* (*Johnston v. Johnston*), 26 Neb. 745, 42 N. W. 754; *Gile v. Sawtelle*, 94 Me. 46, 46 Atl. 786; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St.

Rep. 890, and note, 27 Pac. 454; *fraud*: *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438; *Reeve v. Liverpool Ins. Co.*, 39 Wis. 520; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242; *illegality*: *Bennett v. Covington*, 22 Fed. 816; *Jones v. Ames*, 135 Mass. 431; *usury*: *Cutler v. Wright*, 22 N. Y. 472; *Hough v. Hamlin*, 57 Iowa, 359, 10 N. W. 680; *release*, by discharge in insolvency or bankruptcy: *Blanchard v. Young*, 11 Cush. (Mass.) 341; *Cooper v. Cooper*, 9 N. J. Eq. 56; *payment*: *Tootle v.*

policies where the answer admits the issuing of the policy and the loss and damages claimed, but alleges a breach of conditions; in such cases the plaintiff is entitled to a verdict unless the defendant satisfies the jury that the conditions have been broken. Nor is the rule changed in cases where the complaint alleges that none of the conditions of the policy have been broken and where the answer denies such allegation, since that is an allegation which it is not necessary for the plaintiff to make or prove.³⁹ So in the proof of want of consideration in commercial paper. If, on a trial, when a note is sued for by the promisee against the promisor, the plaintiff produces and reads his note for value received, and the signature is admitted or proved, he has ordinarily no occasion to go further. He has the burden of proof to show a consideration; but he sustains that burden by his *prima facie* evidence, which, if not rebutted, stands as conclusive evidence. Shaw, C. J., said in regard to a note of the class referred to:⁴⁰ "Whilst the note remains as a contract between the original parties, that is, not transferred to another by indorsement, the consideration may be inquired into; and therefore, if upon all

Maben, 21 Neb. 617, 33 N. W. 264, and cases cited in note 16 to the last section; *settlement* of the matters in controversy: *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939; *alteration*: *Wing v. Stewart*, 68 Iowa, 13, 25 N. W. 905; or *rescission* of contract: *Webber v. Dunn*, 71 Me. 331. See, also, the recent cases of *Henderson v. Emerson Co.* (Ark.), 151 S. W. 251; *Hill v. Harris*, 11 Ga. App. 358, 75 S. E. 518; *Sharp v. State* (Ind. App.), 99 N. E. 1072.

³⁹ *Murray v. N. Y. Ins. Co.*, 85 N. Y. 236; *Jones v. Brooklyn Ins. Co.*, 61 N. Y. 79; *Van Valkenburg v. American Ins. Co.*, 70 N. Y. 605; *Supreme Tent Knights etc. v. Stensland*, 206 Ill. 124, 99 Am. St. Rep. 137, 68 N. E. 1098; *National Benev. Assn. v. Grauman*, 107 Ind. 288, 7 N.

E. 233; *Jones v. U. S. Mutual Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485. On the same ground, as well as on the ground of the presumption in favor of innocence, if the company claims that the plaintiff has burned his property, it must assume the burden of proof on that subject: *Murray v. New York Ins. Co.*, 85 N. Y. 236. See note on "Burden of Proof of Accidental Death Under Accident Insurance Policy," to *Preferred Accident Ins. Co. v. Fielding*, 9 Ann. Cas. 919; note on "Burden of Proof of Good Health of Insured at Time of Delivery of Life Insurance Policy," to *Lee v. Prudential Life Ins. Co.*, 17 Ann. Cas. 238.

⁴⁰ *Burnham v. Allen*, 1 Gray (Mass.), 496.

the evidence in the case, whether offered by the plaintiff or the defendant, it appears that there was no consideration, or that the consideration has failed, by evidence sufficient to rebut the *prima facie* evidence arising from the signature and production of the note, it will constitute a good defense; and as the burden is on the plaintiff to prove a good consideration, if the whole evidence, offered on both sides, leaves it in doubt whether there was good consideration or not, the plaintiff fails of making out his case, and the defendant will be entitled to a verdict." In general, the proof of want of consideration should come first from the defendant after the plaintiff has proved the note, not because the burden of proof has shifted from plaintiff to defendant, but for the more simply expressed reason that the plaintiff has offered *prima facie* proof, sufficient to sustain his case unless rebutted and controlled by counter-proof.⁴¹ In the instances above cited, it appeared from the state of the pleadings that the burden of proof rested, not with the plaintiff, but with the defendant. When the form of the pleadings is such that at the beginning the burden is cast upon the plaintiff and he establishes his *prima facie* case, the burden of answering such case must then be met by the defendant or the plaintiff prevails. In many states there are express provisions making facts *prima facie* evidence and regulating the burden of evidence and proof with regard thereto. It must be borne in mind, however, that where such facts are so declared to be *prima facie* evidence the burden of proof is not changed. It determines the verdict or finding if no other evidence is introduced. But the moment that opposing evidence is received the case is to be determined upon all the evidence—the *prima facie* evidence and all the other evidence—and the question is whether the weight preponderates in favor of the party having the burden of proof.⁴² If the party in whose favor *prima*

⁴¹ Delano v. Bartlett, 6 Cush. (Mass.) 364; Pratt v. Langdon, 97 Mass. 97, 93 Am. Dec. 61; Cook v. Noble, 4 Ind. 221; Topper v. Snow, 20 Ill. 434; Emery v. Estes, 31 Me.

155; Craig v. Proctor, 6 R. I. 547. See note to Ginn v. Dolan, 135 Am. St. Rep. 764, 18 Ann. Cas. 205.

⁴² Commonwealth v. Williams, 6 Gray (Mass.), 1; Wyman v. Whicher,

facie evidence is introduced has the burden of proof, the other party is not bound to introduce evidence which outweighs the *prima facie* evidence; but if he introduces anything in opposition, the question is whether the evidence in favor of the party having the burden of proof, including that which was at first *prima facie* evidence, outweighs that upon the other side.⁴³

§ 180 (178). **How affected by form of issue—Whether affirmative or negative.**—Very many of the maxims invoked in the early days of the laws of evidence have to be treated now with care in their adoption. A statement of a guiding principle a thousand years ago may not be used to-day simply because it is a maxim, and in a foreign tongue, without inquiry as to what exceptions have been made to the principle which it may illustrate. The early text-writers declared the burden of proof to be on the party who asserts the *affirmative* of the issue or question in dispute. “*Ei incumbit probatio qui dicit, non qui negat.*”⁴⁴ But it will be seen that the exceptions to this proposition are numerous; and later writers have questioned the accuracy of the rule. They have urged that the burden of proof *does not depend upon the form* of the proposition, but that the burden of proving any given claim or defense rests upon the one who asserts it.⁴⁵ “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.”⁴⁶ But perhaps the controversy is of little importance, since it is conceded by those who assert the ancient rule that it has exceptions, and that the burden is upon him who asserts the affirmative *in sub-*

179 Mass. 276, 60 N. E. 612; *Morrison v. Richardson*, 194 Mass. 370, 80 N. E. 468.

⁴³ *Inhabitants of Cohasset v. Moors*, 204 Mass. 173, 90 N. E. 978.

⁴⁴ *Best, Ev.*, 10th ed., § 269; *Piper v. Matkins*, 8 Kan. App. 215, 55 Pac. 487.

⁴⁵ *Steph. Ev.*, art. 93; *Whart. Ev.*, §§ 353-357; *Prince v. Kennedy*, 3 Cal. App. 404, 85 Pac. 859; *Burford v. Fergus*, 165 Pa. 310, 30 Atl. 844; *Shattuck v. Rogers*, 64 Kan. 266, 38 Pac. 280.

⁴⁶ *Steph. Ev.*, art. 93.

stance, rather than in mere form.⁴⁷ It is reasonable that the one who asserts a fact necessary to the claim or defense should prove such fact; and in the great majority of cases it will be found that the fact to be proved is a proposition affirmative in form. But it is well settled that whoever asserts a claim or a defense which depends upon a *negative* must, as in other cases, establish the truth of the allegation by a preponderance of evidence. Thus the burden is upon the one asserting the negative where the allegation is that another did not build according to certain specifications,⁴⁸ that *proper care* had not been used,⁴⁹ that certain work had not been done in a *workmanlike manner*,⁵⁰ that there were *no liens outstanding* against a building,⁵¹ that a note was *without consideration*,⁵² that a note had not been taken in *payment* for an *antecedent debt*,⁵³ that a pretended deed was *never executed*,⁵⁴ that defendants were not legally *elected directors*,⁵⁵ that an insured person was not in *good health* as represented in his application,⁵⁶ that a tenant had not made *repairs* according to the covenants of the lease,⁵⁷ that a person was not a *legal voter*,⁵⁸ that goods were not according to *warranty*,⁵⁹ that property was taken without the owner's consent,⁶⁰ that a

⁴⁷ Phil. Ev., p. 493; Greenl. Ev., § 74. As to matters in defense and rebuttal, see the following recent cases: Weigel v. Brown, 194 Fed. 652; Carrier Low Co. v. Keys, 162 Ill. App. 311; Baldwin v. Davidson (Tex. Civ. App.), 143 S. W. 716; Hawthorne v. Murray (Del. Super.), 84 Atl. 5.

⁴⁸ Smith v. Davies, 7 Car. & P. 307.

⁴⁹ Heineman v. Heard, 62 N. Y. 448.

⁵⁰ Amos v. Hughes, 1 Moody & Rob. 464.

⁵¹ Turner v. Wells, 64 N. J. L. 269, 45 Atl. 641.

⁵² Towsey v. Shook, 3 Blackf. (Ind.) 267, 25 Am. Dec. 108.

⁵³ Smith v. Bettger, 68 Ind. 254, 34

Am. Rep. 256; Gibson v. Tobey, 46 N. Y. 637, 7 Am. Rep. 397.

⁵⁴ Kerr v. Freeman, 33 Miss. 292.

⁵⁵ Carmel National Gas & Imp. Co. v. Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

⁵⁶ Geach v. Ingall, 14 Mees. & W. 95, 9 Jur. 691, 15 L. J. Ex. 37; Ashby v. Bates, 15 Mees. & W. 589, 4 D. & L. 33, 15 L. J. Ex. 349.

⁵⁷ Doe v. Rowlands, 9 Car. & P. 734, 5 Jur. 177.

⁵⁸ Beardstown v. Virginia, 76 Ill. 34.

⁵⁹ Dorr v. Fisher, 1 Cush. (Mass.) 271.

⁶⁰ Little v. Thompson, 2 Me. (2 Greenl.) 228; Rex v. Hazy, 2 Car. & P. 458.

solicitor had not used *due diligence*,⁶¹ that an insured person had not used *due care* to avoid accident,⁶² that *goods* intrusted to a common carrier had *not* been *delivered*,⁶³ and that, in an action for malicious prosecution, there was not *probable cause* in the former suit.⁶⁴ In *actions for penalties* given by statutes, where the statutes contain negative matter, there must be *prima facie* proof to support the negative allegations of the complaint.⁶⁵ Cases illustrating the same principle might be multiplied almost indefinitely. In some of the cases cited the allegation, negative in form, was made by the plaintiff, in others by way of defense; they all illustrate the rule that where a claim or defense rests upon a negative allegation, the one asserting such claim or defense is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative.⁶⁶ But in such cases a

⁶¹ Shilcock v. Passman, 7 Car. & P. 289.

⁶² Freeman v. Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372. See, also, Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Germain v. Brooklyn Life Ins. Co., 30 Hun (N. Y.), 535.

⁶³ Roberts v. Chittenden, 88 N. Y. 33.

⁶⁴ Good v. French, 115 Mass. 201.

⁶⁵ Commonwealth v. Maxwell, 2 Pick. (Mass.) 139.

⁶⁶ Bufford v. Raney, 122 Ala. 565, 26 South. 120; Weil v. Fineran, 78 Ark. 87, 93 S. W. 568; St. Louis etc. R. Co. v. Berger, 64 Ark. 613, 39 L. R. A. 784, 44 S. W. 809; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Douglass v. Willard, 129 Cal. 38, 61 Pac. 572; Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521; Davis v. Central R. Co., 60 Ga. 329; Kiesel v. Bybee, 14 Idaho, 670, 95 Pac. 20; Ames v. Snider, 69 Ill. 376; Cleve-

land etc. R. Co. v. Moore, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540; Mansfield v. Mallory, 140 Iowa, 206, 118 N. W. 290; Lucas v. Hunt, 91 Ky. 279, 15 S. W. 781, 12 Ky. Law Rep. 871; Delachaise v. Maginnis, 44 La. Ann. 1043, 11 South. 715; Morgan v. Mitchell, 3 Mart., N. S. (La.), 576; Baird v. Brown, 28 La. Ann. 842; Pennell v. Cummings, 75 Me. 163; Phipps v. Mahon, 141 Mass. 471, 5 N. E. 835; Swinhart v. R. Co., 207 Mo. 423, 105 S. W. 1043; Wolf v. United Ry. Co., 155 Mo. App. 125, 133 S. W. 1172; Dowell v. Guthrie, 116 Mo. 646, 22 S. W. 893; Swain v. McMillan, 30 Mont. 433, 76 Pac. 943; Eastman v. Gould, 63 N. H. 89; Atlantic Trust Co. v. Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647; Schlesinger v. Hexter, 34 N. Y. Super. Ct. (2 Jones & S.) 499; Pusey v. Wright, 31 Pa. 387; King v. Colvin, 11 R. I. 582; Western Union Tel. Co. v. Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354; Western Union Tel. Co. v. Jack-

smaller amount of proof than is usually required may avail. Such evidence as renders the existence of the negative probable may change the burden to the other party.⁶⁷ It

son, 19 Tex. Civ. App. 273, 46 S. W. 279; Thayer v. Viles, 23 Vt. 494; Barter v. Smith, 2 Can. Exch. 455. The case of Pollak v. Winter, 166 Ala. 255, 139 Am. St. Rep. 33, 51 South. 998, 52 South. 829, 53 South. 339, calls for the attention its triple citation suggests. The court in that case decided that as a general rule the burden of proving a negative averment is not upon the plaintiff, but this rule does not seem to prevail in actions upon an open account, as distinguished from a stated or uncontroverted one; and when suit is brought upon an open account, the plaintiff does not overcome the burden by merely showing the rendition of service and the value of same, but must offer some proof that it was not paid for when rendered or when due. It subsequently came up for rehearing and was affirmed, one justice dissenting, and in 53 South. 339, that justice (Evans) discloses himself in the valuable dissenting opinion with which we are constrained to agree. The opinion is a valuable one, and we make the following excerpts from it: "To say that in the case of the open account the burden of proof was upon the plaintiff to show that the debt was not paid at or before maturity, but that in the case of the note and the stated account the rule is otherwise, is to make a distinction where there is no difference. . . . I shall now undertake to show and make clear what is necessary to be proved in order to make out a *prima facie* case of the breach of the contract sued upon, in a suit in assumpsit, whether the suit is upon an open account, a

stated account, or a promissory note. When a debt is once shown to have existed, there is no presumption of law or fact that it was paid at or before maturity. Hence, when the plaintiff makes proof that the debt sued upon once existed, and of the fact that the day of payment has passed, the breach is presumed from the facts proven. Possibly it would be more accurate to say that, when the debt has been proven to have once existed, it is presumed to continue until its payment or discharge in some way is shown. The burden of pleading and proving this is upon the defendant." (Citing Jones on Ev., 2d ed., §§ 65, 67.) As to the burden of proof on the issue of payment, the law is correctly stated in 22 American and English Encyclopedia of Law, second edition, page 587, as follows: "The general rule is well settled that payment is an affirmative defense, and will not in the first instance be presumed; but, after the antecedent existence of the debt has been proved by the creditors, the burden of proving its discharge by payment is upon the debtor or person alleging the payment"; citing eighteen cases from the Alabama Reports, as well as cases from the United States supreme court, and numerous cases from the reports of thirty-two other states.

⁶⁷ Kelley v. Owens (Cal.), 30 Pac. 596, 3 Cal. Unrep. 507; Dobbs v. Justices Murray County Inferior Ct., 17 Ga. 624; Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778; Beardstown v. Virginia, 76 Ill. 34; Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Bastrop State Bank v. Levy,

will be observed that we have referred to claims or defenses which rest or depend upon a negative. But it sometimes happens that the negative is used and is not an indispensable part of the proof. In actions of debt, if the plaintiff proves the existence of the debt sued upon, the burden of establishing its payment is on the defendant, although, in his complaint, it was necessary for the plaintiff to allege nonpayment.⁶⁸ Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved.⁶⁹ It has been held, as it was always held at common law, that in a complaint upon a promissory note, or other obligation to pay money, there must be an averment that the money had not been paid. This is necessary to make the complaint perfect upon its face. But it is a *non sequitur* to say that, because such negative averment is necessary in the complaint, therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. In an action against a railroad company for killing an animal on its track, brought under a statute which required the company to fence its road where it runs through inclosed lands, except where the company has a contract with the proprietor of the lands that he shall fence the road, the burden of proving the averment that there was no contract on the part of the plaintiff to fence the track is not upon the plaintiff, but the defendant must disprove it. The burden of proof is

106 La. 586, 31 South. 164; *Dela-
chaise v. Maginnis*, 44 La. Ann.
1043, 11 South. 715; *Commonwealth
v. Locke*, 114 Mass. 288; *State v.
Hirsch*, 45 Mo. 429; *Thayer v. Viles*,
23 Vt. 494; *Colorado Coal etc. Co.
v. United States*, 123 U. S. 307, 317,
31 L. Ed. 182, 8 Sup. Ct. Rep. 131;
United States v. Southern Colorado

Coal etc. Co., 18 Fed. 273, 5 McCrary,
563; *Greenl. Ev.*, § 78. For other il-
lustrations as to burden of proof
where the allegations are negative in
form, see 1 *Greenl. Ev.*, §§ 80, 81.

⁶⁸ *Melone v. Ruffino*, 129 Cal. 514,
79 Am. St. Rep. 127, 62 Pac. 93.

⁶⁹ *Green v. Palmer*, 15 Cal. 411,
76 Am. Dec. 492.

upon the party averring a negative when the means of proving the fact are equally within the control of each party; but when the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, then he must adduce it, or it will be presumed that the fact does not exist.⁷⁰

§ 181 (179). Burden as to particular facts lying peculiarly within knowledge of a party.—It is a general rule of evidence that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.⁷¹ As we have just demonstrated, when a negative is averred in pleading, or a plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, it must be presumed it does not exist, which of itself establishes a negative.⁷² On principles already discussed, the burden of proof as to any particular fact rests upon the party asserting such fact.⁷³ Many general rules have been announced on the subject of the burden of proof, intending to show on whom it lies. It is often announced that the burden is on the plaintiff, and, again, that it is on the party having the affirmative allega-

⁷⁰ *Great Western R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199.

⁷¹ *Greenl. Ev.*, § 79. See *Chicago v. Dunham Towing etc. Co.*, 161 Ill. App. 307.

⁷² *Great Western R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199; *United States v. Denver & R. G. R. Co.*,

191 U. S. 84, 48 L. Ed. 106, 24 Sup. Ct. Rep. 33; *The King v. Turner*, 5 Maule & S. 206, 105 Eng. Reprint, 1026.

⁷³ *Smith v. Roach*, 59 Mo. App. 115; *Green v. Maloney*, 7 Houst. (Del.) 22, 30 Atl. 672.

tion. But an examination of the precedents will show that the burden is often on the defendant; and sometimes on one who has a negative assertion to prove. It may be truly said that the burden is on one to whose case the fact to be proved is essential, but that serves no purpose as a general rule, for it merely presents another question. It seems clear that there can be no general rule for all cases. In the courts it must always remain a question of policy and fairness based on experience in different situations. The solution of the question in each case must depend on its own pleadings and facts. Cases occur where, on the pleadings, no evidence being offered on either side, the plaintiff is entitled to judgment. Such is the case where the plea admits the material averments of the complaint, such as are essential to the cause of action, but accompanies the admission with a statement of affirmative matter by way of defense. In such case the burden of proving the new matter set up as a defense is, of course, upon the defendant. Proof of it is essential to his defense, and, neither side offering evidence, judgment on the pleadings should be entered for the plaintiff.⁷⁴ The burden of proof may during the course of the trial be shifted from one side to the other; and where the fact is one peculiarly within the knowledge of one of the parties slight evidence may suffice for that purpose. Where the *facts lie solely within the knowledge of one party*, there is an important consideration in determining the amount of evidence necessary to be produced by the other party.⁷⁵ "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may, in the course of a case, be shifted from one side to the other; and

⁷⁴ J. M. Robinson, Norton & Co. v. Tuscaloosa Mills, 183 Fed. 966, 106 C. C. A. 306; Cook v. Guirkin, 119 N. C. 13, 25 S. E. 715.

⁷⁵ Robinson v. Robinson, 51 Ill.

App. 317; Nunez v. Bayhi, 52 La. Ann. 1719, 28 South. 349; United States v. Denver & R. G. R. R. Co., 191 U. S. 84, 48 L. Ed. 106, 24 Sup. Ct. Rep. 33.

in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.”⁷⁶ This is often illustrated in prosecutions for selling liquor or doing other acts *without the license* required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him;⁷⁷ but the greater number of authorities hold that where a license would be a complete defense, the burden is upon the defendant to prove the fact so clearly within his own knowledge.⁷⁸ It has been held that the plaintiff pro-

⁷⁶ Steph. Ev., art. 96; Freeman v. Blount, 172 Ala. 655, 55 South. 293; Flower v. State, 39 Ark. 209; Dirks v. California Safe Deposit etc. Co., 136 Cal. 84, 68 Pac. 487; People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; Williams v. People, 121 Ill. 84, 11 N. E. 881; Great Western R. Co. v. Bacon, 30 Ill. 347, 83 Am. Dec. 199; Chicago etc. R. Co. v. Vester, 47 Ind. App. 141, 93 N. E. 1039; Citizens' Bank v. Jeansonne, 120 La. 393, 399, 45 South. 367; Thayer v. Connor, 5 Allen (Mass.), 25; Israel v. Northwestern Nat. Life Ins. Co., 111 Minn. 404, 127 N. W. 187; People v. Nyce, 34 Hun (N. Y.), 298; State v. Arnold, 35 N. C. 184; Van Arsdale v. Young, 21 Okl. 151, 95 Pac. 778; Brooks v. Garner, 20 Okl. 236, 94 Pac. 694, 97 Pac. 995; Jolliffe v. Northern Pac. R. Co., 52 Wash. 433, 100 Pac. 977; United States v. Southern Colorado Coal etc. Co., 18 Fed. 273, 5 McCrary, 563; Rex v. Smith, 3 Burr. 1475, 97 Eng. Reprint, 934.

⁷⁷ State v. Nye, 32 Kan. 201, 204,

4 Pac. 134, 136; State v. Kubuke, 26 Kan. 405; Commonwealth v. Thurlow, 24 Pick. (Mass.) 374; State v. Richeson, 45 Mo. 575; Hepler v. State, 58 Wis. 46, 16 N. W. 42; Mehan v. State, 7 Wis. 670; Reg. v. McNichol, 11 O. R. (Can.) 659; Ex parte Parks, 3 All. (Can.) 237.

⁷⁸ Williams v. State, 35 Ark. 530; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Bach, 36 Minn. 234, 30 N. W. 764; State v. Crowell, 25 Me. 171; State v. Emery, 98 N. C. 668, 3 S. E. 636; Jackson v. Camden, 48 N. J. L. 89, 2 Atl. 668; Commonwealth v. Rafferty, 133 Mass. 574; Commonwealth v. Tuttle, 12 Cush. (Mass.) 502; Sharp v. State, 17 Ga. 290; Thomas v. State, 37 Miss. 353; Noecker v. People, 91 Ill. 468; Haskill v. Commonwealth, 3 B. Mon. (Ky.) 342; Smith v. Adrian, 1 Mich. 495; United States v. Nelson, 29 Fed. 202. In Massachusetts, by statute the burden of proving the license is on the defendant: Commonwealth v. Curran, 119 Mass. 206.

ponent of a deed is not required to show that the defendant grantor was single or, if married, that the deed was not a deed of the homestead.⁷⁹ In an action of trover brought by the United States against a railroad company for the value of timber taken from the public domain, in which the defense was not guilty, and an agreed statement of facts that the defendant was the successor to a company which under certain acts of Congress had the right to take the timber for certain purposes and no testimony was offered by either party tending to show whether the timber cut from the lands and received by the defendant was required for the statutory purposes, Mr. Justice Brown said: "It is insisted that there is a presumption that the agent, having authority to cut, acted within the scope of his authority, and that this would of itself throw upon the plaintiffs the burden of showing that it had not. Although a presumption of this kind may attach to the acts of public officers, we know of no case holding that a party sued for a conversion by his agent may shield himself under a presumption that the agent acted within the scope of his authority. If the burden of proof would rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift that burden upon the plaintiffs by employing an agent to do the work. Upon principle as well as upon authority, a party who has been shown to be *prima facie* guilty of a trespass, and relies upon a license, must exhibit his license, and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiffs not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiffs a difficult, if not an impossible, task, to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could

⁷⁹ Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906.

be readily produced by the defendant.”⁸⁰ In a very recent case,⁸¹ the plaintiff alleged money paid to the defendant for goods which the defendant was to manufacture and deliver to the plaintiff, and that the defendant failed to deliver them and refused to return the money. The plea admitted these facts, coupled with the affirmative defense that the goods were manufactured, set aside for the plaintiff, notice of the fact given plaintiff, and that subsequently, without defendant’s fault, the goods were destroyed by fire. The court said: “On this issue the burden of proof was on the defendant. This is so for three reasons: (a) The defendant makes the affirmative defensive allegation; (b) it relates to a matter especially within the defendant’s knowledge, the proof of which was necessary and essential to the defendant’s defense; and (c) the plaintiff had made proof of a *prima facie* case, which, if not admitted by the pleadings, was undisputed by the evidence, excepting, of course, the evidence offered in support of the new matter pleaded.”⁸²

⁸⁰ United States v. Denver & R. G. R. Co., 191 U. S. 84, 48 L. Ed. 106, 24 Sup. Ct. Rep. 33, cited in *Ghost v. United States*, 168 Fed. 841, 94 C. C. A. 253, and *J. M. Robinson, Norton & Co. v. Tuscaloosa Mills*, 183 Fed. 966, 106 C. C. A. 306.

⁸¹ *Robinson, Norton & Co. v. Tuscaloosa Mills*, 183 Fed. 966, 106 C. C. A. 306.

⁸² The court, after citing *United States v. Denver & R. G. R. Co.*, *supra*, said that the real issue to be tried was the truth of the defensive statements in the plea. The facts pleaded, if they existed, were clearly within the knowledge of the defendant and easily susceptible of proof by it; but it would not be practicable, if possible, for the plaintiff to prove the negative—that the goods were not set aside in performance of the contract. Proof of a fact, which,

if true, rests within the knowledge of the defendant, and which it might be impossible for the plaintiff to prove, “lay upon defendant”: *Borthwick v. Carruthers*, 1 Term Rep. 648, 99 Eng. Reprint, 1300; *Stewart v. Ashley*, 34 Mich. 183. Putting aside the suggestion that the plea admits the negative averment of the complaint—that the defendant had not actually delivered to the plaintiff the goods for which the check was given—it seems that under the circumstances the burden would not be on the plaintiff to prove the negative averment. When, with admissions made by the defendant, evidence offered by the plaintiff makes a *prima facie* case, the plaintiff may rest, and the burden is on the defendant to prove an affirmative defense: *Lilienthal’s Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

§ 182 (180). Actions against common carriers—Of goods. Perhaps no branch of the law of bailments has received more notice from judicial inquiry than that relating to the carriage of goods, and the burden of proving claim for injury or loss to them may be said now to have found itself. The law, with those few conflicting opinions with which we shall deal, may be considered clearly defined with reference to the varied questions which have from time to time arisen as to the burden of proof in actions against railroad companies, express companies and other common carriers for the loss of goods. The plaintiff in all such cases has by the nature of his claim charged himself with the burden of proving that the defendant is a common carrier;⁸³ that the goods have been delivered to him, and the terms which called the contract as alleged in the complaint into existence.⁸⁴ The receipt of the carrier is *prima facie* evidence

⁸³ Ringgold v. Haven, 1 Cal. 108; Citizens' Bank v. Nantucket Steam Boat Co., Fed. Cas. No. 2730, 2 Story, 16.

⁸⁴ Southern Express Co. v. Saks, 160 Ala. 621, 49 South. 392; Capehart v. Granite Mills, 97 Ala. 353, 12 South. 44; Southwestern R. Co. v. Webb, 48 Ala. 585; Southern Exp. Co. v. Hill, 81 Ark. 1, 98 S. W. 371; Stout v. Coffin, 28 Cal. 65; Southern R. Co. v. Allison, 115 Ga. 635, 42 S. E. 15; Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; St. Louis etc. R. Co. v. Keys, 6 Ind. Ter. 396, 98 S. W. 138; Bank of Irwin v. American Express Co., 127 Iowa, 1, 102 N. W. 107; Tarbox v. Eastern S. B. Co., 50 Me. 339; Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 Atl. 437; Whitaker v. Chicago etc. R. Co., 115 Minn. 140, 131 N. W. 1061; Gamble-Robinson Com. Co. v. Northern Pac. R. Co., 107 Minn. 187, 119 N. W. 1068; Blackmer & Post Pipe Co. v. Mobile etc. R. Co., 137

Mo. App. 133, 119 S. W. 13; Thaxter v. Missouri Pac. R. Co., 123 Mo. App. 636, 100 S. W. 1102; Burrowes v. Chicago etc. R. Co., 85 Neb. 497, 34 L. R. A., N. S., 220, 123 N. W. 1028; Peele v. Atlantic etc. R. Co., 149 N. C. 390, 63 S. E. 66; Fuller v. Pennsylvania R. Co., 61 Misc. Rep. 599, 113 N. Y. Supp. 1001; Autler Co. v. Rankin, 112 N. Y. Supp. 1085; Great Western Despatch Line v. Glenny, 41 Ohio St. 166; Farnham v. Camden & A. R. Co., 55 Pa. 53; Hipp v. Southern R. Co., 50 S. C. 129, 27 S. E. 623; Missouri etc. Ry. Co. v. Cumby Mercantile etc. Co. (Tex. Civ. App.), 122 S. W. 568; Galveston etc. R. Co. v. Piper Co., 52 Tex. Civ. App. 568, 115 S. W. 107; Galveston etc. R. Co. v. Keesey, 50 Tex. Civ. App. 463, 110 S. W. 170; Manning v. Hoover, Fed. Cas. No. 9044, Abb. Adm. 188; The Willie D. Sandhovel, 92 Fed. 286; United States v. Pacific Express Co., 15 Fed. 867.

of the delivery.⁸⁵ Having discharged himself of all the matters for preliminary proof, the *plaintiff* must show the default of the carrier by *some proof of damage or of loss* or of nondelivery of the goods,⁸⁶ although slight evidence suffices.⁸⁷ The allegation of the nondelivery of the goods

⁸⁵ Southern Exp. Co. v. Hill, 84 Ark. 368, 105 S. W. 877; Smith v. Austro-American S. S. Co., 125 La. 763, 51 South. 841; Lengsfeld v. Jones, 11 La. Ann. 624; Finklestein v. Long Island R. Co., 126 N. Y. Sup. 93; Harnett v. Westcott, 56 N. Y. Super. Ct. (24 Jones & S.) 213, 3 N. Y. Supp. 7, 18 N. Y. St. 962; Stadhecker v. Combs, 9 Rich. (S. C.) 193; St. Louis I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 Sup. Ct. Rep. 1132; The California, 2 Saw. (U. S.) 12, 4 Fed. Cas. No. 2314, 5 Am. L. T. 132; Cunard S. S. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310.

⁸⁶ St. Louis etc. R. Co. v. Musgrove, 153 Ala. 274, 45 South. 229; Alabama etc. Ry. Co. v. Thompson, 134 Ala. 232, 32 South. 672; South etc. Alabama R. Co. v. Wilson, 78 Ala. 587; South & N. R. Ry. Co. v. Wood, 71 Ala. 215, 46 Am. Rep. 309; Savannah F. & W. R. Co. v. Harris, 26 Fla. 148, 73 Am. St. Rep. 551, 7 South. 544; Southern Ry. Co. v. Allison, 115 Ga. 635, 42 S. E. 15; Chicago Ry. Co. v. Northern Line Packet Co., 70 Ill. 217; Woodbury v. Frink, 14 Ill. 279; Cleveland C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; St. Louis etc. R. Co. v. Keys, 6 Ind. Ter. 396, 98 S. W. 138; Silverman v. St. Louis I. M. & S. R. Co., 51 La. Ann. 1785, 26 South. 447; Sehneideau v. Pennington, 21 La. Ann. 299; Baltimore etc. R. Co. v. Schumacher, 29 Md. 168, 96 Am. Dec. 510; Dow v. Portland Steam P. Co., 84 Me. 490, 24 Atl. 945; Tarbox v. Eastern Steam Boat Co., 50 Me. 339;

Morley v. Eastern Express Co., 116 Mass. 97; Boehl v. Chicago M. & St. P. R. Co., 44 Minn. 191, 46 N. W. 333; Glazier v. Old Dominion Steamship Co., 53 Misc. Rep. 290, 103 N. Y. Supp. 112; Hirsch v. Hudson River Line, 26 Misc. Rep. (N. Y.) 823, 57 N. Y. Supp. 272; Blackmer & Post Pipe Co. v. Mobile etc. R. Co., 137 Mo. App. 479, 119 S. W. 1; Thaxter v. Missouri Pac. R. Co., 123 Mo. App. 636, 100 S. W. 1102; Collins v. Illinois Central R. Co., 94 Mo. App. 130, 67 S. W. 943; Watson v. Atlantic etc. R. Co., 145 N. C. 236, 59 S. E. 55; Walker Bros. v. Southern R. Co., 137 N. C. 163, 49 S. E. 84; Mitchell v. Carolina C. R. Co., 124 N. C. 236, 44 L. R. A. 515, 32 S. E. 671; Barton v. Fuller's Exp. Co., 109 N. Y. Supp. 727; Roberts v. Chittenden, 88 N. Y. 33; Bennett v. Northern Pac. Express Co., 12 Or. 49, 6 Pac. 160; Farnham v. Camden & A. R. Co., 55 Pa. 53; Johnstone v. Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512; Day v. Ridley, 16 Vt. 48, 42 Am. Dec. 489; The Falcon, 3 Blatchf. (U. S.) 64, 8 Fed. Cas. No. 4617, 30 Hunt. Mer. Mag. 201.

⁸⁷ Woodbury v. Frink, 14 Ill. 279; Chicago & N. W. Ry. Co. v. Dickinson, 74 Ill. 249; Lamb v. Western Ry. Corp., 7 Allen (Mass.), 98; Hinkle v. Railway Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Day v. Ridley, 16 Vt. 48, 42 Am. Dec. 489; Hudson R. L. Co. v. Wheeler Cond. & Eng. Co., 93 Fed. 374; Griffiths v. Lee, 1 Car. & P. 110, 12 Eng. Com. L. 74.

is material, and the plaintiff must sustain it by proof. If the loss or nondelivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation notwithstanding its negative character.⁸⁸ This rule imposes no hardship on a plaintiff. If the facts authorize it, he can easily produce evidence conducing to show the nondelivery of the goods and slight evidence is sufficient, as we have said, to sustain such an averment.⁸⁹ That he delivered them in good condition is for him to prove; but the presumption is that they were, so far as the conclusion may be warranted by an inspection of them at the time of delivery.⁹⁰ The bill of lading raises the presumption that the goods were delivered in good order to the shipper.⁹¹ And lastly, the plaintiff should give evidence of the value of the goods.⁹² Thereupon a *prima facie* case is established; and

⁸⁸ 2 Greenl. Ev., § 213.

⁸⁹ Woodbury v. Frink, *supra*.

⁹⁰ Bond v. Frost, 8 La. Ann. 297; The Zone, Fed. Cas. No. 18,220, 2 Spr. 19. In Hastings v. Pepper, 11 Pick. (Mass.) 41, Shaw, C. J., expressed himself thus: Several positions, which have been the subject of argument in this case, may be taken to be perfectly well established: 1. That a common carrier is responsible for all losses and damages which may happen to goods received to be carried, except such as result from the act of God, or a public enemy, or from the act or default of the owner himself, unless such liability is limited or restrained by the terms of the contract, under which the goods were received. 2. That a carrier by water, whether by inland navigation or coastwise from port to port, or to or from foreign countries, is a common carrier. 3. That the signing of a bill of lading acknowledging to have received the goods in question, in good order and well conditioned, is *prima facie* evidence that as to all circumstances which were open to inspection

and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible.

⁹¹ Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894; Seigfried v. Chicago, B. & Q. R. Co. (Mo. App.), 126 S. W. 798; Sumrell v. Atlantic Coast Line R. Co., 152 N. C. 269, 67 S. E. 585; Castellucci v. Lehigh Val. R. Co., 40 Pa. Super. Ct. 24.

⁹² Seller v. The Pacific, Fed. Cas. No. 12,644, 1 Or. 409, Deady, 17.

it becomes *incumbent on the carrier* to prove that the loss arose from some cause for which he is not liable. In other words, the burden of evidence shifts to him, and if he does not carry it, that is, if he does not answer the *prima facie* case thus set up, the plaintiff must prevail. The burden of exoneration is always upon the carrier;⁹³ even to show-

⁹³ Southern R. Co. v. Levy, 144 Ala. 614, 39 South. 95; Mouton v. Louisville etc. R. Co., 128 Ala. 537, 29 South. 602; Little Rock Ry. Co. v. Talbot, 39 Ark. 523; Wilson v. Southern Pac. Ry. Co., 62 Cal. 164; Boies v. Hartford etc. Ry. Co., 37 Conn. 272, 9 Am. Rep. 347; Atlantic etc. R. Co. v. Coachman, 59 Fla. 130, 20 Ann. Cas. 1047, 52 South. 377; Cooper v. Raleigh etc. R. Co., 110 Ga. 659, 36 S. E. 240; Southern Exp. Co. v. Bailey, 7 Ga. App. 331, 66 S. E. 960; Central of Georgia R. Co. v. Manchester Mfg. Co., 6 Ga. App. 254, 64 S. E. 1128; Mahaffey v. Wisconsin Cent. R. Co., 147 Ill. App. 43; Burke v. United States Express Co., 87 Ill. App. 505; Pennsylvania Co. v. Livright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 130 Iowa, 327, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060, 106 N. W. 749; Grieve v. Illinois Cent. R. Co., 104 Iowa, 659, 74 N. W. 192; McCoy v. Keokuk etc. R. Co., 44 Iowa, 424; Adams Express Co. v. Crawford, 8 Ky. Law Rep. 619; Silverman v. St. Louis etc. R. Co., 51 La. Ann. 1785, 26 South. 447; Hunt v. Morris, 6 Mart., O. S. (La.), 676, 12 Am. Dec. 489; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Dow v. Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945; Little v. Boston Ry. Co., 66 Me. 239; Cass v. Boston etc. R. Co., 14 Allen (Mass.), 448; Lewis v. Smith, 107 Mass. 334; Brennisen v. Pennsylvania R. Co., 101 Minn. 120,

111 N. W. 945; Fockens v. United States Exp. Co., 99 Minn. 404, 109 N. W. 834; Lindsley v. Chicago etc. R. Co., 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; Chicago Ry. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428; Brown v. St. Louis R. Co., 135 Mo. App. 624, 117 S. W. 112; Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Levering v. Union Transp. etc. Co., 42 Mo. 88, 97 Am. Dec. 320, and note; Whitnack v. Chicago etc. R. Co., 82 Neb. 464, 130 Am. St. Rep. 692, 19 L. R. A., N. S., 1011, 118 N. W. 67; Peele v. Atlantic etc. R. Co., 149 N. C. 390, 63 S. E. 66; Hall v. Cheney, 36 N. H. 26; Shelden v. Robinson, 7 N. H. 157, 26 Am. Dec. 726; Burke v. Erie R. Co., 134 App. Div. 413, 119 N. Y. Supp. 309; Berkowitz v. Chicago etc. R. Co., 109 App. Div. 878, 86 N. Y. Supp. 825; Westcott v. Fargo, 6 Lans. (N. Y.) 319, 63 Barb. (N. Y.) 349; Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Duncan v. Great Northern R. Co., 17 N. D. 610, 19 L. R. A., N. S., 952, 118 N. W. 826; United States Ex. Co. v. Backman, 28 Ohio St. 144; Armstrong v. Illinois Cent. R. Co., 26 Okl. 352, 29 L. R. A., N. S., 671, 109 Pac. 216; Chicago etc. R. Co. v. Logan, Snow & Co. 23 Okl. 707, 105 Pac. 343; Hays v. Kennedy, 3 Grant Cas. (Pa.) 351; Phoenix Pot-Works v. Pittsburgh etc. R. Co., 139 Pa. 281, 20 Atl. 1058; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Chartrand v. Southern Ry. Co., 85 S. C. 479, 67 S. E. 741; Ewart v.

ing that the shipper had knowledge of and assented to the restrictive provisions of the contract signed by him.⁹⁴ The burden of evidence must not be confused with the burden of proof; for while the carrier is called upon to excuse himself, the plaintiff must prove his case. Although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted.⁹⁵ "If the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care."⁹⁶ For example, in such case the

Street, 2 Bail. (S. C.) 157, 23 Am. Dec. 131; *St. Louis & S. F. R. Co. v. Franklin* (Tex. Civ. App.), 123 S. W. 1150; *Missouri etc. Ry. Co. v. McLean*, 55 Tex. Civ. App. 130, 118 S. W. 161; *St. Louis etc. R. Co. v. Parmer* (Tex. Civ. App.), 30 S. W. 1109; *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; *Murphy v. Staton*, 3 Munf. (Va.) 239; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Struebing Co. v. Merchants' Despatch Transp. Co.*, 142 Wis. 657, 126 N. W. 21; *Ayres v. Chicago & N. W. Ry.*

Co., 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 42 Am. Rep. 713, 13 N. W. 244; *Northern Pac. R. Co. v. Kempton*, 138 Fed. 992, 71 C. C. A. 246; *The E. M. Norton*, 15 Fed. 686; *The Mohler*, 21 Wall. (U. S.) 230, 22 L. Ed. 485; *Nelson v. Woodruff*, 1 Black (U. S.), 156, 17 L. Ed. 97; *Henry v. Railroad Co.*, 1 Manitoba, 210. See, also, note to *Cameron v. Rich*, 4 Strob. (S. C.) 168, 53 Am. Dec. 672.

⁹⁴ *Shoot v. Cleveland etc. Co.*, 145 Ill. App. 532.

⁹⁵ *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121.

⁹⁶ *Scott v. London etc. Dock Co.*, 3 Hurl. & C. 596, 34 L. J. Ex. 220,

burden is upon the defendant to show, if he so claims, that a given loss was caused by the *act of God* or of the public enemy; or that owing to some other rule of law he is not liable therefor. When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff proved that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case. It is not necessary for the carrier to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.⁹⁷ It is likewise incumbent on him to show, if he so claims, that by reason of the contract as expressed in the bill of lading or other form of contract, the *liability* has been *limited*, and that the loss arose from the same cause *exempted* or excepted in the contract,⁹⁸ or that the re-

11 Jur., N. S., 204, 13 L. T. 148, 13 Week. Rep. 410. The burden of proof on the issue of negligence is not changed by this rule. The jury must find affirmatively that the defendant was negligent; and if, after duly considering all the evidence, and all inferences proper to be drawn from it, they are in doubt, the defendant is entitled to the benefit of that doubt. He is not required to satisfy the jury, affirmatively, that he was free from negligence. That was all that was decided in the case of *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271, 7 Am. Rep. 327. The question, what was sufficient *prima facie* evidence of negligence, was not passed upon.

⁹⁷ *Memphis R. R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. Ed. 909. Act of God which excuses carrier must

not only be the proximate cause of the loss, but the sole cause. If the loss is caused by the act of God, and the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible: *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406, and note.

⁹⁸ *Central of Georgia R. Co. v. Burton*, 165 Ala. 425, 51 South. 643; *Montgomery etc. R. Co. v. Moore*, 51 Ala. 394; *St. Louis etc. R. Co. v. Lesser*, 46 Ark. 236; *Union Pac. R. Co. v. Stupeck*, 50 Colo. 151, 114 Pac. 646; *Bennett v. Filyaw*, 1 Fla. 403; *Savannah etc. R. Co. v. Hoffmayer*, 75 Ga. 410; *Atlantic etc. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Toledo etc. R. Co. v. Hamilton*, 76 Ill. 393; *Western Trans. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Owens Bros.*

ceipt or contract limiting the liability was made under circumstances indicating fairness and good faith.⁹⁹ It is well settled that even when the contract exempts the carrier from liability in certain cases, as, for example, fire and perils of the sea, he is still liable on grounds of public policy, if the loss by reason of such cause is the result of his negligence.¹⁰⁰ The law of to-day stands substantially as follows: 1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of cir-

v. Chicago etc. R. Co., 139 Iowa, 538, 117 N. W. 762; Missouri etc. R. Co. v. Watkins Merchandise Co., 76 Kan. 813, 92 Pac. 1102; Alden v. Pearson, 3 Gray (Mass.), 342; American Trans. Co. v. Moore, 5 Mich. 368; Johnson v. Alabama etc. R. Co., 69 Miss. 191, 30 Am. St. Rep. 534, 11 South. 104; Hurst v. St. Louis etc. R. Co., 117 Mo. App. 25, 94 S. W. 794; Read v. St. Louis etc. R. Co., 60 Mo. 199; Hall v. Cheney, 36 N. H. 26; Arend v. Liverpool etc. Steamship Co., 6 Lans. (N. Y.) 457, 64 Barb. (N. Y.) 118; Gaines v. Union Trans. Co., 28 Ohio St. 418; U. S. Express Co. v. Backman, 28 Ohio St. 144; Patterson v. Missouri etc. R. Co., 24 Okl. 747, 104 Pac. 31; Verner v. Sweitzer, 32 Pa. 208; Rhymer v. Delaware etc. R. Co., 27 Pa. Sup. Ct. 345; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Baker v. Brinson, 9 Rich. (S. C.) 201, 67 Am. Dec. 548; Gilliland v. Southern Ry., 85 S. C. 26, 137 Am. St. Rep. 861, 27 L. R. A., N. S., 1106, 67 S. E. 20; Baltimore etc. R. Co. v. Oriental Oil Co., 51 Tex. Civ. App. 336, 111 S. W. 979; Texas etc. Ry. Co. v. Crowley (Tex. Civ. App.), 86 S. W. 342; Browning v. Goodrich Transp. Co., 78 Wis. 391, 23 Am. St. Rep. 414, 10 L. R. A. 415, 47 N. W. 428; The William Taber, Fed. Cas. No. 17,757;

King v. Shepherd, Fed. Cas. No. 7804, 3 Story, 349; The Keokuk, Fed. Cas. No. 7721, 1 Biss. 522; Gleeson v. Virginia Midland Ry. Co., 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859; The Propeller Niagara v. Cordes, 21 How. (U. S.) 7, 16 L. Ed. 41; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985; Vogel v. Railroad Co., 10 Ont. App. 162, 11 Can. S. Ct. 612.

⁹⁹ Adams Exp. Co. v. Guthrie, 9 Bush (Ky.), 78.

¹⁰⁰ South. & N. Ry. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Michigan Ry. etc. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89; Kallman v. United States Exp. Co., 3 Kan. 205; Louisville Ry. Co. v. Brownlee, 14 Bush (Ky.), 590; Newman v. Smoker, 25 La. Ann. 303; Fillebrown v. Grand Trunk Ry. Co., 55 Me. 462, 92 Am. Dec. 606; Shriver v. Sioux City Ry. Co., 24 Minn. 506, 31 Am. Rep. 353; Southern Exp. Co. v. Moon, 39 Miss. 822; School Dist. v. Boston etc. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Clark v. St. Louis etc. Ry. Co., 64 Mo. 40; Knowlton v. Erie Ry. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Pennsylvania R. Co. v. Butler, 57 Pa. 335; Virginia Ry. Co. v. Sayers, 26 Gratt. (Va.) 328; New York etc. R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627.

cumstances and, therefore, not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold.¹ A conflict has arisen over the question whether the burden is on the carrier, after proof that the loss resulted from an *excepted risk*, to also prove that there has been *no negligence* on his part. Greenleaf thus states the view maintained by one class of authorities which in the opinion of the author is the better reasoning: "And if the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception but also that there was on his part no negligence or want of due care."² These authorities base their opinions on

¹ Redfield, C. J., in his collection of American Railway Cases cited in New York C. R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627, in which case Mr. Justice Bradley has crisply syllabized the opinion delivered by him as follows: 1. A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or servants. 3. These rules apply to both the common carriers of goods and common carriers of passengers, and with a special force to the latter. 4. They apply to the case of a drover traveling on a stock train to look after his cattle, and having a free pass for that purpose. 5. Query: Whether the same rules would apply to a strictly free passenger. 6. Held, *ar-*

guendo, that a common carrier does not drop his character as such by merely entering into a contract, for limiting his responsibility. 7. That carefulness and fidelity are essential duties of his employment, which cannot be abdicated. 8. That these duties are as essential to the public security in his servants as in himself. 9. That a failure to fulfill these duties is negligence; the distinction between "gross" and "ordinary" negligence being unnecessary.

² 2 Greenl. Ev., § 219; Louisville etc. R. Co. v. Touart, 97 Ala. 514, 11 South. 756; Alabama Great Southern R. Co. v. Little, 71 Ala. 611; Atlantic etc. R. Co. v. Rice, 169 Ala. 265, Ann. Cas. 1912B. 389, 29 L. R. A., N. S., 1214, 52 South. 918; Central etc. Co. v. Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; Berry v. Cooper, 28 Ga. 543; Carter v. Southern R. Co., 3 Ga. App. 34, 50 S. E. 209; Adams Express Co.

the ground that in such cases the *proof* is generally in the hands of the common carrier; that he or his servants know, or at least ought to know, the circumstances of the loss, while the plaintiff has no such knowledge, and consequently, if the plaintiff were required to furnish proof of negligence, it would practically operate as a denial of justice.³ Those who maintain this view hold that the common carrier cannot by *special contract* relieve himself to any extent from losses occasioned by his own negligence; that common carriers are such by virtue of their occupation and not by virtue of the responsibilities under which they rest, and

v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Pittsburg etc. Ry. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Moore v. Chicago etc. R. Co., 151 Iowa, 353, 131 N. W. 30; Merchants' Despatch Transp. Co. v. Hoskins, 14 Ky. Law Rep. 927; Louisville etc. R. Co. v. Thompson, 13 Ky. Law Rep. 973; Mahon v. Steamer Olive Branch, 18 La. Ann. 107; Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 10 Ann. Cas. 169, 110 N. W. 362; Hinton v. Eastern Ry. Co., 72 Minn. 339, 75 N. W. 373; Southard v. Minneapolis etc. R. Co., 60 Minn. 382, 62 N. W. 442, 619; Newberger Cotton Co. v. Illinois Cent. R. Co., 75 Miss. 303, 23 South. 186; Southern Express Co. v. Seide, 67 Miss. 609, 7 South. 547; Crow v. Chicago etc. R. Co., 57 Mo. App. 135; Hinkle v. Southern R. Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Brewster v. New York etc. R. Co., 145 App. Div. 51, 129 N. Y. Supp. 368; Whitworth v. Erie Ry. Co., 45 N. Y. Super. Ct. (13 Jones & S.) 602; Heyl v. Inman Steamship Co., 14 Hun (N. Y.), 564; United States Express Co. v. Backman, 28 Ohio St. 144; Union Express Co. v. Graham, 26 Ohio St. 595; Trace v. Railroad Co., 26 Pa. Sup. Ct. 466; Davis v. Blue Ridge R. Co., 81 S. C. 466, 62 S. E.

856; Baker v. Brinson, 9 Rich. (S. C.) 201, 67 Am. Dec. 548; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Texas etc. R. Co. v. Richmond, 94 Tex. 571, 63 S. W. 619; Baltimore etc. R. Co. v. Oriental Oil Co., 51 Tex. Civ. App. 336, 111 S. W. 979; Houston etc. R. Co. v. Parker (Tex. Civ. App.), 138 S. W. 437; Houtz v. Union Pac. R. Co., 33 Utah, 175, 180, 17 L. R. A., N. S., 628, 93 Pac. 439; Brown v. Adams Express Co., 15 W. Va. 812; Kirst v. Milwaukee etc. R. Co., 46 Wis. 489, 1 N. W. 89.

³ Berry v. Cooper, 28 Ga. 543; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189; Pittsburgh etc. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; Tardos v. Toulon, 14 La. Ann. 429, 74 Am. Dec. 435; Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Collins v. Bennett, 46 N. Y. 490; Newstadt v. Adams, 5 Duer (N. Y.), 43; Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 44 L. R. A. 515, 32 S. E. 671; Pennsylvania R. Co. v. Miller, 87 Pa. 395; American Express Co. v. Sands, 55 Pa. 140; Johnstone v. Richmond etc. R. Co., 39 S. C. 55, 17 S. E. 512; Riley v. Horne, 5 Bing. 217, 130 Eng. Reprint, 1044; and cases just cited above.

that although their responsibilities may vary, the character of their employment is not changed.⁴ It appeals to us very strongly that this is the better law, and follows as a logical corollary to that already laid down, namely, that when the *prima facie* case is established, the burden of evidence shifts to the carrier, who is to prove that the loss arose from some cause for which he is not liable. In our opinion the limitation of his proof, or rather of his exoneration, to excepted cases only makes the shifting of the burden idle, for the excepted cases are really his affirmative defense. Suppose that A is the shipper and B the carrier under an ordinary contract. The goods to be carried are lost. A sues and establishes a *prima facie* case. It will be conceded the burden of evidence is shifted to B to prove that the loss was caused by something for which he is not liable. Now, suppose that in lieu of an ordinary contract there existed one with an exemption from liability if the goods were destroyed by fire. It will not be seriously contended that B is thereby relieved from all or any negligence. Assume that the goods are destroyed by fire. A again establishes his *prima facie* case; the burden of evidence is on B to prove—what? Merely that the goods were destroyed by fire? If that is all B would have to prove, then eliminate the exemption clause and B's necessity to prove the fire, and we have left an ordinary contract of carriage in which, after the plaintiff had made out a *prima facie* case, the defendant, having nothing to prove, would be entitled to succeed, or, in other words, that a *prima facie* case of negligence is *not* sufficient to entitle the plaintiff to rest in ordinary cases, whereas the law says that it *is*. The author puts this view and illustration with diffidence by reason of the fact that in the conflict of decisions the United States supreme court is ranged upon the opposite side. It must be noted, however, that in the leading case,⁵ Chief Justice

⁴ Davidson v. Graham, 2 Ohio St. 131; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Brown v. Adams Ex. Co., 15 W. Va. 812.

⁵ Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985.

Taney and Mr. Justice Wayne dissented from the opinion delivered by Mr. Justice Nelson. The true rule appears to us to be as laid down in an Alabama case, that in an action against a common carrier for nondelivery of goods, if he would avail himself of an exemption from liability for damages by "dangers of the river and fire," he must show *prima facie* that the damage was not caused by his own negligence. According to that case, the shipper makes a *prima facie* case against the carrier when he shows the goods were not delivered. This casts the *onus* on the carrier to show that the loss occurred from a danger of the river, or from fire, and he must also prove a *prima facie* case of diligence on his part. This, of course, implies a river-worthy vessel, properly furnished and appointed, competent and sufficient officers and crew, and care and vigilance to prevent danger, and to avert it when impending. Any deficiency in the skill or watchfulness of the officers or crew, in the matter of their special function; in the apparatus to extinguish fire, or in its whereabouts or readiness for prompt present use, or in prompt and vigorous effort to extinguish a fire when it originates, would fall short of proving a *prima facie* case of diligence. Beyond these two shifting stages, the Alabama decisions have declared no rule in the matter of the burden of proof.⁶ But there are numerous adjudications holding that in such cases, when there is proof bringing the loss within an excepted peril, the burden of proof is shifted to the plaintiff to prove negligence.⁷ When it is shown that the loss is the result of

⁶ Grey's Exr. v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

⁷ Santa Fe etc. Ry. Co. v. Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467; Little Rock etc. R. Co. v. Corcoran, 40 Ark. 375; St. Louis etc. R. Co. v. Bone, 52 Ark. 26, 11 S. W. 958; East Tennessee etc. R. Co. v. Wright, 76 Ga. 532; Chicago etc. Ry. Co. v. Reyman, 166 Ind. 278, 76 N. E. 970; Insurance Co. of North America v. Lake Erie etc. R. Co., 152 Ind. 333,

53 N. E. 382; Indianapolis etc. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Mitchell v. U. S. Express Co., 46 Iowa, 214; The Steamboat Emily v. Carney, 5 Kan. 645; Kansas Pac. R. Co. v. Reynolds, 8 Kan. 623; Brauer v. The Almoner, 18 La. Ann. 266; Kelham v. Steamship Kensington, 24 La. Ann. 100; Sager v. Portsmouth etc. R. Co., 31 Me. 228, 50 Am. Dec. 659; Morse v. Canadian Pac. R. Co., 97 Me. 77, 53 Atl. 874; Bankard

the *act of God* or of the public enemy, the carrier is not bound to give proof of due care; the *burden* of proving negligence in such case is *upon the plaintiff*.⁸

§ 182a (180). **Same — Telegraph companies.** — A telegraph company is chartered for public purposes, has the power of eminent domain, is a public agent and exercises *quasi*-public employment, and is required to perform the duties it was chartered to perform with the same care, skill, and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and it is contrary to public policy to permit it, by rules and regulations, to restrict its liability for damages, resulting from its own negligence or carelessness.⁹ When a *telegraph company*

v. Baltimore B. & O. Ry. Co., 34 Md. 197, 6 Am. Rep. 321; Jones v. Minneapolis etc. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; Nunnelee v. St. Louis etc. R. Co., 145 Mo. App. 17, 129 S. W. 762; Witting v. St. Louis & S. F. Ry. Co., 101 Mo. 631, 20 Am. St. Rep. 636, 10 L. R. A. 602, 14 S. W. 743; Davis v. Wabash etc. R. Co., 89 Mo. 340, 1 S. W. 327; Rowan v. Wells, 80 App. Div. 31, 80 N. Y. Supp. 226; Dobson v. Central R. Co., 38 Misc. Rep. 582, 78 N. Y. Supp. 82; Whitworth v. Erie Ry. Co., 87 N. Y. 413; Lamb v. Camden Ry. Co., 46 N. Y. 271, 7 Am. Rep. 327; Sutro v. Fargo, 41 N. Y. Super. Ct. (9 Jones & S.) 231; Smith v. North Carolina R. Co., 64 N. C. 235; Pennsylvania Co. v. Yoder, 25 Ohio C. C. 32; Childs v. Little Miami R. Co., 1 Cinc. Super. Ct. 480; Armstrong v. Byrd & Co. v. Illinois Cent. R. Co., 26 Okl. 352, 29 L. R. A., N. S., 671, 109 Pac. 216; Buck v. Pennsylvania R. Co., 150 Pa. 170, 30 Am. St. Rep. 800, 24 Atl. 678; Patterson v. Clyde, 67 Pa. 500; Colton v. Cleveland etc. R. Co., 67 Pa. 211, 5 Am. Rep. 424; Nashville etc. Ry. Co. v. Stone, 112

Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; Louisville etc. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Baker v. Missouri etc. Ry. Co., 57 Tex. Civ. App. 25, 121 S. W. 907; Hecht v. Grand Trunk R. Co., 132 Wis. 605, 113 N. W. 68; Schaller v. Chicago etc. Rep. Co., 97 Wis. 31, 71 N. W. 1042; Cau v. Texas etc. R. Co., 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. Ed. 1053; Memphis etc. R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. Ed. 909; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985; The Buckeye, 7 Biss. (U. S.) 23, 4 Fed. Cas. No. 2084; Vogel v. Railroad Co., 10 Ont. App. 162, 11 Can. S. Ct. 612; Scott v. Lumber Co., 7 Ont. W. R. 857.

⁸ Memphis etc. R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. Ed. 909. See note to Chicago etc. R. Co. v. Logan etc. Co., 29 L. R. A., N. S., 663, on burden of proof when the defense in an action to recover for loss or injury to goods during carriage is an act of God or *vis major*.

⁹ Strong v. Western Union Tel. Co., 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910.

undertakes to transmit a message, it is implied that the message will be sent correctly; and if error occurs, the means of proof and explanation are almost wholly within the reach of the company, and equally beyond the reach of the other party. Owing to these considerations it is the rule that, where the plaintiff proves a failure to transmit the message in the form in which it was received and that damage has resulted, there is a case of *prima facie* negligence for which the company is liable, unless there is proof offered rebutting the presumption of negligence. If the failure to correctly transmit a telegram was not the result of the negligence of the company, the means of showing that fact is within the possession of the company, and it may show it as a defense.¹⁰ Although, in an action against a telegraph company for damages resulting from an inaccuracy in the transmission of a message, the inaccuracy having been shown, the burden is upon the company to show that it was not due to its fault, no presumption can be indulged to sustain an allegation of the company's failure to make timely delivery of a message when it does not appear that the addressee or someone representing him was at the place designated for delivery.¹¹ There is abundant authority for the doctrine that proof of an unreasonable delay in delivery, or of a failure to deliver, creates a presumption of negligence on the part of the carrier, and casts upon it the burden of showing exculpatory facts or circumstances.¹² The reasonableness

¹⁰ *Strong v. Western Union Tel. Co.*, 18 Idaho, 389, Ann. Cas. 1912A, 55, 109 Pac. 910; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605; *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Rittenhouse v.*

Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500. See note to *Western Union Tel. Co. v. Blanchard* (68 Ga. 299), 45 Am. Rep. 499. See, also, § 210, *post*.

¹¹ *Western Union Tel. Co. v. Sullivan*, 82 Ohio St. 14, 137 Am. St. Rep. 754, 91 N. E. 867; distinguishing *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500.

¹² *Lothian v. Western Union Tel. Co.*, 25 S. D. 319, 126 N. W. 621;

or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stipulation which exempts such company from damages for its own negligence is void.¹³ There appears to be considerable conflict in the various decisions upon the question of the validity of the printed stipulation upon a telegraph blank limiting the liability of the company for mistakes and delays in transmission of messages. In some of the decisions it is held that such stipulations are valid, and in others, that they are not valid and are contrary to public policy. And it has been suggested that a different rule as to the burden of proof may obtain where the restriction of the liability is held to be competent. We see no reason for this. In such cases we have only to urge the adoption of the views set forth in the preceding section that once the plaintiff has established his *prima facie* case, the burden of evidence should rest upon the defendant, to prove his special contractual exemption and to meet the plaintiff's case up to any point which may recast the burden onto him; and this finds support from the fact above stated, that in most cases the defendant will be aware of facts in explanation or palliation of which the plaintiff *ex necessitate rei* is ignorant.¹⁴

Seldon v. Western Union Tel. Co., 146 Iowa, 743, 126 N. W. 969; Carswell v. Western Union Tel. Co., 154 N. C. 112, 69 S. E. 782; Bailey & Co. v. Western Union Tel. Co., 227 Pa. 522, 19 Ann. Cas. 895, 76 Atl. 736; Leppard v. Western Union Tel. Co., 88 S. C. 388, 70 S. E. 1004; Garner v. Western Union Tel. Co., 87 S. C. 316, 69 S. E. 510; Heath v. Postal Tel. Cable Co., 87 S. C. 219, 69 S. E. 283; Baker v. Western Union Tel. Co., 87 S. C. 174, 69 S. E. 151.

¹³ Strong v. Western Union Tel. Co., *supra*.

¹⁴ Sweatland v. Illinois etc. Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Bald-

win v. United States Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; Kemp v. Western Union Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064. In Mississippi, Kentucky, and Oklahoma, telegraph companies are by law declared to be common carriers, and the supreme courts in those states held that said stipulation above quoted is invalid and unavailing as a defense under the constitution and statute which declared telegraph companies to be common carriers in their line of business and subject to liability as such: Post Tel. & C. Co. v. Wells, 82 Miss. 733, 35 South. 190; Western Union Tel. Co. v. Eubanks, 100 Ky.

§ 183 (181). Actions against common carriers—Of passengers.—Equally important in its magnitude, and more important from its results, is that branch of the law of evidence relating to actions for personal injuries to a passenger through the act of a common carrier. The question of what the plaintiff has to prove to put upon the defendant the burden of evidence is now regulated, after a countless number of decisions founded on the various and improved means of transportation, on the original simple lines of the contract to carry the passenger without negligence on his, the carrier's, part. It is well settled that, while the common carrier of passengers is not an insurer of the safety of its passengers, yet it is bound to use the utmost care to guard against the possibility of accident arising from the condition of its road, machinery and appliances used in transportation, or from the conduct and control, or defect of such conduct or control, of its transportation business.¹⁵ In ordinary actions for negligence the general rule obtains that the person asserting the negligence or other wrong has the burden of proof; but, as we have seen in such actions, slight proof sometimes suffices to raise a presumption of negligence, and the burden is thus cast upon the other party to overcome this presumption.¹⁶ Thus in actions against common carriers for *personal injuries* received by a *passenger*, the burden is upon him to show that he received the injury while a passenger and by reason of the negligence of the carrier. It goes without saying that on the plaintiff rests the burden of introducing his case by proving the very foundation on which the liability of the defendant is charged. The plain-

591, 66 Am. St. Rep. 361, 36 L. R. A. 711, 38 S. W. 1068; *Blackwell M. & E. Co. v. Western Union Co.*, 17 Okl. 376, 10 Ann. Cas. 855, 89 Pac. 235. In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. Rep. 1098, the court declares that telegraph companies are not common carriers except in so far as they

are obliged to serve all alike, and that they may protect themselves by stipulations similar to those under consideration in this case. See, also, exhaustive note to *Western Union Tel. Co. v. Blanchard*, *supra*.

¹⁵ *Irvine v. Delaware L. & W. R. Co.*, 184 Fed. 664, 106 C. C. A. 600.

¹⁶ See § 15, *ante*, and cases cited.

tiff having alleged that he was a passenger, a material allegation, he must prove it by a preponderance of the evidence before he can recover.¹⁷ He must also prove that the defendant is a carrier, except when it is presumed, as in the case of a railway company (for everyone riding in a railway car is presumed to be there lawfully as a passenger, and the *onus* is upon the carrier to prove that he was a trespasser), and further, that he had a right to be in the vehicle of transportation when the injuries were caused. In other words, the burden is on him to establish the basis of his claim on which his injury depends.¹⁸

¹⁷ *Kulpinsky v. Sampsell*, 145 Ill. App. 242.

¹⁸ *Birmingham Ry. etc. Co. v. McCurdy*, 172 Ala. 488, 55 South. 616; *Georgia Pac. R. Co. v. Love*, 91 Ala. 432, 24 Am. St. Rep. 927, 8 South. 714; *Southern Pac. Co. v. Hogan*, 13 Ariz. 34, 29 L. R. A., N. S., 813, 108 Pac. 240; *St. Louis etc. Ry. Co. v. Watson*, 97 Ark. 560, 134 S. W. 949; *Kruse v. St. Louis etc. R. Co.*, 97 Ark. 137, 133 S. W. 841; *Wyatt v. Pacific etc. R. Co.*, 156 Cal. 170, 103 Pac. 892; *Valente v. Sierra R. Co.*, 151 Cal. 534, 91 Pac. 481; *Kruck v. Connecticut Co.*, 84 Conn. 401, 80 Atl. 162; *Bergan v. Central etc. R. Co.*, 82 Conn. 574, 74 Atl. 937; *File v. Wilmington City R. Co.*, 7 Penne. (Del.) 463, 80 Atl. 623; *Sullivan v. Capital Trac. Co.*, 34 App. D. C. 358; *Florida East Coast Ry. Co. v. Wade*, 53 Fla. 620, 43 South. 775; *Jackson v. Georgia R. etc. Co.*, 7 Ga. App. 644, 67 S. E. 898; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *Griswold v. Chicago City Ry. Co.*, 150 Ill. App. 614; *Barnes v. Danville St. Ry. etc. Co.*, 143 Ill. App. 259; *Chicago etc. R. Co. v. Huston*, 95 Ill. App. 350; *Kelley v. Grand Trunk etc. R. Co.*, 46 Ind. App. 697, 93 N. E. 616; *Louisville etc. R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 8

N. E. 18, 9 N. E. 357; *Hannestad v. Chicago etc. R. Co.*, 132 Iowa, 232, 109 N. W. 718; *Brown v. Union Pac. R. Co.*, 81 Kan. 701, 106 Pac. 1001; *Illinois Cent. R. Co. v. Proctor*, 31 Ky. Law Rep. 494, 102 S. W. 826; *Marsalis v. Louisiana etc. R. Co.*, 129 La. 146, 55 South. 744; *Lockwood v. Boston etc. R. Co.*, 200 Mass. 537, 22 L. R. A., N. S., 488, 86 N. E. 934; *Carroll v. Boston etc. R. Co.*, 200 Mass. 527, 86 N. E. 793; *Konieczny v. Detroit etc. R. Co.*, 164 Mich. 66, 128 N. W. 1096; *Mageau v. Great Northern R. Co.*, 102 Minn. 399, 113 N. W. 1016; *Richter v. United Rys. Co.*, 145 Mo. App. 1, 129 S. W. 1055; *Norton v. St. Louis etc. R. Co.*, 40 Mo. App. 642; *Setzler v. Metropolitan St. R. Co.*, 227 Mo. 454, 127 S. W. 1; *Gabriel v. St. Louis etc. R. Co.*, 135 Mo. App. 222, 115 S. W. 3; *Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S. W. 848; *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988; *Lincoln Traction Co. v. Brookover*, 77 Neb. 217, 109 N. W. 168; *Keene v. Eastman*, 75 N. H. 191, 72 Atl. 213; *McCullom v. Atlantic City etc. R. Co.*, 77 N. J. L. 603, 72 Atl. 87; *Meschneck v. Brooklyn etc. R. Co.*, 125 App. Div. 265, 109 N. Y. Supp. 594; *Dista v. Westchester etc. R. Co.*, 103 N. Y. Supp. 738; *Goss v. North-*

Having established the relationship of passenger and carrier, it is on the plaintiff to prove that his injuries were caused through the carrier's negligence. The question immediately arises, how far the *res ipsa loquitur* doctrine will carry the plaintiff, and there is high authority for the statement that the mere fact of the accident to the passenger, and attributable to the carrier, the passenger not being a contributing party to it is sufficient to make out his *prima facie* case.¹⁹ It has been the settled law of the United

ern Pac. R. Co., 48 Or. 439, 87 Pac. 149; Creed v. Pennsylvania R. Co., 86 Pa. 139, 27 Am. Rep. 693; Sutton v. Southern Ry., 82 S. C. 345, 64 S. E. 401; International etc. R. Co. v. Duncan, 55 Tex. Civ. App. 440, 121 S. W. 362; St. Louis etc. R. Co. v. Sizemore, 53 Tex. Civ. App. 491, 116 S. W. 403; Rambie v. San Antonio etc. R. Co., 45 Tex. Civ. App. 422, 100 S. W. 1022; Texas etc. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Schuyler v. Southern Pac. Co., 37 Utah, 581, 109 Pac. 458; Norfolk etc. R. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445; Norfolk etc. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879; Southern R. Co. v. Dawson, 98 Va. 577; 36 S. E. 996; Norvel v. Kanawha etc. Co., 67 W. Va. 467, 68 S. E. 288; Lugner v. Milwaukee etc. Ry. & Light Co., 146 Wis. 175, 131 N. W. 342; Bartholomaeus v. Milwaukee etc. Ry. & Light Co., 129 Wis. 388, 109 N. W. 143; Irvine v. Delaware etc. R. Co., 184 Fed. 664, 106 C. C. A. 600; Pennsylvania R. Co. v. McCaffrey, 149 Fed. 404; Lydon v. Robert Smith Ale Brewing Co., 133 Fed. 830.

¹⁹ Birmingham Ry. etc. Co. v. McCurdy, 172 Ala. 488, 55 South. 616; St. Louis etc. Ry. Co. v. Fambro, 88 Ark. 12, 114 S. W. 230; Roberts v. Sierra R. Co., 14 Cal. App. 180, 111 Pac. 519, 527; Houghton v. Market St. R. Co., 1 Cal. App. 576, 82 Pac.

972; Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 Pac. 125; Pensacola Electric Co. v. Bissett, 59 Fla. 360, 52 South. 367; Freeman v. Collins Park etc. R. Co., 117 Ga. 78, 43 S. E. 410; Killian v. Georgia R. etc. Co., 97 Ga. 727, 25 S. E. 384; Elgin etc. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; New York etc. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Garner v. Chicago Con. Traction Co., 150 Ill. App. 149; Lake Erie etc. R. Co. v. Cotton, 45 Ind. App. 580, 91 N. E. 253; Louisville etc. R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 3 L. R. A. 434, 20 N. E. 284; Dieckmann v. Chicago etc. R. Co., 145 Iowa, 250, 139 Am. St. Rep. 420, 121 N. W. 676; Metropolitan St. R. Co. v. Warren, 74 Kan. 244, 86 Pac. 131, 89 Pac. 656; Southern Ry. Co. v. Brewer, 32 Ky. Law Rep. 1374, 108 S. W. 936; Louisville etc. R. Co. v. Ritter's Admr., 85 Ky. 368, 9 Ky. Law Rep. 22, 3 S. W. 591; United Rys. etc. Co. v. Woodbridge, 97 Md. 629, 55 Atl. 444; Baltimore etc. R. Co. v. Swann, 81 Md. 400, 31 L. R. A. 313, 32 Atl. 175; Hebblethwaite v. Old Colony St. R. Co., 192 Mass. 295, 78 N. E. 477; Wadsworth v. Boston El. Ry. Co., 182 Mass. 572, 66 N. E. 421; Yazoo R. Co. v. Humphrey, 83 Miss. 721, 36 South. 154; Mitchell v. Chicago etc.

States supreme court²⁰ that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight.²¹ But the plaintiff cannot rest on the fact merely that while a passenger he was injured, because *non constat* but that he was injured by someone or something for which the carrier would not be responsible.²² He

R. Co., 132 Mo. App. 143, 112 S. W. 291; *Erwin v. Kansas City etc. R. Co.*, 94 Mo. App. 289, 68 S. W. 88; *Lincoln Traction Co. v. Heller*, 72 Neb. 127, 100 N. W. 197, 102 N. W. 262; *Chicago etc. R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988; *Brumberger v. Joline*, 125 N. Y. Supp. 519; *Greer v. Union R. Co.*, 50 Misc. Rep. 560, 99 N. Y. Supp. 428; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494, 8 Am. Rep. 508; *Traction Co. v. Holzenkamp*, 74 Ohio St. 379, 113 Am. St. Rep. 980, 6 L. R. A., N. S., 800, 78 N. E. 529; *Enos v. Rhode Island etc. R. Co.*, 28 R. I. 291, 12 L. R. A., N. S., 244, 67 Atl. 5; *Dampman v. Pennsylvania R. Co.*, 166 Pa. 520, 31 Atl. 244; *Grant v. Southern Ry.*, 84 S. C. 114, 65 S. E. 1022; *Davis v. Atlantic etc. R. Co.*, 83 S. C. 66, 64 S. E. 1015; *Cooper v. Georgia etc. R. Co.*, 61 S. C. 345, 39 S. E. 543; *Illinois Cent. R. Co. v. Porter*, 117 Tenn. 13, 10 Ann. Cas. 789, 94 S. W. 666; *Freeman v. Davis* (Tex. Civ. App.), 117 S. W. 186; *Roanoke Ry. etc. Co. v. Sterrett*, 111 Va. 293, 68 S. E. 998; *Cincinnati Traction Co. v. Leach*, 169 Fed. 549, 95 C. C. A. 47; *New Jersey R. etc. Co. v. Pollard*, 22 Wall. (U. S.) 341, 22 L. Ed. 877; *Railroad Co. v. Chalfoux*, 22 Can. S. Ct. 721; *Thatcher*

v. Railroad Co. (Can.), 4 U. C. C. P. 543.

²⁰ Since the decisions in *Stokes v. Saltonstall*, 38 U. S. (13 Pet.) 181, 10 L. Ed. 115, and *New Jersey etc. Co. v. Pollard*, 89 U. S. (22 Wall.) 341, 22 L. Ed. 877. The rule announced in these cases has received general acceptance, and was followed in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. Rep. 653.

²¹ *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859, followed in *Cincinnati Traction Co. v. Leach*, 169 Fed. 549, 95 C. C. A. 47, where the court said the defendant in error having shown to the jury that he was a passenger aboard appellant's car, and that while such passenger he was injured, the burden of proof shifted to the appellant (defendant below) to satisfy the jury by a preponderance of the evidence in the case that it was guilty of no negligence that proximately contributed to the accident: *Missouri K. & T. Ry. Co. v. Foreman*, 174 Fed. 377, 98 C. C. A. 281; *Patton v. Illinois Cent. R. Co.*, 179 Fed. 530; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151; *Irvine v. Delaware etc. Co.*, 184 Fed. 664, 106 C. C. A. 600.

²² *Central of Georgia R. Co. v. Brown*, 165 Ala. 493, 51 South. 565;

must further prove the injury which can be attributed to the defendant's negligence. "It has been pointed out by an able judge that the presumption which arises in this case does not arise from the mere fact of injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence on the part of the carrier until something further

Wyatt v. Pacific Electric R. Co., 156 Cal. 170, 103 Pac. 892; Donovan v. Hartford St. R. Co., 65 Conn. 201, 29 L. R. A. 297, 32 Atl. 350; File v. Wilmington City R. Co., 7 Penne. (Del.) 463, 80 Atl. 623; Harbison v. Metropolitan R. Co., 9 App. Cas. (D. C.) 60; Jacksonville St. R. Co. v. Chappell, 21 Fla. 175; Smith v. Atlantic Coast R. Co., 5 Ga. App. 219, 62 S. E. 1020; Le Deau v. Northern Pac. R. Co., 19 Idaho, 711, Ann. Cas. 1912C, 438, 34 L. R. A., N. S., 725, 115 Pac. 502; McFadden v. Chicago etc. R. Co., 149 Ill. App. 298; Dressler v. Citizens' St. R. Co., 19 Ind. App. 383, 47 N. E. 651; Hart v. St. Louis etc. R. Co., 80 Kan. 699, 102 Pac. 1101; Pittsburg etc. R. Co. v. Grom, 142 Ky. 51, 133 S. W. 977; Western Maryland R. Co. v. State, 95 Md. 637, 53 Atl. 969; Bigwood v. Boston etc. R. Co., 209 Mass. 345, 35 L. R. A., N. S., 112, 95 N. E. 751; Sewell v. Detroit United Ry. Co., 158 Mich. 407, 123 N. W. 2; Thurston v. Detroit United Ry. Co., 137 Mich. 231, 100 N. W. 395; Rhea v. Minneapolis St. R. Co., 111 Minn. 271, 126 N. W. 823; Bridges v. Jackson etc. R. Co., 86 Miss. 584, 4 Ann. Cas. 662, 38 South. 788; Allison v. St. Louis etc. R. Co., 157 Mo. App. 72, 137 S. W. 896; Knuckey v. Butte etc. R. Co., 41 Mont. 314, 109 Pac. 979; Lincoln Traction

Co. v. Webb, 73 Neb. 136, 148, 119 Am. St. Rep. 879, 102 N. W. 258; Boucher v. Boston etc. R. Co. (N. H.), 79 Atl. 993, 995; Kingsley v. Delaware etc. R. Co., 81 N. J. L. 536, 80 Atl. 327; Losie v. Delaware etc. Co., 142 App. Div. 214, 126 N. Y. Supp. 871; Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604; St. Louis etc. R. Co. v. Gosnell, 23 Okl. 588, 22 L. R. A., N. S., 892, 101 Pac. 1126; Armstrong v. Portland R. Co., 52 Or. 437, 97 Pac. 715; Ault v. Cowan, 20 Pa. Sup. Ct. 616; Fagan v. Rhode Island Co., 27 R. I. 51, 69 Atl. 672; McKittrick v. Greenville Traction Co., 88 S. C. 91, 70 S. E. 414; East Tennessee etc. R. Co. v. Mitchell, 11 Heisk. (Tenn.) 400; Texas etc. R. Co. v. Harrington, 44 Tex. Civ. App. 386, 98 S. W. 653; Texas etc. R. Co. v. Overall, 82 Tex. 247, 18 S. W. 142; Paul v. Salt Lake City R. Co., 34 Utah, 1, 95 Pac. 363; Roanoke R. etc. Co. v. Sterrett, 108 Va. 533, 128 Am. St. Rep. 971, 19 L. R. A., N. S., 316, 62 S. E. 385; De Yoe v. Seattle Elec. Co., 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133; Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Am. St. Rep. 72, 16 L. R. A. 808, 28 Pac. 1021; Wenzel v. City & Elm Grove R. Co., 64 W. Va. 310, 61 S. E. 1001; The Nederland, 14 Fed. 63; Giles v. Railroad Co., 36 U. C. Q. B. 360.

be shown. If the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence might arise—not, however, from the fact that the leg was broken, but from the circumstances attending the fact. . . . As shown by other decisions, the meaning of the foregoing doctrine is that the mere fact that a passenger has sustained some injury of an unknown or obscure character, proceeding from an unknown or obscure source, while in transit in the carrier's vehicle, does not of itself raise the presumption that the injury proceeded from the negligence of the carrier. The presumption arises from a consideration, collectively, of the fact of the injury, and of the kind and source of it. The fact of an injury alone is not sufficient. It must be traced to the carrier.' ”²³ Therefore, the *prima facie* case is made out when it appears that an accident occurred to the plaintiff without fault on his part while he was a passenger by reason of the *failure* of some portion of the *machinery* or other means provided for transportation. “In such cases, the rule of *res ipsa loquitur* applies, and when that which causes the injury is shown to have been under the management and control of the carrier or its servants, and furnished and applied by it, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, and there is said to be a presumption of negligence sufficient to entitle the plaintiff to go to the jury.”²⁴ For example, when

²³ Thompson, Neg., § 2756.

²⁴ Moore on Carriers, 772; St. Louis etc. R. Co. v. Savage, 163 Ala. 55, 50 South. 113; Alabama Ry. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65, and note, 9 South. 722; St. Louis etc. R. Co. v. Pollock, 93 Ark. 240, 123 S. W. 790; St. Louis Ry. Co. v. Mitchell, 57 Ark. 418, 21

S. W. 883; Walker v. Beaumont Land etc. Co., 15 Cal. App. 726, 115 Pac. 766; Bassett v. Los Angeles Traction Co. (Cal.), 65 Pac. 470; Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 Pac. 125; Denver & R. G. R. Co. v. Fotheringham, 17 Colo. App. 410, 68 Pac. 978; Burroughs v. Housatonic Ry. Co., 15

the injury is shown to be the result of the breaking of an axletree of a coach, or the upsetting of a coach, or the collision of cars on the road of the defendant, or of their running off the track, or of the falling of a berth of a vessel or in a railroad car, the breaking of a bridge, the fall-

Conn. 124, 38 Am. Dec. 64, and note; Wood v. Philadelphia etc. R. Co., 1 Boyce (Del.), 336, 76 Atl. 613; Kohner v. Capital Traction Co., 22 App. D. C. 181, 62 L. R. A. 875; Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Freeman v. Collins Park etc. R. Co., 117 Ga. 78, 43 S. E. 410; Castelano v. Chicago etc. Ry. Co., 149 Ill. App. 250; Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245; Toledo Ry. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Louisville etc. Traction Co. v. Worrell, 44 Ind. App. 480, 86 N. E. 78; Terre Haute etc. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Fitch v. Mason City etc. Traction Co., 124 Iowa, 665, 100 N. W. 618; Chicago etc. R. Co. v. Brandon, 77 Kan. 612, 95 Pac. 573; St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89, 61 Pac. 439; Southern R. Co. v. Brewer, 32 Ky. Law Rep. 43, 105 S. W. 160; Davis v. Paducah R. & L. Co., 24 Ky. Law Rep. 135, 68 S. W. 140; McGinn v. New Orleans R. etc. Co., 118 La. 811, 13 L. R. A., N. S., 601, 43 South. 450; Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303, 31 South. 766; Jones v. United Rys. etc. Co., 99 Md. 64, 57 Atl. 620; Philadelphia Ry. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 8 L. R. A. 673, 20 Atl. 2; Stockton v. Frey, 4 Gill (Md.), 406, 45 Am. Dec. 138, and note; McDonough v. Boston etc. R. Co., 208 Mass. 436, 94 N. E. 809; Feital v. Middlesex Ry. Co., 109 Mass. 398, 12 Am. Rep. 720; Ingalls v. Bills, 9

Met. 1, 43 Am. Dec. 346, and note; Sewell v. Detroit etc. Ry. Co., 158 Mich. 407, 123 N. W. 2; Marquette Ry. Co. v. Kirkwood, 45 Mich. 51, 40 Am. Rep. 453, and note; 7 N. W. 209; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; McLean v. Burbank, 11 Minn. 277; Easley v. Alabama etc. R. Co., 96 Miss. 396, 50 South. 491; Memphis etc. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Kinyoun v. Metropolitan St. R. Co., 153 Mo. App. 477, 134 S. W. 15; Oeh v. Missouri etc. R. Co., 130 Mo. 27, 36 L. R. A. 442, 31 S. W. 962; Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438, 22 Am. St. Rep. 781, and note, 13 S. W. 1044; Levering v. Union Transportation Co., 42 Mo. 88, 97 Am. Dec. 320, and note; Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406, and note; Knuckey v. Butte etc. R. Co., 41 Mont. 314, 109 Pac. 979; Lincoln Traction Co. v. Shephard, 74 Neb. 369, 104 N. W. 882, 107 N. W. 764; Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 26 Am. St. Rep. 325, and full note, 6 L. R. A. 809, 44 N. W. 226; Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 68 Am. St. Rep. 723, 41 L. R. A. 836, 40 Atl. 645; Burke v. State, 64 Misc. Rep. 558, 119 N. Y. Supp. 1089; Breen v. New York Cent. etc. R. Co., 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60, 14 N. Y. St. 835; Bowen v. New York Cent. Ry. Co., 18 N. Y. 408, 72 Am. Dec. 529, and note; Cox v. High Point etc. R. Co., 147 N. C. 353, 61

ing of a window, the "slamming" of a door,²⁵ in all such cases the contract of the carrier implies that the means of transportation are proper and adequate; that the appliances of the defendant in every respect are fit for the purpose, and that its servants are competent. If an injury to a passenger is caused by apparatus wholly under

S. E. 183; *Budd v. United Carriage Co.*, 25 Or. 314, 27 L. R. A. 279, 35 Pac. 660; *Clow v. Pittsburgh Traction Co.*, 158 Pa. 410, 27 Atl. 1004; *Meier v. Pennsylvania Ry. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *McKittrick v. Greenville Traction Co.*, 88 S. C. 91, 70 S. E. 414; *Cameron v. Rich*, 4 Strob. (S. C.) 168, 53 Am. Dec. 670, and note; *Reeves v. Chicago etc. R. Co.*, 24 S. D. 84, 123 N. W. 498; *Southern Pac. Co. v. Blake* (Tex. Civ. App.), 128 S. W. 668; *Paul v. Salt Lake City R. Co.*, 34 Utah, 1, 95 Pac. 363; *Baltimore etc. R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 16 L. R. A. 808, 28 Pac. 1021; *Carrico v. West Virginia Cent. etc. R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Feldschneider v. Chicago etc. R. Co.*, 122 Wis. 423, 99 N. W. 1034; *Baltimore etc. R. Co. v. White*, 176 Fed. 900, 10 C. C. A. 370; *Root v. Catskill Mountain R. Co.*, 33 Fed. 858; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. Ed. 115; *New Jersey R. etc. Co. v. Pollard*, 22 Wall. (U. S.) 341, 22 L. Ed. 877; *Carpue v. London etc. R. Co.*, 5 Q. B. 747, D. & M. 608, 8 Jur. 464, 13 L. J. Q. B. 138, 3 R. & Can. Cas. 692, 48 Eng. Com. L. 747, 114 Eng. Reprint, 1431; *Young v. Owen Sound Dredge Co.*, 27 A. R. (Can.) 649; *Morrow v. Canadian Pac. R. Co.*, 21 A. R. (Can.) 149; *Thatcher v. Railroad Co.*, 4 U. C. C. P. 543. See notes to *Laing v. Celder*, 8 Pa. 479, 49 Am.

Dec. 533; *Farish & Co. v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 505; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Memphis etc. Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 Am. St. Rep. 790, 15 Atl. 520; *Philadelphia etc. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483, 8 L. R. A. 673, 20 Atl. 2; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 10 Am. St. Rep. 601, 2 L. R. A. 820, 17 Atl. 14.

²⁵ *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Green v. Pacific L. Co.*, 130 Cal. 435, 62 Pac. 747; *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; *Colorado etc. R. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *MacFeat v. Philadelphia etc. R. Co.*, 5 Penne. (Del.) 52, 62 Atl. 898; *Pensacola Elec. Co. v. Alexander*, 58 Fla. 337, 50 South. 673; *Louisville & N. R. Co. v. Willis*, 58 Fla. 307, 51 South. 134; *Pensacola Elec. Co. v. Bissett*, 59 Fla. 360, 52 South. 367; *McFadden v. Chicago etc. R. Co.*, 149 Ill. App. 298; *Castelano v. Chicago & J. El. R. Co.*, 149 Ill. App. 250; *Hickey v. Chicago City R. Co.*, 148 Ill. App. 197; *Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270; *Cleveland etc. R. Co. v. Hadley*, 170 Ind. 204, 16 Ann. Cas. 1, 16 L. R.

the control of the carrier and furnished and applied by it, or by some defect in machinery, cars or tracks, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. The presumption arises, however, from the nature of the accident and the circumstances, and not from the mere fact of the accident itself. Since the defendant is in a situation to ascertain and explain the cause of the injury, while the plaintiff is not, it is reasonable that the *burden of such explanation* should rest *upon the defendant*.²⁶ It follows that, when the plaintiff in such cases shows that an acci-

A., N. S., 527, 82 N. E. 1025, 84 N. E. 13; Cleveland etc. R. Co. v. Newell, 75 Ind. 542; Quimby v. Boston etc. R. Co., 69 Me. 340; Philadelphia etc. R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 8 L. R. A. 673, 20 Atl. 2; Smith v. St. Paul Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; Easley v. Alabama G. S. R. Co., 96 Miss. 396, 50 South. 491; Donovan v. Kansas etc. R. Co., 157 Mo. App. 649, 138 S. W. 679; Cooper v. Century Realty Co., 224 Mo. 709, 123 S. W. 848; Knuckey v. Butte Elec. R. Co., 41 Mont. 314, 109 Pac. 979; Sherman v. Southern Pac. Co., 33 Nev. 385, 111 Pac. 416, 419, 115 Pac. 909; Burke v. State, 64 Misc. Rep. 558, 119 N. Y. Supp. 1089; Bamberg v. International R. Co., 53 Misc. Rep. 403, 103 N. Y. Supp. 297; Smith v. British Packet Co., 86 N. Y. 408; Curtis v. Rochester Ry. Co., 18 N. Y. 534, 75 Am. Dec. 258; Murphy v. Coney Island Ry. Co., 36 Hun (N. Y.), 199; Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229; Rundle v. Railroad Co., 33 Pa. Sup. Ct. 233; Williford v. Southern R. Co., 85 S. C. 301, 67 S. E.

302; Shelton v. Southern R. Co., 86 S. C. 98, 67 S. E. 899; Lewis v. Texas & N. O. R. Co. (Tex. Civ. App.), 124 S. W. 1006; St. Louis etc. R. Co. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343; Dearden v. San Pedro etc. R. Co., 33 Utah, 147, 93 Pac. 271; Firebaugh v. Seattle Electric Co., 40 Wash. 658, 111 Am. St. Rep. 990, 2 L. R. A., N. S., 836, 82 Pac. 995; Winters v. Baltimore etc. R. Co., 163 Fed. 106, 100 C. C. A. 462; New Jersey etc. Co. v. Pollard, 22 Wall. (U. S.) 341, 22 L. Ed. 877; Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Christie v. Griggs, 2 Camp. 79, 11 R. R. 666; Skinner v. London etc. Ry. Co., 5 Ex. 787, 15 Jur. 299. For further illustrations, see 2 Ency. of Ev., pp. 912-920. See, also, notes to Barnowski v. Helson, 15 L. R. A. 38; Chicago Union Traction Co. v. Thomas Mee, 4 Ann. Cas. 10, and to Overcash v. Charlotte Electric etc. Co., 12 Ann. Cas. 1045.

²⁶ Delaware, L. & W. Ry. Co. v. Napheys, 90 Pa. 135; Gillespie v. St. Louis, K. C. & N. Ry. Co., 6 Mo. App. 554; Ware v. Barataria & L. Canal Co., 15 La. 169, 35 Am. Dec. 189, and note.

dent has happened to him as a passenger by reason of some defect or failure in the vehicle or by reason of some mismanagement, it is *not necessary* for him to prove the *specific defect* or mismanagement; an inference of a want of care arises from the injury and surrounding circumstances, and the burden of explanation is thrown upon the carrier.²⁷ The rule was thus stated in an English case: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."²⁸ The reason assigned for the adoption of the rule, that the happening of the accident is *prima facie* proof of the negligence of the carrier, is the fact that, from the very nature of things, the means of proving due care and diligence on his part are more within his power than are the means of proving negligence in the power of the party injured. "The law, looking both to the convenience and justice of the case—convenience, because the evidence is generally in the possession of the defendant and not in that of the plaintiff, and justice, because the plaintiff should not be required to give evidence as to facts which are known to the defendant and not to him, and which the defendant is interested in withholding from him—requires the defendant to prove affirmatively that such care and skill were exercised."²⁹

²⁷ Meier v. Pennsylvania Ry. Co., 64 Pa. 225, 3 Am. Rep. 581; Feital v. Middlesex Ry. Co., 109 Mass. 398, 12 Am. Rep. 720; Holbrook v. Utica Ry. Co., 12 N. Y. 236, 64 Am. Dec. 502; Smith v. St. Paul Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; New Jersey etc. R. Co. v. Pollard, 22 Wall. (U. S.) 341, 22 L. Ed.

877; Skinner v. London etc. Ry. Co., 5 Ex. 787, 15 Jur. 299. See note to Barnowski v. Helson, 15 L. R. A. 35.

²⁸ Scott v. London Dock Co., 3 Hurl. & C. 595, 34 L. J. Ex. 220, 11 Jur., N. S., 204, 13 L. T. 148, 13 Week. Rep. 410.

²⁹ Thomp. Carr. Pass. 211.

§ 183a (181). **Actions against common carriers — By others than passengers.**—It follows that if there is no obligation on the part of the carrier, then the person injured and the carrier stand on the ordinary footing of the parties to the well-known action for negligence. The rule laid down in the foregoing cases grows out of the peculiar relation between the carrier and the passenger and of the *contract to carry safely*; and, unless such relation exists, the plaintiff in an action against a common carrier must furnish other proof of negligence than the fact of the injury.³⁰ Where there is no such contract for the special care and safety of the plaintiff on the part of the carrier, the plaintiff must establish more than a *prima facie* case; and the burden of proof rests on him to show due care on his part. It devolves upon him to trace the cause of his injury directly to the fault or neglect of the defendant; and to do this he must establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and further, the plaintiff should also show with reasonable certainty what *particular precautions* should have been taken to avoid the accident.³¹

§ 183b (181). **Actions against common carriers — In respect to livestock.**—The rule referred to in the preceding section applies to other accidents where cattle or horses are killed or other damage is done to property when the property is not being transported by the defendant.³²

³⁰ Nitro-glycerine Case, 15 Wall. (U. S.) 524, 21 L. Ed. 206.

³¹ Louisville Ry. Co. v. Allen, 78 Ala. 494; State v. Maine Cent. Ry. Co., 76 Me. 357, 49 Am. Rep. 622, and note; Philadelphia Ry. Co. v. Stebbing, 62 Md. 504; Daniel v. Metropolitan Ry. Co., 3 C. P. 591, L. R. 5 H. L. 45, 40 L. J. C. P. 121, 24 L. T. 815. See note to Louis-

ville etc. Co. v. Corps, 8 L. R. A. 636, as to injury to a servant.

³² Savannah, Fla. & West Ry. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697, and note. See notes to Terre Haute etc. Co. v. Sherwood, 17 L. R. A. 339, as to injury to livestock; Bennett v. American Express Co., 13 L. R. A. 33, as to injury to other property; Cleve v. Chicago etc. R.

With regard, however, to livestock carried by the carrier under contract, while the burden of proof, as a rule, is the same as that for goods generally, there are some departures from it which call for notice. While the responsibility is the same as with regard to goods, the carrier is not an insurer "against losses and injuries resulting from the inherent nature, propensities or habits of the animals."³³ The case of animals dying *in transitu* is very common, but the carrier is not liable by reason of the mere fact of the death of an animal so carried any more than he would be for the death of a passenger, and the plaintiff would have the burden of proving that the defendant's act was the cause of its so dying.³⁴ On the other hand, proof of the animals being in good condition when shipped affords a presumption against the carrier, and, in the event of their death or loss of condition, the burden is on him to explain his care by general evidence of the attention he gave to them. "A common carrier is an insurer for safe delivery of livestock, and as such answerable for every loss which cannot be attributed to the act of God, the public enemy, or to the natural or proper vices of the animals themselves, and, as in case of loss by the act of God or public enemy, the burden is upon the carrier to show exemption from liability, so also it is in the case of loss or death resulting from the nature or vice of the animal. In other words, proof of delivery to the carrier of stock,

Co., 15 Ann. Cas. 35, as to burden of proof of negligence on part of carrier of livestock.

³³ Ray on Freight Carriers, 253.

³⁴ Louisville etc. R. Co. v. Smitha, 145 Ala. 686, 40 South. 117; Hendrick v. Boston etc. R. Co., 170 Mass. 44, 48 N. E. 835; Illinois etc. R. Co. v. Davis (Miss.), 43 South. 674; Cash v. Wabash R. Co., 81 Mo. App. 109; Hance v. Pacific Express Co., 48 Mo. App. 179, 66 Mo. App. 486; Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 1 Ann. Cas. 156, 56 Atl. 128, 71 N. J. L. 339, 59 Atl.

1117; Pennsylvania R. Co. v. Raiondon, 119 Pa. 577, 4 Am. St. Rep. 670, 13 Atl. 324; St. Louis etc. R. Co. v. Franklin (Tex. Civ. App.), 123 S. W. 1150; St. Louis etc. R. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131; Thomas v. Wells-Fargo Exp. Co. (Tex. Civ. App.), 95 S. W. 723; Texas etc. Ry. Co. v. Snyder (Tex. Civ. App.), 86 S. W. 1041; United States v. Southern Pac. Co., 157 Fed. 459; Hussey v. Saragossa, 3 Woods (U. S.), 380, 12 Fed. Cas. No. 6949.

in live and good condition, and its injury or death while in the custody of the carrier, makes a *prima facie* case against it, which may be rebutted by evidence that it provided all suitable means of transportation, and exercised that degree of care which the nature of the property required."³⁵ The foregoing states the correct rule as to the carrier's responsibility and the burden of proof in all the cases wherein the liability is not limited or changed by special contract.³⁶

§ 184 (182). Other actions for negligence.—In every action for damages resulting from injuries to the plain-

³⁵ Louisville etc. R. Co. v. Smitha, 145 Ala. 686, 40 South. 117; Richmond etc. R. Co. v. Trousdale, 99 Ala. 389, 42 Am. St. Rep. 69, 13 South. 23; Western R. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Georgia etc. R. Co. v. Greer, 2 Ga. App. 516, 58 S. E. 782; Tate v. Missouri etc. Co., 157 Ill. App. 105; Gilchrist v. Chicago etc. R. Co., 156 Ill. App. 117; Sinsbaugh v. Cleveland etc. Ry. Co., 149 Ill. App. 642; Baltimore etc. R. Co. v. Fox, 113 Ill. App. 180; Moore v. Chicago etc. R. Co., 151 Iowa, 353, 131 N. W. 30; Owens v. Chicago etc. R. Co., 139 Iowa, 538, 117 N. W. 762; Baltimore etc. R. Co. v. Clift, 142 Ky. 573, 134 S. W. 917; Louisville etc. R. Co. v. Warfield, 30 Ky. Law Rep. 352, 98 S. W. 313; Cincinnati etc. R. Co. v. Grover, 11 Ky. Law Rep. 236; Boehl v. Chicago etc. R. Co., 44 Minn. 191, 46 N. W. 333; Lindsley v. Chicago etc. Ry. Co., 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; Mercantile Co. v. Mobile etc. R. Co., 87 Miss. 675, 40 South. 259; Illinois Cent. R. Co. v. Teams, 75 Miss. 147, 21 South. 706; Keyes-Marshall Bros. Livery Co. v. St. Louis etc. R. Co., 105 Mo. App. 556, 80 S. W. 53; Hance v. Pacific Ex-

press Co., 66 Mo. App. 486; George v. Chicago etc. R. Co., 57 Mo. App. 358; Wahle v. Great Northern R. Co., 41 Mont. 326, 109 Pac. 713; Church v. Chicago etc. R. Co., 81 Neb. 615, 116 N. W. 520; Hayman v. Philadelphia etc. R. Co., 8 N. Y. St. 86, 54 N. Y. Sup. Ct. (22 Jones & S.) 158; Jones-Lane Co. v. Atlantic Coast etc. R. Co., 148 N. C. 580, 62 S. E. 701; Schaeffer v. Philadelphia etc. R. Co., 168 Pa. 209, 47 Am. St. Rep. 884, 31 Atl. 1088; Mayfield v. Southern Ry., 84 S. C. 393, 66 S. E. 405; Peterson v. Chicago etc. R. Co., 19 S. D. 122, 102 N. W. 595; Louisville etc. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Gulf etc. Ry. Co. v. Peacock (Tex. Civ. App.), 128 S. W. 463; San Antonio etc. Ry. Co. v. Rheinstrom (Tex. Civ. App.), 111 S. W. 168; International etc. R. Co. v. Nowaski, 48 Tex. Civ. App. 144, 106 S. W. 437; Texas etc. Ry. Co. v. Slater (Tex. Civ. App.), 102 S. W. 156; Thomas v. Wells-Fargo Exp. Co. (Tex. Civ. App.), 95 S. W. 723; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Rick v. Wells, Fargo Co., 39 Utah, 130, 115 Pac. 991; Chicago etc. R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

³⁶ Tate v. Missouri etc. Co., *supra*.

tiff, alleged to have been inflicted by the negligence of the defendant, it is incumbent upon the plaintiff to establish, by a preponderance of the testimony, three propositions: (1) A duty which the defendant owes to him; (2) A negligent breach of that duty; (3) Injuries received thereby, resulting proximately from the breach of that duty. If he aver that the duty which the defendant owes to him arises out of a particular relationship, or that the negligence constituting its breach consists of a particular act, omission, or thing, the burden is upon him to prove his case substantially as averred. This may be done, either by direct testimony of witnesses who know the facts, or by direct proof of indirect, but correlated, facts from which the duty owing him, the injury done him, the negligence of defendant, and its proximate causal connection with the injury may be reasonably inferred. When such method of establishing liability is resorted to, negligence is never inferred from the mere fact of the injury; but the act which produced it, and defendant's negligence, and the injury must all be shown, and the nexus between them must appear in the relationship of cause and effect. This indirect method of arriving at the negligence of defendant is generally expressed by the maxim, "*res ipsa loquitur*." Literally translated, it means "the thing speaks for itself," and is merely a short way of saying that the circumstances attendant upon the accident are themselves of such a character as to justify a jury in inferring negligence as the cause of the injury. It in no wise modifies the general doctrine that negligence will not be presumed.³⁷ But the plaintiff must prove his case; he must bear the burden of proving the negligence right up to the point when the defendant must explain or risk an adverse verdict. Negligence is a positive wrong, and, whenever the plaintiff makes it the gravamen of his pleaded cause, he must prove it affirmatively. "The party who founds his cause of action upon negligence must be prepared to

³⁷ *De Glopper v. Nashville Ry. & Light Co.*, 123 Tenn. 633, 33 L. R. A., N. S., 913, 134 S. W. 609.

establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case."³⁸ In the words of another recent case, no amount of conjecture or weight of mere possibility can support a verdict in a plaintiff's favor. It must not be forgotten that reasonable certainty, at least, must be established in plaintiff's favor, to warrant a recovery.³⁹ The doctrine of *res ipsa loquitur* was not intended to exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference.⁴⁰ This principle of *res ipsa loquitur* under discussion as well in the preceding section is not confined in its application to common carriers. When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of

³⁸ *Decker v. Missouri Pac. Ry. Co.*, 149 Mo. App. 534, 131 S. W. 118.

³⁹ *Houg v. Girard Lumber Co.*, 144 Wis. 337, 140 Am. St. Rep. 1012, 129 N. W. 633.

⁴⁰ *Losie v. Delaware & H. Co.*, 142 App. Div. 214, 126 N. Y. Supp. 871. In the language of Judge Cullen, in *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 926, 52 L. R. A. 922, its "application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence." It is not the accident, but the manner and circumstances of the accident, that

justifies the application of the maxim. The fact of the casualty and the attending circumstances may themselves furnish all the proof of negligence that it is necessary to offer; but when, as in this case, they do not, a plaintiff must prove facts and circumstances from which the jury may fairly infer negligence as the cause of the accident. "In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was caused by negligence": *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067; *Griffen v. Manice*, *supra*.

proper care.⁴¹ For example, in an English case already cited the plaintiff was injured by bags of sugar falling from a crane in which they were being lowered to the ground from the warehouse of the defendant;⁴² so where the wall of a cistern which is being constructed by a city falls by its own weight or by the pressure of gravel and earth behind it, whereby a person is injured, the burden of explanation is cast upon the city.⁴³ On the same principle it has been held that, from the mere fact of the *explosion of a steam boiler* within the control of the defendant, it is competent for the jury to infer some negligence in the management of the boiler or some defect in its condition;⁴⁴ but by the weight of authority such evidence does not shift the burden of proof upon the defendant.⁴⁵ But

⁴¹ *Chicago Union Trac. Co. v. Giese*, 229 Ill. 260, 82 N. E. 232.

⁴² *Scott v. London Dock Co.*, 3 Hurl. & C. 596, 34 L. J. Ex. 220, 11 Jur., N. S., 204, 13 L. T. 148, 13 Week. Rep. 410. See § 15, *ante*.

⁴³ *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565.

⁴⁴ *Rose v. Stephens etc. Transp. Co.*, 11 Fed. 438, 20 Blatchf. 411; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164; *Fay v. Davidson*, 13 Minn. 523. See note on injury by explosion to *Barnowski v. Helson*, 15 L. R. A. 35. Other explosives, see *Lykiardopoulo v. New Orleans etc. Co.*, 127 La. 309, Ann. Cas. 1912A, 976, 53 South. 575; *Kearner v. Charles S. Tanner Co.*, 31 R. I. 203, 76 Atl. 833; *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020; *Bradford Glycerine Co. v. Kizer*, 113 Fed. 894, 51 C. C. A. 524; falling of brick arch: *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443. See note to *Lebanon Light etc. Power Co. v. Leap*, 29 L. R. A. 345, as to burden

of proof as to negligence respecting escape and explosion of gas.

⁴⁵ *Millsaps v. Brogdon*, 97 Ark. 469, 32 L. R. A., N. S., 1177, 134 S. W. 632; *Sullivan v. Morton Draying & Warehouse Co.*, 13 Cal. App. 35, 108 Pac. 895; *Butler v. Wilmington City Ry. Co. (Del.)*, 78 Atl. 871; *McCartney v. People's Ry. Co. (Del.)*, 78 Atl. 771; *Short v. Philadelphia, B. & W. R. Co.*, 7 Penne. (Del.) 108, 76 Atl. 363; *Benson v. Wilmington City R. Co.*, 1 Boyce (Del.), 202, 75 Atl. 793; *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 757, 111 Pac. 1080, 1086; *American Ice Co. v. South Gardiner Lumber Co.*, 107 Me. 494, 32 L. R. A., N. S., 1003, 79 Atl. 6; *Ouellette v. Grand Trunk R. Co.*, 106 Me. 153, 138 Am. St. Rep. 340, 76 Atl. 280; *Alabama & V. R. Co. v. Groome*, 97 Miss. 201, 52 South. 703; *Hollenbeech v. McCord*, 132 Mo. App. 248, 132 S. W. 1189; *Decker v. Missouri Pac. R. Co.*, 149 Mo. App. 534, 131 S. W. 118; *Jackson v. Old Dominion Min. Co.*, 151 Mo. App. 640, 132 S. W. 306; *Veatch v. Wabash R. Co.*, 145 Mo. App. 232, 129 S. W. 404; *Bracey v.*

though *res ipsa loquitur* does not shift the burden of proof, it does cast the burden of evidence on the defendant. The doctrine applies where it appears the train is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those managing the conveyance use proper care. In such circumstances, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from a want of care on the part of defendant. In other words, in those circumstances the occurrence itself affords a presumption sufficient as *prima facie* proof of the fact of some negligence.⁴⁶

§ 184a (182). Same—Setting of fires, etc.—The question has often arisen as to the burden of proof in actions against *railroad companies* for injuries caused by *fires* communicated from their engines. At the common law, the ground upon which the owner of the property consumed by fire, started upon or suffered to escape from the premises of another, could recover for such loss, was negligence. This rule, requiring the plaintiff to affirmatively show that

Northwestern Imp. Co., 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; Piper v. Boston & M. R. Co., 75 N. H. 435, 75 Atl. 1041; Miller v. West Jersey & S. R. Co., 79 N. J. L. 499, 76 Atl. 973; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394; Losie v. Delaware & H. Co., 142 App. Div. 214, 126 N. Y. Supp. 871; Scott v. Nauss Bros. Co., 141 App. Div. 255, 126 N. Y. Supp. 17; Jordan v. Reedy Elevator Co., 125 N. Y. Supp. 432; Hayden v. Joline, 137 App. Div. 755, 122 N. Y. Supp. 629; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433. See note on "Injury in a Highway," to Barnowski v. Helson, 15 L. R. A. 33; Spencer v. Campbell, 9 Watts & S. (Pa.) 32; Brace

v. Kirby, 43 Pa. Super. Ct. 389; De Gloppe v. Nashville R. & L. Co., 123 Tenn. 633, 33 L. R. A., N. S., 913, 134 S. W. 609; Sommers v. Mississippi etc. R. Co., 7 Lea. (Tenn.), 201; Norfolk & W. R. Co. v. Witt, 110 Va. 117, 65 S. E. 489; Anus-tasakas v. International Cont. Co., 57 Wash. 453, 107 Pac. 342; Houg v. Girard Lumber Co., 144 Wis. 337, 140 Am. St. Rep. 1012, 129 N. W. 633; Schumacher v. Tuttle Press Co., 142 Wis. 631, 126 N. W. 46.

⁴⁶ Mitchell v. Chicago & Alton Ry. Co., 132 Mo. App. 143, 112 S. W. 291; Trotter v. St. Louis & Suburban Ry. Co., 122 Mo. App. 405, 99 S. W. 508; Gibler v. Quincy etc. R. Co., 148 Mo. App. 475, 128 S. W. 791.

the fire by which he suffered had resulted from a negligent act of the defendant, applied also to fires started by escaping sparks from locomotives of railway companies lawfully using such locomotives in the operation of their railways.⁴⁷ There has always existed sharp conflict between decisions of eminent courts as to whether evidence that a fire was started by escaping sparks constituted, without more, a *prima facie* case of negligence.⁴⁸ There is a substantial agreement in all the cases, however, in holding that very slight evidence, such as proof that the sparks were of an unusual character in size, or in number, or that an unusual number of fires had been caused by sparks immediately before the fire in question, or that the defendant had been negligent in leaving upon its premises, in a very dry season, inflammable material, liable to be set on fire by the small sparks which inevitably escape under the most ordinary precautions, is enough to make a *prima facie* case of negligence demanding evidence of due care

⁴⁷ *Garrett v. Southern Railway*, 101 Fed. 102, 49 L. R. A. 645, 41 C. C. A. 237; *Cincinnati etc. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, 537, 1 L. R. A., N. S., 533, 71 C. C. A. 316; *Shearman & Redfield on Negligence*, §§ 655-666; *St. Louis etc. Ry. Co. v. Mathews*, 165 U. S. 1, 5, 15, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243.

⁴⁸ Upon the affirmative of this question were such cases as *McCullen v. Chicago & N. W. Ry. Co.*, 101 Fed. 66, 49 L. R. A. 642, 41 C. C. A. 365; *Spaulding v. Chicago & N. W. Ry. Co.*, 30 Wis. 110, 11 Am. Rep. 550. See, also, *Menominee River Sash & Door Co. v. Milwaukee & Northern R. Co.*, 91 Wis. 459, 460, 65 N. W. 176. Upon the other hand, there are many cases which seem to rest upon a more logical basis in holding that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that in-

asmuch as a railway company may lawfully use locomotives, it cannot be made liable for a loss from sparks emitted, unless the plaintiff shows such sparks to have been negligently emitted, the burden of showing negligence being always upon him who affirms it: *Henderson v. Philadelphia etc. R. Co.*, 144 Pa. 461, 476, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Flinn v. New York Central etc. R. R.*, 142 N. Y. 11, 19, 36 N. E. 1046. This was the view entertained by this court in a case originating in Tennessee, where there was no statute: *Garrett v. Southern Ry.*, 101 Fed. 102, 49 L. R. A. 645, 41 C. C. A. 237. To the same effect are *Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 38 Am. Dec. 64; *Gandy v. Chicago N. W. R. Co.*, 30 Iowa, 420, 6 Am. Rep. 682; *Toledo etc. R. R. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 203.

in rebuttal. The prevailing rule now is that it is incumbent upon the plaintiff to show that the fire was caused by the engine;⁴⁹ the *onus* then rests upon the defendant to show that the engine was properly constructed and managed.⁵⁰ This rule rests upon the principle, to which we

⁴⁹ Louisville etc. R. Co. v. Marbury Lumber Co., 132 Ala. 520, 90 Am. St. Rep. 917, 32 South. 745; Jefferis v. Philadelphia etc. R. Co., 3 Houst. (Del.) 447; Gracy v. Atlantic Coast Line R. Co., 53 Fla. 350, 42 South. 903; Georgia R. etc. Co. v. Roberts, 114 Ga. 387, 20 S. E. 264; Inman v. Elberton Air-Line R. Co., 90 Ga. 663, 35 Am. St. Rep. 232, 16 S. E. 958; Toledo etc. R. Co. v. Fenstermaker, 163 Ind. 534, 72 N. E. 561; McCummons v. Chicago etc. R. Co., 33 Iowa, 187; Edrington v. Louisville etc. R. Co., 41 La. Ann. 96, 6 South. 19; Lowney v. New Brunswick R. Co., 78 Me. 479, 7 Atl. 381; Osborne v. Chicago etc. R. Co., 111 Mich. 15, 69 N. W. 86; Louisville etc. R. Co. v. Natchez etc. R. Co., 67 Miss. 399, 7 South. 350; Palmer v. Missouri Pac. R. Co., 76 Mo. 217; Creighton v. Chicago etc. R. Co., 68 Neb. 456, 94 N. W. 527; Union etc. R. Co. v. Keller, 36 Neb. 189, 54 N. W. 420; White v. New York etc. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497; Peck v. New York Cent. etc. R. Co., 165 N. Y. 347, 59 N. E. 206; Sheldon v. Hudson River R. Co., 29 Barb. (N. Y.) 226; Maguire v. Seaboard etc. R. Co., 154 N. C. 384, 70 S. E. 737; Moore v. Wilmington etc. R. Co., 124 N. C. 338, 32 S. E. 710; Henderson v. Philadelphia etc. R. Co., 144 Pa. 461, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; Pennsylvania Co. v. Watson, 81 Pa. 293; Mattoon v. Fremont etc. R. Co., 6 S. D. 301, 60 N. W. 69; Scott v. Texas etc. R. Co. (Tex. Civ. App.), 56 S. W. 97; Ft. Worth

etc. R. Co. v. Tomlinson (Tex. App.), 16 S. W. 866; Ide v. Boston etc. R. Co., 83 Vt. 66, 74 Atl. 401; White v. New York etc. R. Co., 99 Va. 357, 38 S. E. 180; Kimball v. Borden, 95 Va. 203, 28 S. E. 207; Snyder v. Pittsburgh etc. R. Co., 11 W. Va. 14; Garrett v. Southern Ry. Co., 101 Fed. 102, 49 L. R. A. 645, 41 C. C. A. 237.

⁵⁰ Miller-Brent Lumber Co. v. Douglas, 167 Ala. 286, 52 South. 414; Sullivan Timber Co. v. Louisville R. Co., 163 Ala. 125, 50 South. 941; Sherrill v. Louisville etc. R. Co., 143 Ala. 1, 44 South. 153; Louisville etc. R. Co. v. Sherrill, 152 Ala. 213, 44 South. 631; Southern R. Co. v. Johnson, 141 Ala. 575, 37 South. 919; Florida East Coast Ry. Co. v. Smith, 61 Fla. 218, 55 South. 871; Jacksonville T. & K. W. Ry. Co. v. Peninsular Land Transp. & Mfg. Co., 27 Fla. 1, 157, 17 L. R. A. 33, 9 South. 661; Southern R. Co. v. Elliott, 129 Ga. 705, 59 S. E. 786; St. Louis A. & T. H. Ry. Co. v. Strotz, 47 Ill. App. 342; Illinois Cent. R. Co. v. Mills, 42 Ill. 407; St. Louis etc. R. Co. v. Lawrence, 4 Ind. Ter. 611, 76 S. W. 254; Stewart v. Iowa Cent. R. Co., 136 Iowa, 182, 113 N. W. 764; Dyer v. Maine Cent. R. Co., 99 Me. 195, 2 Ann. Cas. 457, 67 L. R. A. 416, 58 Atl. 994; Ryan v. Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302; Green Ridge Ry. Co. v. Brinkman, 64 Md. 52, 54 Am. Rep. 755, 20 Atl. 1024; Baltimore & S. Ry. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72; Hagan v. Chicago, D. & C. G. T. J. Ry. Co., 86 Mich. 615, 49 N.

have already called attention, that when the facts lie peculiarly within the knowledge of one of the parties, this is an important consideration in determining the amount of evidence necessary to shift the burden of proof.⁵¹ There is,

W. 509; *Woodson v. Milwaukee St. P. Ry. Co.*, 21 Minn. 60; *Alabama etc. R. Co. v. Barrett*, 78 Miss. 432, 28 South. 820; *Louisville N. O. & T. Ry. Co. v. Natchez, J. & C. Ry. Co.*, 67 Miss. 399, 7 South. 350; *Wise v. Joplin R. Co.*, 85 Mo. 178; *Coates v. Missouri K. & T. Ry. Co.*, 61 Mo. 38; *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 13 Pac. 367; *Westing v. Chicago etc. R. Co.*, 87 Neb. 655, 127 N. W. 1076; *Shipman v. Chicago etc. R. Co.*, 78 Neb. 43, 110 N. W. 535; *Union Pac. Ry. Co. v. Keller*, 36 Neb. 189, 54 N. W. 420; *Longabaugh v. Virginia City etc. R. Co.*, 9 Nev. 271; *Goodman v. Lehigh Valley R. Co.*, 78 N. J. L. 317, 74 Atl. 519; *Peck v. New York C. R. R.*, 165 N. Y. 347, 59 N. E. 206; *Flinn v. New York C. & C. R. R.*, 142 N. Y. 11, 36 N. E. 1046; *Field v. New York Cent. Ry. Co.*, 32 N. Y. 339; *Kornegay v. Atlantic Coast Line R. Co.*, 154 N. C. 389, 70 S. E. 731; *North Fork Lumber Co. v. Southern R. Co.*, 143 N. C. 324, 55 S. E. 781; *Anderson v. Oregon R. Co.*, 45 Or. 211, 77 Pac. 119; *Koontz v. Oregon Ry. & Nav. Co.*, 20 Or. 3, 23 Pac. 820; *Henderson v. Philadelphia R. R. Co.*, 144 Pa. 461, 477, 27 Am. St. Rep. 652, 16 L. R. A. 299, 22 Atl. 851; *Huyett v. Philadelphia R. R. Co.*, 23 Pa. 373; *Brown v. Atlanta etc. R. Co.*, 19 S. C. 39; *Cronk v. Chicago etc. R. Co.*, 3 S. D. 93, 52 N. W. 420; *White v. Chicago, M. & St. P. Ry. Co.*, 1 S. D. 326, 9 L. R. A. 824, 47 N. W. 146; *Burke v. Railroad*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Simpson v. East Tennessee etc. R. Co.*, 5 Lea (Tenn.),

456; *Houston etc. R. Co. v. Washington (Tex. Civ. App.)*, 127 S. W. 1126; *Gulf etc. Ry. Co. v. Meentzen*, 52 Tex. Civ. App. 416, 113 S. W. 1000; *Gulf etc. R. Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563; *Van Dyke v. Grand Trunk R. Co.*, 84 Vt. 212, Ann. Cas. 1913A, 640, 78 Atl. 953; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Norfolk etc. R. Co. v. Thomas*, 110 Va. 622, 66 S. E. 817; *Norfolk etc. R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911, 68 L. R. A. 864, 49 S. E. 971; *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656; *Jacobs v. Baltimore etc. R. Co.*, 68 W. Va. 618, 620, 70 S. E. 369; *Spaulding v. Chicago etc. R. Co.*, 30 Wis. 110, 11 Am. Rep. 550, 33 Wis. 582; *Cincinnati etc. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, 1 L. R. A., N. S., 533, 71 C. C. A. 316; *Eddy v. Lafayette*, 49 Fed. 807, 1 C. C. A. 441; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Smith v. London etc. R. R.*, L. R. 6 C. P. 14. For the principles applicable to fires originating from collisions on a railroad track, see *Cincinnati etc. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, 1 L. R. A., N. S., 533, 71 C. C. A. 316. See notes to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71, and *Barnowski v. Helson*, 15 L. R. A. 40. On "Presumption of Negligence Arising from Communication of Fire by Railroad Engine," see note to *Atchison etc. R. Co. v. Geiser*, 1 Ann. Cas. 815. As to proof of other fires, see § 166, *ante*.

⁵¹ *Pittsburg etc. Ry. Co. v. Campbell*, 86 Ill. 443; *Slosson v.*

however, a conflict of opinion on this subject; and in some states mere proof that the fire has been communicated from the engine of the defendant does not constitute a *prima facie* case.⁵² Of course the *prima facie* case is repelled by proof that the engine was provided with the best appliances to prevent the communication of fire, and that it was properly managed.⁵³ The principle under discussion has

Burlington Ry. Co., 51 Iowa, 294, 1 N. W. 543; Annapolis Ry. Co. v. Gantt, 39 Md. 115; Anderson v. Wasatch & J. V. Ry. Co., 2 Utah, 518; Laird v. Connecticut etc. R. R., 62 N. H. 254, 13 Am. St. Rep. 564, and note. See, also, City of Fort Smith v. Dodson, 51 Ark. 447, 14 Am. St. Rep. 62, and note, 4 L. R. A. 252, 11 S. W. 687, and cases above cited. See § 181 et seq., *ante*.

⁵² Indianapolis Ry. Co. v. Paramore, 31 Ind. 143; Jefferis v. Philadelphia, W. & B. Ry. Co., 3 Houst. (Del.) 447; Ruffner v. Cincinnati, H. & D. Ry. Co., 34 Ohio St. 96; Albert v. Northern C. Ry. Co., 98 Pa. 316; Henderson v. Philadelphia Ry. Co., 144 Pa. 461, 27 Am. St. Rep. 652, and note; 16 L. R. A. 299, 22 Atl. 851. In some of the states the statutes impose a liability unless the defendant company shall prove that the sparks escaped without negligence and that it was in all respects free from censure. Among the states having such statutes are Vermont, Michigan, Iowa, Louisiana: See Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Ann Arbor R. Co. v. Fox, 92 Fed. 494, 34 C. C. A. 497; Small v. Chicago etc. R. Co., 50 Iowa, 338. In Ohio the statute makes a railway company absolutely liable, irrespective of negligence, for a fire started upon its own premises, in the operation of its railway, by which adjacent property is destroyed. By another

provision of the same act, the fact that fire was communicated by sparks from an engine to property adjacent to the railway right of way is made *prima facie* evidence of negligence. In other states absolute liability for fire communicated by sparks is imposed regardless of any actual negligence. Among such statutes are those of Missouri, Massachusetts, Maine, New Hampshire, Connecticut, Colorado, South Carolina. For the terms and dates of these statutes the very elaborate opinion of Justice Gray, in St. Louis etc. Ry. Co. v. Mathews, 165 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243, in which the constitutionality of the Missouri statutes was vindicated, may be consulted. (From the opinion in Toledo etc. R. R. v. Star Flouring Mills Co., 146 Fed. 953, 77 C. C. A. 203.)

⁵³ Louisville etc. R. Co. v. Marbury Lumber Co., 132 Ala. 520, 90 Am. St. Rep. 917, 32 South. 745; St. Louis etc. R. Co. v. Ayres, 67 Ark. 371, 55 S. W. 159; Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968; Alabama Midland R. Co. v. Swindell, 117 Ga. 883, 45 S. E. 264; Chicago etc. R. Co. v. Neilson, 118 Ill. App. 343; Cleveland etc. R. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052; Chicago & A. Ry. Co. v. Quaintance, 58 Ill. 389; Toledo W. & W. Ry. Co. v. Larmon, 67 Ill. 68; Libby v. Chicago R. I. & P. Ry. Co., 52 Iowa, 92, 2 N. W. 982; Small v. Chicago R. I. & P. Ry. Co., 50 Iowa, 338;

been often illustrated by other cases brought for injuries caused by fallen or broken *telephone or other electric wires*, or by the falling of other articles under the care and control of the defendant.⁵⁴

Ft. Scott etc. R. Co. v. Karracker, 46 Kan. 511, 26 Pac. 1027; Meyer v. Vicksburg, S. & P. R. Co., 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 South. 218; Continental Ins. Co. v. Chicago etc. R. Co., 97 Minn. 467, 6 L. R. A., N. S., 99, 107 N. W. 548; Drake v. Yazoo etc. R. Co., 79 Miss. 84, 29 South. 788; Palmer v. Missouri Pac. R. Co., 76 Mo. 217; Kenney v. Hannibal Ry. Co., 70 Mo. 243; Johnson v. Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227; Lake Shore etc. R. Co. v. Anderson, 27 Ohio C. C. 577; Koontz v. Oregon Ry. Co., 20 Or. 3, 23 Pac. 820; Ross v. St. Louis Southwestern R. Co., 47 Tex. Civ. App. 24, 103 S. W. 708; Gulf etc. R. Co. v. Jordan, 25 Tex. Civ. App. 82, 60 S. W. 784; Galveston etc. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440; Olmstead v. Oregon Short Line R. Co., 27 Utah, 515, 76 Pac. 557; Menominee River Sash etc. Co. v. Milwaukee etc. R. Co., 91 Wis. 447, 65 N. W. 176; Woodward v. Chicago etc. R. Co., 145 Fed. 577, 75 C. C. A. 591; Savannah Ins. Co. v. Pelzer Co., 60 Fed. 39. When the engine is shown to be in perfect condition, the plaintiff has the burden of proving that a newer pattern of engine in use at that time is safer: Babcock v. Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596.

⁵⁴ As to falling of *electric and telephone wires*: Arkansas Tel. Co. v. Ratteree, 57 Ark. 429, 21 S. W. 1059; Uggia v. West End St. Ry. Co., 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126; Newark E. L. & R. Co. v. Ruddy, 62 N. J. L. 505, 57 L. R. A. 624, 41 Atl. 712; Haynes v.

Raleigh Gas Co., 114 N. C. 203, 41 Am. St. Rep. 786, 26 L. R. A. 810, 19 S. E. 344; Chaperon v. Portland Electric Co., 41 Or. 39, 67 Pac. 928; Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 64 Am. St. Rep. 922, 39 L. R. A. 499, 28 S. E. 733; *tools*: Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268; falling of ties from moving train: Howser v. Cumberland etc. R. Co., 80 Md. 146, 45 Am. St. Rep. 332, 27 L. R. A. 154, 30 Atl. 906. Other recent illustrations will be found of the doctrine attaching in cases collected in 16 Current Law, 1201, from which we condense the following: The fall of an awning over a sidewalk: Potter v. Rorabaugh Wiley etc. Co., 83 Kan. 712, 32 L. R. A., N. S., 45, 112 Pac. 613; of plaster from a ceiling: Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. Supp. 900; of rock from a bluff: Gibson v. Chicago etc. R. Co., 61 Wash. 639, 112 Pac. 919; of trolley wire: Booker v. Southwest Missouri R. Co., 144 Mo. App. 273, 128 S. W. 1012; of scaffold: Huston v. Dobson, 138 App. Div. 810, 123 N. Y. Supp. 892; electric burn or shock: Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767; Abrams v. Seattle, 60 Wash. 356, 140 Am. St. Rep. 916, 111 Pac. 168; Garner v. Chicago etc. Traction Co., 150 Ill. App. 149; collapse of a wall: Schmidt v. J. G. Johnson Co., 145 Wis. 468, 129 N. W. 657; of a plank platform: Alabama etc. Co. v. Groome, 97 Miss. 201, 52 South. 703; bursting of storage tank: Weaver Mercantile Co. v. Thurmond, 68 W.

§ 185 (183). **Contributory negligence.**—The great weight of authority, as well as the reason of the law, is in favor of the rule which imposes the burden of proof upon defendant to establish plaintiff's contributory negligence. To the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence there appear to be, in the very nature of things, two well-defined exceptions: First. Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a *prima facie* defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury.⁵⁵ It is true that contributory negligence is a defense, but where proof of such defense is fully made out by plaintiff's own evidence, it may be availed of by motion to nonsuit.⁵⁶ When a plaintiff has left his cause in a condition which would justify the judge in declaring in the charge that the evidence *prima facie* shows contributory negligence, there is nothing to submit to the jury. But when his evidence is such that the court cannot so determine its effect, as matter of law, the question whether or not he affirmatively

Va. 530, 33 L. R. A., N. S., 1061, 70 S. E. 126. See, also, *Fleishman v. Polar Wave Ice & Fuel Co.*, 148 Mo. App. 117, 127 S. W. 660; *Jones & Co. v. Pelly* (Ky.), 128 S. W. 305; *Schulk v. Joliet & S. Traction Co.*, 154 Ill. App. 108; *Atlantic Coast Line R. Co. v. Moore*, 8 Ga. App. 185, 68 S. E. 875.

⁵⁵ *Texas etc. Ry. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *Houston*

etc. R. Co. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632; *Denman, J., in Gulf etc. Co. v. Shieder*, 88 Tex. 152, 28 L. R. A. 538, 30 S. W. 902.

⁵⁶ *Strickland v. Atlantic Coast Line R. Co.*, 150 N. C. 4, 63 S. E. 161; *Mitchell v. Seaboard Air Line Ry.*, 153 N. C. 116, 68 S. E. 1059; *Washington etc. R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

appears to have been guilty of negligence is to be submitted to the jury on all the facts adduced, and is not to be divided up by instructing that some of the facts, unless rebutted or explained, would constitute such negligence, and then leaving the jury to say whether or not such facts had been rebutted or explained.⁵⁷ Second. When the undisputed evidence adduced on the trial establishes *prima facie* as a matter of law contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case may find him free from negligence; otherwise the court may instruct a verdict for defendant, there being no issue of fact for the jury.⁵⁸ It is very clear that when it appears from the plaintiff's own showing that he has been guilty of negligence which, as a proximate cause, contributed to the injury, he cannot recover, and a nonsuit should be granted; and where the plaintiff's own evidence raises an inference of negligence against him, he is required to overcome this inference in order to establish his *prima facie* case.⁵⁹ But assume that the plaintiff's evidence raises no

⁵⁷ *Houston v. Harris*, 103 Tex. 422, 128 S. W. 897.

⁵⁸ *Sanchez v. San Antonio etc. R. Co.* (Tex. Civ. App.), 27 S. W. 922; *Gulf etc. Co. v. Shieder*, *supra*.

⁵⁹ *McDonald v. Montgomery St. R. Co.*, 110 Ala. 161, 20 South. 317; *Dufour v. Central Pac. R. Co.*, 67 Cal. 319, 7 Pac. 769; *Cleveland etc. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; *Missouri etc. Ry. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819; *Ryan v. Louisville etc. Ry. Co.*, 44 La. Ann. 806, 11 South. 30; *State v. Maine Cent. Ry. Co.*, 76 Me. 357, 49 Am. Rep. 622, and note; *Gahagan v. Boston Ry. Co.*, 1 Allen (Mass.), 187, 79 Am. Dec. 724, and note; *Hocum v. Weitherick*, 22 Minn. 152; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503, and note; *Cummings v. Helena etc.*

Smelting Co., 26 Mont. 434, 68 Pac. 852; *Meehan v. Great Northern R. Co.*, 43 Mont. 72, 114 Pac. 781; *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525, 57 Pac. 140; *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; *Chicago etc. R. Co. v. Featherly*, 64 Neb. 323, 89 N. W. 792; *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722; *Meek v. Pennsylvania Co.*, 38 Ohio St. 632; *Robison v. Gary*, 28 Ohio St. 241; *Cleveland etc. R. Co. v. Rowan*, 66 Pa. 393; *Texas etc. R. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Missouri Pac. Ry. Co. v. Foreman*, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326; *Silcock v. Rio Grande Western Ry. Co.*, 22 Utah, 179, 61 Pac. 565; *Washington etc. R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035; *Winchester v. Carroll*, 99

such inference of negligence on his part, and that the inference is that he has suffered injury by reason of the negligence of the defendant—is the plaintiff then bound to prove affirmatively that he has been guilty of no negligence? The affirmative of this proposition has been maintained in many cases, and in several states this rule is adhered to. This view rests upon the ground that there can be no recovery unless two conditions concur, to wit, negligence of the defendant, and freedom of the plaintiff from contributory fault; these courts hold that it is incumbent on the plaintiff to show the existence of both conditions.⁶⁰

Va. 727, 40 S. E. 37; Overby v. Chesapeake etc. R. Co., 37 W. Va. 524, 16 S. E. 813; Waterman v. Chicago etc. R. Co., 82 Wis. 613, 52 N. W. 247, 1136; Randall v. Northwestern Tel. Co., 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419; Achtenhagen v. Watertown, 18 Wis. 331, 86 Am. Dec. 769; Milwaukee Ry. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699, and note; Washington etc. R. Co. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284, 13 Sup. Ct. Rep. 557; Indianapolis & St. L. Ry. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898. See elaborate notes to Oklahoma City v. Reed, 33 L. R. A., N. S., 1085, and to Crawford v. Bonners etc. Co., 10 Ann. Cas. 4, as to burden of proof as to contributory negligence.

⁶⁰ Kruck v. Connecticut Co., 84 Conn. 401, 80 Atl. 162; Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523; Fox v. Glastenbury, 29 Conn. 204; Keck v. Calumet etc. Ry. Co., 156 Ill. App. 402; O'Hern v. Chicago City Ry. Co., 151 Ill. App. 208; Stack v. East St. Louis & S. R. Co., 245 Ill. 308, 137 Am. St. Rep. 318, 92 N. E. 241; West Chicago St. R. Co. v. Liderman, 187 Ill. 463, 79 Am. St. Rep. 226, 52 L. R. A. 655, 58 N. E. 367; Baltimore etc. R. Co. v. Young, 153 Ind. 163, 54

N. E. 791; Engerer v. Ohio etc. Ry. Co., 142 Ind. 618, 42 N. E. 217; Cincinnati Ry. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Buchholtz v. Radcliffe, 129 Iowa, 27, 105 N. W. 336; Hawes v. Burlington etc. Ry. Co., 64 Iowa, 315, 20 N. W. 717; Deikman v. Morgan's Louisiana etc. R. Co., 40 La. Ann. 787, 5 South. 76; Ouellette v. Grand Trunk R. Co., 106 Me. 153, 138 Am. St. Rep. 340, 76 Atl. 280; Ward v. Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947; Lisan v. Maine Cent. Ry. Co., 77 Me. 85; Ralph v. Cambridge Electric Light Co., 200 Mass. 566, 86 N. E. 922; Dacey v. New York etc. R. Co., 168 Mass. 479, 47 N. E. 418; Lane v. Atlantic Works, 107 Mass. 104; Mynning v. Detroit etc. R. Co., 67 Mich. 677, 35 N. W. 811; Guggenheim v. Lake Shore & M. S. Ry. Co., 66 Mich. 150, 33 N. W. 161; Teipel v. Hilsendegen, 44 Mich. 461, 7 N. W. 82; Vicksburg v. Hennessy, 54 Miss. 391, 28 Am. Rep. 354; Drago v. New York Cent. & H. R. R. Co., 139 App. Div. 828, 124 N. Y. Supp. 374; Riesenbergh v. Goldstein, 126 N. Y. Supp. 612; Kane v. Williams, 140 App. Div. 857, 125 N. Y. Supp. 641; Jordan v. Reedy Elevator Co., 125 N.-Y. Supp. 432; Brudie v. Renault-Freres Selling Branch, 138

The anomaly of requiring the party holding the affirmative to negatively prove a part of his case is apparent, while the necessarily attendant presumption of the negligence of mankind in general requires for its support the mind of a cynic or a pessimist. The opinion here expressed is that also of authoritative text-writers,⁶¹ and is sustained by the

App. Div. 112, 122 N. Y. Supp. 963; *Owens v. Richmond etc. R. Co.*, 88 N. C. 502; *Bovee v. Danville*, 53 Vt. 183; *Conrad v. Ellington*, 104 Wis. 367, 80 N. W. 456; *Richardson v. Babcock & Wilcox Co.*, 175 Fed. 897, 99 C. C. A. 353. In Illinois, however, there is a peculiar line of cases which establish that though the plaintiff is violating the law at the time of the injury, if he is otherwise free from negligence, the burden is on the defendant: *Ewing v. Chicago & A. etc. Co.*, 72 Ill. 25; *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370. In the case last cited the court said: "In a suit against a railroad company for stock killed or injured in consequence of the neglect of the company to fence its road, where it appears such stock was permitted to run at large in violation of law, the question whether the owner has been guilty of contributory negligence in permitting them to run at large is one of fact, to be determined by the jury from the circumstances of the case, and that it is not sufficient to charge a plaintiff with contributory negligence, in a suit against a railroad company for injury to stock, to simply show that the owner permitted the stock to run at large in violation of law; but it must appear that he did so under such circumstances that the natural and probable consequences of doing so was, that the stock would go upon the railroad track and be injured. The burden of showing such contribu-

tory negligence in such cases, where it does not appear otherwise, is upon the railroad company." And in *Haumesser v. Central Brewing Co.*, 158 Ill. App. 648, that case was followed, and it was held that the defendant had the burden of proving the contributory negligence although the plaintiff's horse was killed while it was in a place contrary to a city ordinance.

⁶¹ See note by the late A. C. Freeman to *Farish & Co. v. Reigle*, 62 Am. Dec. 679. Thus Redfield, in his work on Railways, says: "Although the majority of the American courts lay down the rule . . . that the burden of proof is upon the plaintiff to show that he was guilty of no negligence on his own part, we still think the point is not well defined in these terms. All that is meant, we apprehend, is that where there is any evidence tending to prove, either directly or from the manner of the accident, that there might have been fault on the part of the plaintiff, he must assume the burden upon the whole issue of satisfying the jury that the injury occurred through the fault of the defendant, and that his own want of care at the time did not in any sense contribute directly to it. The result of the rule thus stated would be, that where there was no evidence of want of care on the part of the plaintiff the law will presume none existed, as in regard to good character in a witness or sanity in one where there is no

greater weight of authority. For instance, on the trial of an action against the proprietors of a public skating-rink for damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendants, wherein the defendants, after denying generally all the material allegations of the petition, pleaded that the plaintiff's injuries, if any, were caused by her own negligence, it was not error for the court to instruct the jury that, the plaintiff having made out a *prima facie* case, "the burden is on the defendants to establish by a preponderance of the testimony that the plaintiff is guilty of any negligence which caused her injuries."⁶² Where the plaintiff shows that he has suffered injury by reason of the negligence of the defendant, he has made out a *prima facie* case; and the *burden is upon the defendant* to prove the contributory negligence which he asserts.⁶³ In the federal courts contributory negligence is

proof." To make the plaintiff give affirmative evidence of his own due care and caution "is much like one giving evidence of the good character of his witnesses before any impeachment, and we think should never be required": 2 Redfield on Railways, 5th ed., 253, notes.

⁶² Stewart v. Mynatt, 135 Ga. 637, 70 S. E. 325.

⁶³ City of Montgomery v. Wyche, 169 Ala. 181, 53 South. 786; Western Ry. of Alabama v. Williamson, 114 Ala. 131, 21 South. 827; Alabama Ry. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, and note, 9 South. 303; Southern Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710; Millsaps v. Brogdon, 97 Ark. 469, 32 L. R. A., N. S., 1177, 134 S. W. 632; Little Rock etc. Ry. v. Atkins, 46 Ark. 423; Foley v. Northern California Power Co., 14 Cal. App. 401, 112 Pac. 467; Cahill v. Stone, 153 Cal. 571, 19 L. R. A., N. S., 1094, 96 Pac. 84; Denver etc. R. Co.

v. Ryan, 17 Colo. 98, 28 Pac. 79; Sanders v. Reister, 1 Dak. 151 (145), 46 N. W. 680; Philadelphia B. & W. R. Co. v. Buchanan (Del.), 78 Atl. 776; Truman v. Wilmington City R. Co., 7 Penne. (Del.) 192, 78 Atl. 636; Elliott v. Wilmington City R. Co., 6 Penne. (Del.) 570, 73 Atl. 1040; Harmon v. Washington etc. R. Co., 7 Mackey (18 D. C.), 255; Orlando v. Heard, 29 Fla. 581, 11 South. 182; Fisher Motor Car Co. v. Seymour, 9 Ga. App. 465, 71 S. E. 764; Johnston v. Richmond etc. R. Co., 95 Ga. 685, 22 S. E. 694; Chattanooga etc. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853; Hopkins v. Utah Northern R. Co., 2 Idaho, 300 (277), 13 Pac. 343; Lake Erie & W. R. Co. v. Parrish, 46 Ind. App. 577, 93 N. E. 450; Indiana Union Trac. Co. v. Keiter, 175 Ind. 268, 92 N. E. 982; Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060, 73 N. E. 818; Chicago etc. R. Co. v. Pounds, 1 Ind. Ter.

an affirmative defense. The burden of establishing it rests on the defendant. This rule does not require defendant to establish contributory negligence by witnesses whom defendant calls to the stand. If the plaintiff's own witnesses testify to undisputed facts from which that inference must be drawn, defendant may rest on their testimony and ask for a dismissal; but if the undisputed facts might reasonably support an inference as to the injured person's conduct which would leave it doubtful whether he was or was not negligent, the question whether or not the defense

51, 35 S. W. 249; *Eidson v. Chicago etc. R. Co.*, 85 Kan. 329, 116 Pac. 485; *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455, 66 L. R. A. 334, 36 South. 603; *Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326; *County Commrs. v. Carr*, 111 Md. 141, 73 Atl. 668; *Ralph v. Cambridge Electric Light Co.*, 200 Mass. 566, 86 N. E. 922; *Merrill v. Eastern R. Co.*, 139 Mass. 238, 52 Am. Rep. 705, 1 N. E. 548; *Lammers v. Great Northern R. Co.*, 82 Minn. 120, 84 N. W. 728; *Lorimer v. St. Paul Ry. Co.*, 48 Minn. 391, 51 N. W. 125; *Mississippi Cent. R. Co. v. Hardy*, 88 Miss. 732, 41 South. 505; *Holman v. Southern Iron Co.*, 152 Mo. App. 672, 133 S. W. 379; *Newton v. Wabash R. Co.*, 152 Mo. App. 167, 132 S. W. 1195; *Trout v. Laclède Gas Light Co.*, 151 Mo. App. 207, 132 S. W. 58; *Richter v. United Rys. Co.*, 145 Mo. App. 1, 129 S. W. 1055; *Badovinac v. Northern Pac. R. Co.*, 39 Mont. 454, 104 Pac. 543; *Mulville v. Pacific Mut. Ins. Co.*, 19 Mont. 95, 47 Pac. 650; *McGahey v. Citizens' R. Co.*, 88 Neb. 218, 129 N. W. 293; *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; *Union Stock Yards Co. v. Conoyer*,

41 Neb. 617, 59 N. W. 950; *Danskin v. Pennsylvania R. Co.*, 79 N. J. L. 526, 76 Atl. 975; *Consolidated Traction Co. v. Behr*, 59 N. J. L. 477, 37 Atl. 142; *Boney v. Atlantic Coast Line R. Co.*, 155 N. C. 95, 71 S. E. 87; *Halton v. Southern R. Co.*, 127 N. C. 255, 37 S. E. 262; *Schweinfurth v. Cleveland etc. R. Co.*, 60 Ohio St. 215, 54 N. E. 89; *Palmer v. Portland R. L. & P. Co.*, 56 Or. 262, 108 Pac. 211; *Dubiver v. City R. Co.*, 44 Or. 227, 1 Ann. Cas. 889, 74 Pac. 915, 75 Pac. 693; *Clark v. Lancaster*, 229 Pa. 161, 78 Atl. 96; *Baker v. Westmoreland etc. Natural Gas Co.*, 157 Pa. 593, 27 Atl. 789, 792; *Bradwell v. Pittsburg & W. E. Ry. Co.*, 139 Pa. 404, 20 Atl. 1046; *Oliver v. Columbia etc. R. Co.*, 65 S. C. 1, 43 S. E. 307; *Burke v. Citizens' St. Ry. Co.*, 102 Tenn. 409, 52 S. W. 170; *Western Union Tel. Co. v. Conder* (Tex. Civ. App.), 138 S. W. 447; *Jacksonville Ice & Elec. Co. v. Moses* (Tex. Civ. App.), 134 S. W. 379; *Texas & N. O. R. Co. v. McLeod* (Tex. Civ. App.), 131 S. W. 311; *Smith v. Ogden etc. R. Co.*, 33 Utah, 129, 93 Pac. 185; *Hickey v. Rio Grande Western R. Co.*, 29 Utah, 392, 82 Pac. 29; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37; *Curran v. Seattle*

is proved will be one for the jury to determine.⁶⁴ This rule seems not only to be sustained by the greater weight of authority, but more nearly to accord with the general principle that the burden of proving a given fact rests upon the one who asserts such fact. Moreover, it is a familiar rule that *negligence will not be presumed*. To call upon the plaintiff to prove that he has been guilty of no negligence would seem to reverse the order of proof which this presumption usually and logically establishes. The rule does not apply to a case in which the *proofs* on behalf of the plaintiff show or tend to show his contributory negligence. If such negligence conclusively appears, the court, as we have shown, will *nonsuit* the plaintiff or direct the jury to find for the defendant; if the evidence only tends to show such contributory negligence, the question must go to the jury, to be determined, like any other question of fact, upon a preponderance of the evidence.⁶⁵

etc. R. Co., 34 Wash. 512, 76 Pac. 87; Fowler v. Baltimore etc. R. Co., 18 W. Va. 579; Pfeiffer v. Radke, 142 Wis. 512, 125 N. W. 934; Dugan v. Chicago St. P. Minn. & O. Ry. Co., 85 Wis. 609, 55 N. W. 894; Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558, and note; O'Hara v. Central R. Co., 183 Fed. 739, 106 C. C. A. 177; Washington Ry. Co. v. Harmon, 147 U. S. 571, 37 L. Ed. 284, 13 Sup. Ct. Rep. 557; Inland etc. Coasting Co. v. Tolson, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. Rep. 653; Indianapolis & St. L. Ry. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Washington etc. R. R. Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. Ed. 114; Forwood v. Toronto, 22 Ont. 351.

⁶⁴ O'Hara v. Central R. Co. of New Jersey, 183 Fed. 739, 106 C. C. A. 177.

⁶⁵ Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 74 Am. St. Rep. 53, 45 L. R. A. 767, 24 South.

921; Hobson v. New Mexico etc. R. Co., 2 Ariz. 171, 11 Pac. 545; St. Louis R. Co. v. Wiggam, 98 Ark. 259, 135 S. W. 889; Choctaw etc. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; MacDougall v. Central R. Co., 63 Cal. 431; Platte etc. Canal etc. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Chicago etc. R. Co. v. Lee, 66 Kan. 806, 72 Pac. 266; Simms v. Forbes, 86 Miss. 412, 38 South. 546; Baker v. Kansas City etc. R. Co., 147 Mo. 140, 48 S. W. 838; Harrington v. Butte etc. Ry. Co., 37 Mont. 169, 16 L. R. A., N. S., 395, 95 Pac. 8; Nord v. Boston & M. Consol. Copper etc. Min. Co., 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Omaha St. R. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Jackson v. Sumpter Val. R. Co., 50 Or. 455, 93 Pac. 356; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 Atl. 808; Smith v. Chicago etc. R. Co., 4 S. D. 71, 55 N. W. 717; Missouri etc. Ry. Co. v. King (Tex. Civ. App.), 123 S. W. 151; Gulf etc. R.

It should be observed that in some of those decisions which declare that the burden of proving due care is cast upon the plaintiff, it is held that the plaintiff need not, in the first instance, give evidence for the direct and special object of establishing the observance of due care, but that it is enough if the proof introduced of the negligence of the defendant and of the circumstances of the injury, *prima facie* establishes the fact that the injury was caused by the negligence of the defendant, as such evidence would exclude the idea of the want of due care by the plaintiff.⁶⁶ This "splitting the difference," as it were, adds nothing to and fails to aid the discussion either way. While those courts which boldly follow the rule that the plaintiff shall affirmatively prove the negative of no want of due care, their decisions, however we differ from them, command respect for the conclusions which able lawyers have drawn from certain premises. The suggestion in the cases last referred to that the plaintiff's *prima facie* case of negligence itself imports the absence of want of care is merely begging the question, and it only creates the confusion which invariably follows the utterance of an ill-considered opinion. The law should be clear that the plaintiff is not called upon to prove what is the defendant's affirmative defense. Among other circumstances which may be considered in this connection are the natural *instinct of self-preservation* and the general disposition of men to avoid danger.⁶⁷ This subject has often arisen in cases relating

Co. v. Shieder, 88 Tex. 152, 28 L. R. A. 538, 30 S. W. 902; Smith v. Ogden etc. R. Co., 33 Utah, 129, 93 Pac. 185; Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 Pac. 1065; Baltimore etc. R. Co. v. Whittington, 30 Gratt. (Va.) 805; Hoyt v. Hudson, 41 Wis. 105, 22 Am. Rep. 714; Gill v. Homrighausen, 79 Wis. 634, 48 N. W. 862.

⁶⁶ Button v. Hudson Riv. Ry. Co., 18 N. Y. 248; Johnson v. Hudson Riv. Ry. Co., 20 N. Y. 65, 75 Am. Dec. 375; Texas Ry. Co. v. Crowder,

63 Tex. 502. (This case is challenged in Houston etc. R. Co. v. Harris, 103 Tex. 422, 128 S. W. 897.)

⁶⁷ Button v. Hudson Riv. Ry. Co., 18 N. Y. 248; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. Ed. 262; Lillstrom v. Northern Pac. R. Co., 53 Minn. 464, 20 L. R. A. 587, 55 N. W. 624. See elaborate note on this subject, citing many cases, to Hendrickson v. Great Northern R. Co., 16 L. R. A. 261.

to the *death of a person* where it is claimed that he has been killed *by the negligence of another*; and in such cases, where there is no evidence as to how the accident occurred, it has frequently been declared that the deceased should be presumed to have exercised due care, and the court will not assume that the deceased came to his death through his own contributory negligence.⁶⁸ In a recent action by the representatives of a man killed on a railroad track the court said: "It is contended that there being no evidence as to how this young man got on to the track, or what his position was at the time he was struck, there is no way by which the jury could determine whether the accident was caused by the high rate of speed at which the car was being run, or whether it was caused by the deceased having suddenly stepped upon the track in front of the car. The difficulty of this position is that, in the absence of any proof as to what the deceased was doing at the time of the accident, the law will presume that he was using ordinary care for his own safety. Therefore, the jury would have no right to infer that the accident might have occurred by him stepping suddenly in front of a rapidly moving car, for, if he had been guilty of such conduct, it would have been contributory negligence upon his part, and contributory negligence cannot be considered by a jury unless proof is offered tending to sustain it."⁶⁹ Contributory negligence will not be presumed.⁷⁰ The law presumes that the deceased was in the exercise of ordinary care at the time of the accident until the contrary appears;⁷¹ and where

⁶⁸ *Guggenheim v. Lake Shore Ry. Co.*, 66 Mich. 150, 33 N. W. 161; *Phillips v. Milwaukee & Northern Ry. Co.*, 77 Wis. 349, 9 L. R. A. 521, 46 N. W. 543; *Longenecker v. Pennsylvania Ry. Co.*, 105 Pa. 328; *Flynn v. Kansas City Ry. Co.*, 78 Mo. 195, 47 Am. Rep. 99; *Morrison v. New York Cent. Ry. Co.*, 63 N. Y. 643. There are some few cases, of which *Chase v. Maine Cent. Ry. Co.*, 77 Me. 62, 52 Am. Rep. 744, is the

type, which hold contrary to the general rule, but they are so outweighed by decisions supporting it, that they need not be seriously considered.

⁶⁹ *Richter v. United Rys. Co. of St. Louis*, 145 Mo. App. 1, 129 S. W. 1055.

⁷⁰ *Jacksonville etc. Co. v. Moses* (Tex. Civ. App.), 134 S. W. 379.

⁷¹ *Heine v. St. Louis etc. Co.*, 144 Mo. App. 443, 129 S. W. 421.

the evidence discloses negligence of the defendant as a proximate cause of the injury, we begin with the presumption that the injured person was in the exercise of reasonable care. That presumption is a judicial recognition of the instinct of self-preservation which prompts every individual to use his senses for his own protection. The presumption casts the burden on the defendant in negligence cases of pleading and proving contributory negligence.⁷² In a case where the deceased met his death through picking up a live electric wire, the court said: "Assuming that the deceased picked up the wire, we must conclude, so it is contended, that he did not believe, and had no reason to believe, that the wire carried electricity. This follows from the presumption that he had such a regard for his life as the ordinary man has."⁷³ In a negligence suit, where there is no eye-witness to the accident, it will be presumed, in the absence of any evidence to the contrary, as above shown, that the deceased used ordinary care and caution, which presumption is sufficient to permit recovery, if negligence is shown on the part of the defendant.⁷⁴ But where the circumstances of the accident are

⁷² *Newton v. Wabash R. Co.*, 152 Mo. App. 167, 132 S. W. 1195.

⁷³ *Foley v. Northern Cal. Power Co.*, 14 Cal. App. 401, 112 Pac. 467; *Texas P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. Ed. 186, 16 Sup. Ct. Rep. 1104; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. Ed. 262, 24 Sup. Ct. Rep. 157. In the last-named case the United States supreme court said: "There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104. The case was a natural extension of prior cases. The presumption is founded on a law

of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to."

⁷⁴ *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, and cases there cited, 44 N. W. 270; *Underhill v. Railway Co.*, 81 Mich. 43, 45 N. W. 508; *Grostick v. Railroad Co.*, 90 Mich. 594, 51 N. W. 667. See, also, *Chesapeake etc. R. Co. v. Steele*, 84 Fed. 93, 29 C. C. A. 81.

not sufficiently shown to warrant any inference on the question of care or negligence, there can be no recovery.⁷⁵ Of course if there is direct testimony of contributory negligence, the *presumption of due care is rebutted*;⁷⁶ and the very circumstances of the accident may be such as to negative any presumption of due care.⁷⁷

§ 186 (184). Burden in cases of bailment—Ordinary bailees—Warehousemen.—The law of bailments is now so well settled, and the question of the burden of proof regulated to such a degree of perfection, that there seems no chance for any disturbance of the principles which regulate it. The rules dealing with common carriers have already been discussed, and this and the following section includes bailees other than common carriers. The rules as to such bailees as warehousemen and innkeepers and others to whom bailment may be made are with slight variations the same. Ordinary bailees for hire are not insurers of goods intrusted to their keeping, and are only required to use ordinary care; hence a bailor who alleges negligence on the part of the bailee must offer some proof

⁷⁵ *Weatherly v. Nashville etc. R. Co.*, 166 Ala. 575, 51 South. 959; *Jaquette v. Capital Traction Co.*, 34 App. D. C. 41; *Corcoran v. Boston Ry. Co.*, 133 Mass. 507; *Crafts v. Boston*, 109 Mass. 519; *Fleishman v. Polar Wave Ice & Fuel Co.*, 148 Mo. App. 117, 127 S. W. 660; *King v. Ringling*, 145 Mo. App. 285, 130 S. W. 482; *Losie v. Delaware & H. Co.*, 142 App. Div. 214, 126 N. Y. Supp. 871; *Scott v. Nauss Bros. Co.*, 141 App. Div. 255, 126 N. Y. Supp. 17; *O'Donohoe v. Duparquet, Hout & Moncuse Co.*, 67 Misc. Rep. 435, 123 N. Y. Supp. 193; *St. Louis etc. R. Co. v. Cason* (Tex. Civ. App.), 129 S. W. 394; *Coffman v. Texas Midland R. Co.* (Tex. Civ. App.), 126 S. W. 619.

⁷⁶ *Thompson v. Duncan*, 76 Ala. 334; *Reading etc. R. Co. v. Ritchie*, 102 Pa. 425; *Fitzgerald v. Weston*, 52 Wis. 354, 9 N. W. 13.

⁷⁷ *State v. Maine Ry. Co.*, 76 Me. 357, 49 Am. Rep. 622, and note; *Brown v. Milwaukee & St. Ry. Co.*, 22 Minn. 165; *Connelly v. New York Cent. Ry. Co.*, 88 N. Y. 346; *Riceman v. Havemeyer*, 84 N. Y. 647. See note on "Burden of Proof of Knowledge by Employee of Latent Danger," to *Williams v. Sleepy Hollow Mining Co.*, 11 Ann. Cas. 116, and "Sufficiency of Evidence as to Practicability of Guarding Machinery from Which Servant has Sustained Injury," to *Glockner v. Hardwood Mfg. Co.*, 18 Ann. Cas. 133.

of his claim.⁷⁸ But when he shows a total *default in delivery* or accounting for the goods on demand, and when the bailee has had the exclusive possession and it appears that the loss or injury would not ordinarily happen without negligence, he makes out a *prima facie* case of negligence which imposes upon the bailee the burden of explaining the nondelivery.⁷⁹ This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his nondelivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and, by his refusal, con-

⁷⁸ James v. Orrell, 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931; Sanford v. Kimball, 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890; Darby Candy Co. v. Hoffberger, 111 Md. 84, 73 Atl. 565; Hambleton v. McGee, 19 Md. 43; Batesville Gin Co. v. Whitten, 96 Miss. 210, 50 South. 695; Levi v. Missouri etc. R. Co., 157 Mo. App. 536, 138 S. W. 699; Freeman v. Foreman, 141 Mo. App. 359, 125 S. W. 524; Gill Forge & Machine Works v. Detroit-Cadillac Motor Car Co., 139 App. Div. 205, 123 N. Y. Supp. 621; Parlato v. Thomas, 123 N. Y. Supp. 373; Hasbrouck v. New York Cent. & H. R. R. Co., 137 App. Div. 532, 122 N. Y. Supp. 123; Cramer v. Kelin, 127 App. Div. 146, 111 N. Y. Supp. 469; Stewart v. Stone, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595, 40 N. Y. St. 314; Erie Bank v. Smith, 3 Brewst. (Pa.) 9; Light v. Miller, 38 Pa. Super. Ct. 408; Carrier v. Dorance, 19 S. C. 30; Runyan v. Caldwell, 7 Humph. (Tenn.) 134; Malaney v. Taft, 60 Vt. 571, 6 Am. St. Rep. 135, 15 Atl. 326.

⁷⁹ Weller & Co. v. Camp, 169 Ala. 275, 28 L. R. A., N. S., 1106, 52 South. 929; First Nat. Bank v. First

Nat. Bank, 116 Ala. 520, 22 South. 976; Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664; Boies v. Hartford Ry. Co., 37 Conn. 272, 9 Am. Rep. 347; Netzwor Mfg. Co. v. Southern R. Co., 7 Ga. App. 163, 66 S. E. 399; Funkhouser v. Wagner, 62 Ill. 59; Sanborn v. Kimball, 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890; Davis v. Tribune etc. Printing Co., 70 Minn. 95, 72 N. W. 808; Brown v. Waterman, 10 Cush. (Mass.) 117; Collier v. Langan & Taylor Storage & Moving Co., 147 Mo. App. 700, 127 S. W. 435; Freeman v. Foreman, 141 Mo. App. 359, 125 S. W. 524; Hasbrouck v. New York Cent. & H. R. R. Co., 137 App. Div. 532, 122 N. Y. Supp. 123; Bean v. Ford, 65 Misc. Rep. 481, 119 N. Y. Supp. 1074; Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, and note; Logan v. Matthews, 6 Pa. 417; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574. So the bailee is liable when the goods are delivered by him to the wrong person: Hawkins v. Hoffman, 6 Hill (N. Y.), 586, 41 Am. Dec. 767; Furman v. Union Pac. Ry. Co., 106 N. Y. 579, 13 N. E. 587.

verts them. Where, however, the refusal of the bailee to deliver is explained by the fact appearing that the goods have been lost, destroyed by fire or stolen, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care; and the court will not assume, in the absence of proof on the point, that such loss, fire or theft was the result of his negligence.⁸⁰ But in such cases the burden of proof to show the loss is upon the other party, and he must prove such loss with reasonable certainty.⁸¹ The burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. "Nor do we concur in the view that there is in these cases any real '*shifting*' of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence

⁸⁰ Hackney v. Perry, 152 Ala. 626, 44 South. 1029; Haas v. Taylor, 80 Ala. 459, 2 South. 633; Johnson v. Perkins, 4 Ga. App. 633, 62 S. E. 152; Hawkins v. Haynes, 71 Ga. 40; Vogelsang v. Fredkyn, 133 Ill. App. 356; Funkhouser v. Wagner, 62 Ill. 59; Sherwood v. Home Sav. Bank, 131 Iowa, 528, 109 N. W. 9; Nicholls v. Roland, 11 Mart., O. S. (La.), 190; Buswell v. Fuller, 89 Me. 600, 36 Atl. 1059; Mills v. Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Knights v. Piella, 111 Mich. 9, 66 Am. St. Rep. 375, 69 N. W. 92; Collier v. Langan & Taylor Storage etc. Co., 147 Mo. App. 700, 127 S. W. 435; Taussig v. Schields, 26 Mo. App. 318; Shropshire v. Sidebottom, 30 Mont. 406, 408, 76 Pac. 941; Sulpho-

Saline Bath Co. v. Allen, 66 Neb. 295, 1 Ann. Cas. 21, 92 N. W. 354; Sheldon v. Robinson, 7 N. H. 157, 26 Am. Dec. 726; Bryant v. Auchmuty, 129 N. Y. Supp. 471; Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Lamb v. Camden Ry. Co., 46 N. Y. 271, 7 Am. Rep. 327; Scranton v. Baxter, 4 Sand. (N. Y.) 5; Hoyt v. Hotel Co., 35 Pa. Super. Ct. 297; Hislop v. Ordner, 28 Tex. Civ. App. 540, 67 S. W. 337; Pregent v. Mills, 51 Wash. 187, 98 Pac. 328; Phipps v. New Claridge Hotel, 22 T. L. R. 49; McKenzie v. Lewis, 31 Nova Scotia, 408.

⁸¹ Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Clark v. Spence, 10 Watts (Pa.), 335; Dinsmore v. Abbott, 89 Me. 373, 36 Atl. 621.

and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman."⁸² On the same principle, where the *bailee returns the goods in a damaged condition* and gives no explanation of their injury, it has been held that the burden is upon him to show that he had used

⁸² *Clafin v. Meyer, supra*. We can find no clearer or more accurate statement of what we conceive to be the true rule than the one made by the great Judge McClellan, in *Higman v. Camody*, 112 Ala. 367, 57 Am. St. Rep. 33, 20 South. 480, in which he says: "In an action by a bailor against a bailee for the destruction of or injuries to the chattel while held under the bailment through the negligence of the latter, the burden of proof shifts from one side to the other and rests with plaintiff or the defendant, upon the development of the circumstances in the evidence. It is, of course, on the plaintiff to show the bailment, that the defendant took the property under it, and returned it in a damaged condition, or did not return it at all. It is also, it seems, with him to show the condition of the chattel when it was delivered to the defendant. If the property was in good condition for the uses of the bailment, and it is not returned, or returned in an injured state, or if though there be an infirmity or defect in the chattel, but the injury sustained by it is not of a character attributable to such defect (as, for instance, where a leaky boat is let, and is injured by an explosion of gunpowder), the burden is on the

bailee, since in either of the cases put the injury would not have happened in the ordinary course of things had he been duly prudent and diligent, not, indeed, to acquit himself of all negligence, but to show a cause producing the injury which *prima facie* did not arise or result from or operate on account of a want of ordinary care on his part. This being done, the burden shifts back to the plaintiff to affirmatively show some casual negligence on the part of the defendant. To illustrate: The hirer of a boat loses it in a storm of sufficient severity to have probably caused the loss without fault on his part. He acquits himself of negligence *prima facie* by showing these facts, and throws the onus on the latter to prove that, notwithstanding the storm, the boat would not have been lost but for defendant's negligence in going out in the storm, or, being out, his want of care and diligence in handling the boat; and in such case it is with the plaintiff to reasonably satisfy the jury by a preponderance of evidence that not the storm alone, but the failure of the defendant to act with prudence and diligence in view of the storm, caused the loss." Some of the authorities do not subscribe to the doctrine that there is any

due care.⁸³ This rule is illustrated in a New York case where the owner of a horse brought an action for conversion against one who had hired the horse and returned it in a foundered condition. The court said: "Here, it will be observed, this horse was in the exclusive possession of the defendant. He had charge and care of him for hire. During that charge he was injured in a way that ordinarily does not occur without negligence, usually not without the horse having been used and then neglected. This may be safely said on the evidence and upon human experience.

shifting of the burden of proof, but this variance in logical method does not affect the result so far as practical ends are concerned: *Yazoo & M. V. R. Co. v. Hughes*, 94 Miss. 242, 22 L. R. A., N. S., 975, 47 South. 662.

⁸³ *Funkhouser v. Wagner*, 62 Ill. 59; *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189; *Bennett v. O'Brien*, 37 Ill. 250; *Burlingame v. Horne*, 30 Ill. App. 330; *Baren v. Cain*, 15 Ill. 387; *Wiser v. Chesley*, 53 Mo. 547; *Jackson v. McDonald*, 70 N. J. L. 594, 57 Atl. 126; *Harms v. New York*, 69 Misc. Rep. 315, 125 N. Y. Supp. 477; *Powers v. Jughardt*, 101 App. Div. 53, 91 N. Y. Supp. 556; *Wintringham v. Hayes*, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999, 63 N. Y. St. 16; *Nichols v. Balch*, 8 Misc. Rep. 452, 28 N. Y. Supp. 667, 59 N. Y. St. 573; *Collins v. Bennett*, 46 N. Y. 490; *Fox v. Pruden*, 3 Daly (N. Y.), 187; *Logan v. Mathews*, 6 Pa. 417; *Hildebrand v. Carroll*, 106 Wis. 324, 80 Am. St. Rep. 29, 82 N. W. 145. Vermont, Maine and Massachusetts do not appear to follow this rule. In Vermont it has been held that the burden of proof of negligence is on plaintiff in an action on the case for negligence against the bailee of a horse for hire, and is not shifted by merely showing that the

horse was sound when delivered to the bailee, and when returned was injured in a way that does not ordinarily occur without negligence: *Malaney v. Taft*, 60 Vt. 571, 6 Am. St. Rep. 135, 15 Atl. 326; and on the same line is *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776. In Maine, in an action of negligence against a bailee, not a common carrier, the general burden to prove negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he ordinarily makes out a *prima facie* case, and it is then incumbent on the bailee to explain the cause of refusal, as by showing a loss by fire, theft or accident. It then devolves upon the plaintiff to show that such loss was due to the negligence of the bailee. The final burden is on the bailor to prove negligence, not on the bailee to prove due care. The hirer of a horse, to *prima facie* exonerate himself from liability for injury to the animal, need go no further than show that the cause of the injury is a mystery. He need not show how the injury was received: *Sanford v. Kimball*, 106 Me. 355, 138 Am. St. Rep. 345, 76 Atl. 890. These cases are directly opposed to the cases cited and to the "horse" case referred to in the text.

In such case the burden rests with the custodian to show how the injury occurred, and that he was not guilty of the negligence that caused it. This rests upon the defendant for two reasons: First, because the facts are within the defendant's peculiar knowledge, and he should, therefore, prove them; second, such injury does not usually occur without negligence on the part of the custodian of the animal."⁸⁴ It frequently happens that the very *circumstances of the loss* are such as to afford *proof of negligence*, as where goods are stolen, the circumstances may be such as to show that the bailee has not kept such watch over the goods as was commensurate with their value.⁸⁵ In another interesting New York case, where a valise had been delivered to the person in charge of the check room in a hotel and was lost, the court said: "The inability to produce the valise when it was called for was itself evidence of negligence on the part of the bailees and, as they failed to show the precise manner in which the loss occurred, whether by fire, by theft, or by delivery to the wrong person, and also failed to show any record of the removal of this particular package from the hotel or of its receipt at the storeroom in the other building, I do not think that they could meet the case made out by the plaintiff by proving merely that they had an elaborate and careful system for the care and safekeeping of baggage left in their charge. Assuming that they proved that a careful system was in operation in the hotel, which may be doubted in view of the manner in which the baggage was kept in the basement, still they failed to show that the system had been applied to the particular case, inasmuch as they had no record of what was done with the missing valise after it went to the basement storeroom."⁸⁶ A bailee has the burden of show-

⁸⁴ Collins v. Bennett, 46 N. Y. 490.

⁸⁵ Safe Deposit Co. v. Pollock, 85 Pa. 391, 27 Am. Rep. 660; Brown v. Waterman, 10 Cush. (Mass.) 117; Wintringham v. Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999.

⁸⁶ Bean v. Ford, 65 Misc. Rep. 481, 119 N. Y. Supp. 1074, citing Claffin v. Meyer, *supra*; Burnell v. New York C. & R. Co., 45 N. Y. 184, 6 Am. Rep. 61.

ing that the property has been taken from him by process of law, or by a person having a paramount title, or perhaps excuse his default in some other way. But he cannot set up *jus tertii* against his bailor, however tortious the possession of the latter, unless the true owner has claimed the property and the bailee has yielded to the claim.⁸⁷ The bailee setting up a lien has, of course, the burden of proving it as an affirmative claim;⁸⁸ and also that of contributory negligence of the bailor.⁸⁹

§ 187 (185). Innkeepers.—The general doctrine deducible from the authorities, ancient and modern, is that keepers of public inns are bound well and safely to keep the property of their guests accompanying them at the inn; and in case such property is lost or injured, the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part; or by the fault of the guest, his companions or servants; or by superior force; and the burden of proof to exonerate the innkeeper is upon him, for, in the first instance, the law will attribute the loss or injury to his default.⁹⁰ These rules, though seemingly hard on inn-

⁸⁷ Story on Bailm., §§ 450, 582; Schouler on Bailm., § 494; Jensen v. Eagle Ore Co., 47 Colo. 306, 19 Ann. Cas. 519, 33 L. R. A., N. S., 681, 107 Pac. 259; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Sadgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154; Nudd v. Montanye, 38 Wis. 511, 20 Am. Rep. 25. On the subject of the duty of warehousemen in the care of property, see full and instructive note to Carley v. Offut, 136 Am. St. Rep. 212.

⁸⁸ Shearer v. Gunderson, 60 Minn. 525, 63 N. W. 103.

⁸⁹ Dickie v. Henderson, 95 Ark. 78, 128 S. W. 561; Edwards v. Adams (Tex. Civ. App.), 122 S. W. 898; Broussard v. Sells-Floto Show (Tex. Civ. App.), 128 S. W. 439.

⁹⁰ Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, and note, 6 L. R. A. 483, 10 S. E. 491; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369, 371; Bowell v. De Wald, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; Laird v. Eichold, 10 Ind. 212, 71 Am. Dec. 323, and note; Hill v. Owen, 5 Blackf. (Ind.) 323, 35 Am. Dec. 124, and note; Norcross v. Norcross, 53 Me. 163; Baehr v. Downey, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750; Dunbier v. Day, 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109; Cunningham v. Bucky, 42 W. Va. 671, 57 Am. St. Rep. 876, 35 L. R. A. 850, 26 S. E. 442.

keepers, are founded on considerations of public utility, and deemed essential to insure a high degree of security to travelers and strangers, who of necessity must trust to and confide in the honesty and vigilance of the innkeeper and those in his employ.⁹¹ If the goods of a guest disappear, the guest cannot ordinarily be presumed to know the party whose guilt or negligence has caused the loss; and he is not bound to prove the negligence or misconduct of the landlord or his servants in order to recover.⁹² Where the loss is shown, the *burden* is cast upon the innkeeper to show that it was due to the negligence of the guest or to some other cause relieving the innkeeper of the liability.⁹³ It is not enough to show that the loss or damage did not happen through his negligence or that of his servants.⁹⁴ When property committed to the custody of an innkeeper by his guest is lost, the presumption is that the innkeeper is liable for it; and he can relieve himself from that liability by showing that he has used extreme diligence. What facts will excuse him is a question, perhaps, not very well settled; but it is well settled

⁹¹ 2 Kent's Com., 592-596; Jones on Bailm., 95, 96; Story on Bailm., 471, 472.

⁹² 2 Thomp. Trials, § 1843.

⁹³ Sasseen v. Clark, 37 Ga. 242; Rockhill v. Congress Hotel Co., 237 Ill. 98, 22 L. R. A., N. S., 576, 86 N. E. 740; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Howell v. De Wald, 2 Ind. App. 303, 50 Am. St. Rep. 240, 28 N. E. 430; Norcross v. Norcross, 53 Me. 163; Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590; Baehr v. Downey, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750; Dunbier v. Day, 12 Neb. 596, 41 Am. Rep. 772, 12 N. W. 109; Murray v. Clarke, 2 Daly (N. Y.), 102; Quinton v. Courtney, 2 N. C. 40; Jordan v. Boone, 5 Rich. (S. C.) 528; Howe Mach. Co. v. Pease, 49 Vt. 477;

Watt v. Kilbury, 53 Wash. 446, 102 Pac. 403.

⁹⁴ Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745; Piper v. Manny, 21 Wend. (N. Y.) 282. It must be borne in mind there are divergent rulings as to an innkeeper's liability, with which, of course, this work does not assume to deal, but to which we make the following reference as a necessary guide in ascertaining the locality and weight of the burden. There are those which liken the innkeeper's liability to the carrier's, those which follow the English leading case (Calye's Case, 8 Coke 32a, 1 Smith Lead. Cas. 246), which does not hold him liable for accidental fire, or the negligence of a third person, and a third class only holding for negligence.

that he cannot excuse himself without showing that he has used extreme care and diligence in relation to the property lost.⁹⁵ An innkeeper cannot be exonerated from loss of his guest's goods merely upon presumption, nor without proof of circumstances ordinarily attending the breaking of a house securely fastened. He is bound to prove the mode in which the goods were taken from him, and that it was without any fault or negligence on his part.⁹⁶ The ancient rule was that, so soon as the goods of the guest were brought within the precincts of the inn, the responsibility of the innkeeper for their safekeeping began. The application of the principles of the common law has been modified from time to time, with the changing conditions under which business is transacted and obligations are entered into. In this country the baggage of travelers is transported in cars separate from those in which its owners ride. Such owners receive from the carrier checks, a kind of receipt, upon surrender of which the baggage is given to whomsoever so equipped calls for it. In consequence of this, it has become a frequent custom for travelers upon their arrival at hotels, or the stations in the cities where they are situate, to hand their baggage checks to a representative of some hotel, who assumes the duty and responsibility of having the baggage delivered from the station to the hotel for the guest.⁹⁷ It has consequently now been repeatedly held that one who becomes the guest of a hotel by giving his baggage checks into its possession places the goods they represent into its custody, so far as to make the innkeeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage be never brought within the walls of the hotel.⁹⁸ And the *onus* is

⁹⁵ Edwards on Bailm., 406; 2 Kent's Com., 592; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

⁹⁶ McDaniels v. Robinson, 26 Vt. 316, and note, 62 Am. Dec. 574.

⁹⁷ Keith v. Atkinson, 48 Colo. 480, 139 Am. St. Rep. 284, 111 Pac. 55.

⁹⁸ Thompson on Negligence, § 6668; Dickinson v. Winchester et al., 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Sassee v. Clark, 37 Ga. 242; Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, 6 L. R. A. 483, 10 S. E. 491.

on the innkeeper from the assumption of care and custody, both where the owner does not arrive until some time afterward,⁹⁹ and after he has departed.¹⁰⁰ The ordinary burden of proving his case is on the plaintiff, who must show the delivery or reception of them by the innkeeper or the possession by the innkeeper on the plaintiff's departure.¹ An innkeeper's liability for the baggage of his guest is not terminated the instant the guest pays his bill and leaves the hotel, but continues for such a reasonable time thereafter as may be necessary for him to secure its removal.² If the innkeeper sets up as a defense the guest's contributory negligence, he has the burden of proving it.³ If, however, the goods are not in the defendant's possession *qua* innkeeper, the rule in all its rigidity is not applied. For example, it does not apply to the loss or to the damage of the goods of *permanent boarders* and other parties who have a special contract as to board.⁴

⁹⁹ *Flint v. Illinois Hotel Co.*, 149 Ill. App. 404. For an excellent note on the delivery of baggage by an intending guest, as establishing the relation of guest and innkeeper, see note to *Brewer v. Caswell*, 23 L. R. A., N. S., 1107.

¹⁰⁰ *Kaplan v. Titus*, 140 App. Div. 416, 125 N. Y. Supp. 397.

¹ *Giblyn v. Hanf*, 126 N. Y. Supp. 581.

² *Maxwell v. Gerard*, 84 Hun (N. Y.), 537, 32 N. Y. Supp. 849. In that case, the plaintiff, who left the hotel to go on a cruise, had arranged with the clerk in charge of the hotel office to have his trunk delivered to an expressman for transportation to his residence. The court, through Parker, J., after likening the liability of an innkeeper to that of a common carrier, said: "It is not pretended that this undertaking on the part of the defendant's clerk was outside of the ordinary routine of the work undertaken by defendant to

promote the pleasure, comfort, and convenience of his guests, and to assure their further patronage. Nor is it pretended that innkeepers generally are not accustomed to perform work of like character for their guests, and for a like purpose."

³ *Jefferson Hotel Co. v. Warren*, 128 Fed. 565, 63 C. C. A. 193; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82.

⁴ *Calye's Case*, *supra*; *Bacon's Abr.*, "Inns and Innkeepers"; *Story on Bailm.*, 4th ed., § 477 (3); *Chamberlain v. Masterson*, 26 Ala. 371; *Manning v. Wells*, 9 Humph. (Tenn.), 746, 51 Am. Dec. 688. For discussion of distinction between a "guest" and a "boarder," see *Meacham v. Galloway*, 102 Tenn. 415, 73 Am. St. Rep. 886, 46 L. R. A. 319, 52 S. W. 859. Also note to *Tulane Hotel Co. v. Holohan*, 105 Am. St. Rep. 932-940. It oftentimes becomes important to determine whether the status of a person stopping at an

§ 188 (186). **Insanity — Civil cases.**—From our comments on the strength of the presumption of sanity,⁵ it logically follows that an issue upon it is upon the head of him who raises it; and hence it is a familiar rule that he who asserts insanity as a defense to a contract or who relies upon insanity to maintain his action or defense in civil proceedings must assume the burden of proof. Although this is a mooted question in respect to the proof of wills, there is no such controversy in other civil proceedings.⁶ Where the assignor in a deed of assignment sought to have it set aside on the ground of his insanity at the time of making it, the burden of proof was on him at the outset,

inn is that of a guest or a boarder. Because, if it is determined that he is a boarder and not a guest, the extraordinary liability of an innkeeper as an insurer of the property of his guest does not attach: *Johnson v. Reynolds*, 3 Kan. 257; *Vance v. Throckmorton*, 5 Bush (Ky.), 41, 96 Am. Dec. 327; *Taylor v. Downey*, 104 Mich. 532, 53 Am. St. Rep. 472, 29 L. R. A. 92, 62 N. W. 716. Whether an inmate of a hotel is a guest or a boarder is a question of fact always to be determined by the trial court upon the evidence before it: *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; *Lusk v. Belote*, 22 Minn. 468; *Hall v. Pike*, 100 Mass. 495; *Jalie v. Cardinal*, 35 Wis. 118.

⁵ § 59, *ante*.

⁶ *Pritchard v. Fowler*, 171 Ala. 662, 55 South. 147; *Rawdon v. Rawdon*, 28 Ala. 565; *Frazer v. Frazer*, 2 Del. Ch. 260; *Stevens v. Shannahan*, 160 Ill. 330, 43 N. E. 350; *English v. Porter*, 109 Ill. 285; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Speer v. Speer*, 146 Iowa, 6, 140 Am. St. Rep. 268, 27 L. R. A., N. S., 294, 123 N. W. 176; *State v. Geddis*, 42 Iowa, 264; *Fish v. Poor-*

man, 85 Kan. 237, 116 Pac. 898; *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 10 Ky. Law Rep. 577, 9 S. W. 812; *Wright v. Wright*, 139 Mass. 177, 29 N. E. 380; *Howe v. Howe*, 99 Mass. 88; *Ancient Order United Workmen v. Brown*, 160 Mich. 437, 125 N. W. 400; *Brown v. Brown*, 39 Mich. 792; *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478; *Perkins v. Perkins*, 39 N. H. 163; *Weed v. Mutual Ben. L. Ins. Co.*, 70 N. Y. 561; *Ean v. Snyder*, 46 Barb. (N. Y.) 230; *In re Shelleig*, 11 Ohio S. & C. Pl. Dec. 81, 8 Ohio N. P. 399; *Nonnemacher v. Nonnemacher*, 159 Pa. 634; *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Commonwealth v. Kirkbride*, 11 Phila. (Pa.) 427; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Jarrett v. Jarrett*, 11 W. Va. 584; *Hoge v. Fisher*, 12 Fed. Cas. No. 6585, Pet. C. C. 163; *Hiatt v. Mutual L. Ins. Co.*, 12 Fed. Cas. No. 6449a, 2 Dill. 572. As to burden of proof in will cases, see § 189, *post*. See note to *State v. Scott*, 36 L. R. 9. 731-733. See, also, note on existence of guardianship as showing want of capacity to contract, to *In re Will of Van Houton*, 140 Am. St. Rep. 355.

and was not to be shifted in consequence of any proof to be made by him in respect to the relation in which the parties stood to each other, or the character of the transaction which was the subject of inquiry. It was incumbent upon him, in order to make out his case in this respect, to overcome, by a clear preponderance of evidence, the presumption of sanity and competent mental capacity which obtains in the case of every person of full age who has not been judicially declared of unsound mind, or incapable of managing his affairs.⁷ The cases go even further than this, and show that it is incumbent not only to prove insanity but also to prove that the act of the alleged insane person was not done during a lucid interval; because the act of a man who has been insane is valid if performed during a lucid interval.⁸ The converse of this rule is found in the presumption of the continuance of insanity, when it has been proved to exist; in which case the party alleging a lucid interval must bear the burden of establishing it.⁹

⁷ *Dorchester v. Dorchester*, 50 Hun, 600, 3 N. Y. Supp. 238.

⁸ *Ancient Order United Workmen v. Brown*, 160 Mich. 437, 125 N. W. 400; *Ramsdell v. Ramsdell*, 128 Mich. 110, 87 N. W. 81. In the last-named case, Mr. Justice Long, speaking for the court, said: "We think that the decree by the court below cannot stand. There was no direct proof offered by complainant showing an unsettled mental condition of Mr. Ramsdell on the day the deed was executed, nor for some time before that. Complainant rests his case upon the fact that Mr. Ramsdell had been insane in previous years; also some months preceding the making of the deed, as well as after its execution. . . . In the present case Mr. Ramsdell was able to describe the land (which consisted of two forties, separately described) from memory. . . . We think it apparent that Mr. Ramsdell, at the time the deed was

executed, was restored to his mental faculties so far as to be able to comprehend what he was doing, what property he was disposing of, the condition of his family, and his own situation, and was able to act with memory and judgment."

⁹ *Pike v. Pike*, 104 Ala. 642, 16 South. 689; *People v. Loper*, 159 Cal. 6, Ann Cas. 1912B, 1193, 112 Pac. 720; *Rogers v. Rogers*, 6 Penne. (Del.) 267, 66 Atl. 374; *Armstrong v. Timmons*, 3 Harr. (Del.) 342; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Severns v. Broffey*, 155 Ill. App. 10; *Emery v. Hoyt*, 46 Ill. 258; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Mileham v. Montagne*, 148 Iowa, 476, 125 N. W. 664; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Pennell v. Cummings*, 75 Me. 163; *Taylor v. Cres-*

The law is admirably summed up in a recent Alabama case,¹⁰ where the following authoritative propositions are laid down: 1. The law presumes that every man is sane until there is evidence to the contrary.¹¹ 2. The burden of proof is upon the party attacking a conveyance to show the incapacity of the grantor at the time it is made, and insanity prior to that time does not raise the presumption of insanity at a subsequent time, unless it is shown that the insanity is permanent in its nature.¹² 3. Therefore, proof of insanity at intervals or of a temporary character would create no presumption that it continued up to the execution of the instrument, and the burden would be upon the attacking party to show insanity at the very time of the transaction. 4. On the other hand, when mental incapacity is once established and is shown to be permanent in its nature, the law presumes that it continues, and the party claiming insanity meets the burden when once establishing permanent insanity. 5. If the insanity is not questioned, but the act involved is claimed to be during a lucid interval, the burden of proof would be upon the party suggesting the lucid interval.¹³

§ 188a (186). Insanity—Criminal cases.—While these commentaries purport to deal only with the law of evidence in civil cases, it occasionally happens that the subject

well, 45 Md. 422; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *De Vries v. Crofoot*, 148 Mich. 183, 186, 111 N. W. 775; *Ricketts v. Joliff*, 62 Miss. 440; *State v. Vaughn*, 223 Mo. 149, 122 S. W. 677; *Kiehne v. Wessell*, 53 Mo. App. 667; *Pettes v. Bingham*, 10 N. H. 514; *Meeker v. Boylan*, 28 N. J. L. 274; *Cook v. Cook*, 53 Barb. (N. Y.) 180; *Wood v. Sawyer*, 61 N. C. 251; *Noel v. Karper*, 53 Pa. 97; *Davis v. Davis*, 24 S. D. 474, 124 N. W. 715; *Haynes v. Swann*, 6 Heisk. (Tenn.) 560; *Elston v. Jasper*, 45 Tex. 409; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575;

State v. Snell, 46 Wash. 327, 9 L. R. A., N. S., 1191, 89 Pac. 931; *Jarrett v. Jarrett*, 11 W. Va. 584; *Wright v. Jackson*, 59 Wis. 569, 18 N. W. 486; *Hoge v. Fisher*, 12 Fed. Cas. No. 6585, Pet. C. C. 163; *Smee v. Smee*, 5 P. D. 84, 44 J. P. 220, 49 L. J. P. & Adm. 8, 28 Wkly. Rep. 703.

¹⁰ *Pritchard v. Fowler*, *supra*.

¹¹ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

¹² *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *Murphree v. Senn*, 107 Ala. 424, 18 South. 264.

¹³ *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322.

as dealt with in courts of criminal jurisdiction materially aids the application on the civil side. There have been wide differences of judicial opinion as to the burden of proof where insanity is urged as a defense in *criminal* cases. The extreme rule has sometimes been declared that in such cases it is incumbent on the prisoner to prove the insanity beyond a *reasonable doubt*;¹⁴ but manifestly no such rule can be upheld. In Texas the voice of Hurt, J., has been clearly heard to the contrary:¹⁵ "When the plea of insanity is interposed, is the burden of proof on the state to show sanity, or is it on the defendant to prove insanity? Brush from this question the dust of ancient days, separate it from its old companions, and its solution is perfectly simple. Before entering upon an analysis of this subject permit us to allude to some very strange and inconsistent expressions used by the learned judges in treating of this question. The following are of the number alluded to: 'As *insanity excuses the commission of crime*, on the ground that the actor is not a responsible being,' etc. 'The *onus* of proving the defense of insanity, or, in the case of lunacy, of showing that the *offense* was committed when the prisoner was in a state of *lunacy*, lies upon the prisoner. . . . It is rather in the nature of a plea to the jurisdiction. The defendant, through his counsel and friends, comes in and says that he is not *amenable* to penal jurisdiction.' What sane mind can comprehend the possibility of a *crime* being committed by an *insane* person? If the prisoner is

¹⁴ State v. Danby, 1 Houst. C. C. (Del.) 175 (166); State v. Pratt, 1 Houst. C. C. (Del.) 269 (249); State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426, and note; State v. Paulk, 18 S. C. 514; State v. Spencer, 21 N. J. L. 196; State v. Trapp, 56 Or. 588, 109 Pac. 1094 (intoxication); State v. Maioni, 78 N. J. L. 339, 20 Ann. Cas. 204, 74 Atl. 526. Notwithstanding the efforts to dislodge it from New Jersey, Gummere, C. J., says in this case: "The rule there laid

down by us, although not in harmony with that existing in some of our sister states, has been steadfastly held to by our courts ever since the decision in the Spencer Case, 21 N. J. L. 196, in the year 1846, and is too firmly imbedded in our law to be subject to alteration or modification by judicial decision. The criticism upon this portion of the charge is, in our opinion, without merit."

¹⁵ King v. State, 9 Tex. App. 515; Webb v. State, 9 Tex. App. 490.

insane there is no *crime*. If there be *crime* there is no *insanity*. Insanity cannot *excuse* crime, from the fact that if *insane there is no crime to be excused*. These observations apply to the second. Now, to the third: 'Plea in the nature of a plea to the jurisdiction.' This plea never draws in issue the *guilt* of the prisoner. Under this plea sanity or insanity *would* be the issue separate and independent from the question of guilt to be determined. But the court *has jurisdiction of the crime* if any has been committed; and how are we to sever the one from the other? Shall we first try the question of sanity and then that of guilt? Not so, for on the threshold we are met with the fact that under the plea of not guilty evidence on the question of sanity can be introduced. Behold what darkness and confusion surround the question of sanity—a subject around which gather more vagaries and inconsistencies than infest any other question in the whole range of criminal jurisprudence. . . . The fallacy of this fundamental error can be made more fully to appear by comparing two propositions: 1. *Sanity is an inherent, intrinsic element of crime*. 2. *Sanity is not an inherent and intrinsic element, but is extrinsic and independent of the crime*. The last proposition contains a monstrous fallacy, the fruits of which are visible in so many of the text-books, and which are followed out in many of the enunciations in the adjudicated cases. If *sanity* is an *inherent* element of crime, no well-ordered mind can stop short of the conclusion that the state must carry its burden and prove it. Feeling the force of this, writers have treated it as an *extrinsic* matter, separate and distinct from the question of guilt, and hence those strange and incomprehensible expressions above referred to. Let us pay our respects to this last proposition, and see if from a bare touch it will not crumble to dust. '*Sanity is extrinsic*.' Therefore the prisoner is to be tried for the act, and the question of *intent* or *malice* is not drawn in issue. This for the simple reason that an issue formed upon the question of intent or malice irresistibly includes that of sanity; *for there can be no intent or malice*

without sanity. Therefore it follows from this erroneous position that the jury, in viewing the act sought to be punished, must strip it of the intent which prompted it, and look alone to the act. To this we enter our solemn protest. We now invite attention to what we believe to be the true position, which is that *sanity is an inherent, intrinsic, and necessary element of crime.* Is this a correct proposition? Is it not a self-evident proposition? If murder can be committed without intent or malice, then the proposition is false; if not, it is true. But we do know, if it be possible to know anything, that, to constitute murder, the act of killing must be attended not only with the intent to kill, but with malice; and we also know, with the same degree of certainty, that there can be no intent or malice without sanity. It therefore follows, beyond any shadow of doubt, that sanity is an inherent, intrinsic, and necessary ingredient of crime." It is now maintained by one line of authorities that, in order to overcome the presumption of sanity, the burden is upon the defendant to prove to the satisfaction of the jury by a preponderance of the whole evidence upon that issue that at the time of the alleged crime he was not of sane mind.¹⁶ While this is the

¹⁶ Howard v. State, 172 Ala. 402, 55 South. 255; Lide v. State, 133 Ala. 43, 31 South. 953; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, and note, 2 South. 854; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20, and note; State v. Marler, 2 Ala. 43, 36 Am. Dec. 398, and note; Cavaness v. State, 43 Ark. 331; McKenzie v. State, 26 Ark. 334; People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Messersmith, 61 Cal. 246; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State v. Cole, 2 Penne. (Del.) 344, 45 Atl. 391; State v. Hand, 1 Marv. (Del.) 545, 41 Atl. 192; Hobbs v. State, 8 Ga. App. 53,

68 S. E. 515; Holsenbake v. State, 45 Ga. 43; Chase v. People, 40 Ill. 352; State v. Humbles, 126 Iowa, 462, 102 N. W. 409; State v. Thiele, 119 Iowa, 659, 94 N. W. 256; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; Moore v. Commonwealth, 92 Ky. 630, 18 S. W. 833, 13 Ky. Law Rep. 738; State v. Scott, 49 La. Ann. 253, 36 L. R. A. 721, 21 South. 271; State v. Parks, 93 Me. 208, 44 Atl. 899; State v. Lawrence, 57 Me. 574; Commonwealth v. Heath, 11 Gray (Mass.), 303; Commonwealth v. Eddy, 7 Gray (Mass.), 583; State v. Barker, 216 Mo. 532, 115 S. W. 1102; State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State v. Wright, 134 Mo. 404, 35 S. W. 1145;

rule which formerly prevailed and which still obtains in the greater number of states, it has been abandoned in some of those states in which it was formerly recognized. And the tendency of judicial decisions is no doubt in the direction of a less stringent rule. Numerous authorities of the highest character now maintain that upon this, as upon other issues, the *burden is upon the state*, and that the prisoner should be acquitted if there is any well founded or reasonable doubt as to his sanity.¹⁷ These

State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462, and note; *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121, and note; *State v. Maiomi*, 78 N. J. L. 339, 120 Ann. Cas. 204, 74 Atl. 526; *State v. Hancock*, 151 N. C. 699, 66 S. E. 137; *State v. Davis*, 109 N. C. 780, 14 S. E. 55; *State v. Austin*, 71 Ohio St. 317, 104 Am. St. Rep. 778, 73 N. E. 218; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, 39 L. R. A. 737, 45 N. E. 6; *Bond v. State*, 23 Ohio St. 349; *State v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Commonwealth v. Heidler*, 191 Pa. 375, 43 Atl. 211; *Commonwealth v. Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, and note, 22 Atl. 464; *Coyle v. Commonwealth*, 100 Pa. 573, 45 Am. Rep. 397; *Ortwein v. Commonwealth*, 76 Pa. 414, 18 Am. Rep. 420; *Commonwealth v. Beckwith*, 27 Pa. C. C. 481; *State v. Quigley*, 26 R. I. 263, 3 Ann. Cas. 920, 67 L. R. A. 322, 58 Atl. 905; *Gray v. State* (Tex. Cr. App. 1903), 74 S. W. 552; *Carlisle v. State* (Tex. Cr. App. 1900), 56 S. W. 365; *Smith v. State*, 55 Tex. Cr. 563, 117 S. W. 966; *State v. Brown*, 36 Utah, 46, 24 L. R. A., N. S., 545, 102 Pac. 641; *Boswell v. Commonwealth*, 20 Gratt. (Va.) 860; *Dejarnette v. Commonwealth*, 75 Va. 867; *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006, 76 Pac. 98; *State v. Strauder*, 11 W.

Va. 745, 27 Am. Rep. 606; *Reg. v. Lawton*, 4 Cox C. C. 149. See notes to *State v. Scott*, 36 L. R. A. 727-729, and *Greene v. Phoenix etc. Ins. Co.*, 10 L. R. A. 576.

¹⁷ *Brown v. State*, 40 Fla. 459, 25 South. 63; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *State v. Jones*, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *State v. Crawford*, 11 Kan. 32; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, and note; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360, and note; *Snider v. State*, 56 Neb. 309, 76 N. W. 574; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Walker v. People*, 88 N. Y. 81; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Brotherton v. People*, 75 N. Y. 159; *Maas v. Territory*, 10 Okl. 714, 53 L. R. A. 814, 63 Pac. 960; *Davis v. United States*, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353 (full discussion). In some states statutes regulate the subject: See note to *State v. Scott*, 36 L. R. A. 729; note on "Proof of Insanity by General Reputation," to *State v. Charles*, 18 Ann. Cas. 935; note to *Jordan v. Tennessee*, 34 L. R. A., N. S., 1115, as to burden of proof and *quantum* of evidence on issue of present insanity of defendant in criminal prosecution.

authorities rest upon the consideration, which is no doubt entitled to great weight, that from the beginning to the end of the case the prisoner is entitled to invoke the *presumption of innocence*. Said Cooley, C. J.: "There is no such thing in law as a separation of the ingredients of the offense so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent."¹⁸ According to this view, although the law raises the presumption of sanity which stands as evidence tending to establish the *prima facie* case, if further evidence is offered by either party tending to repel the presumption, when the whole evidence is before the jury, the burden is with the prosecution to show that the accused was sane.¹⁹ A charge of District Judge Hundley to the jury contains similar reference to the whole evidence: "Every person charged with crime is presumed to be sane—that is, of sound memory and discretion—until the contrary is shown by proof. No act done in a state of insanity can be punished as an offense. The question

¹⁸ *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162. See, also, *People v. Finley*, 38 Mich. 482.

¹⁹ *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Pribble v. People*, 49 Colo. 210, 112 Pac. 220; *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664; *Montag v. People*, 141 Ill. 75, 30 N. E. 337; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Brown v. State*, 40 Fla. 459, 25 South. 63; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *Smith v.*

Commonwealth, 1 Duv. (Ky.) 224; *Commonwealth v. Gilbert*, 165 Mass. 45, 42 N. E. 336; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117, 19 South. 665; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Knights v. State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275; *State v. Coleman*, 20 S. C. 441; *Revoir v. State*, 82 Wis. 295, 52 N. W. 84.

of the insanity of the defendant has exclusive reference to the act of which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to law. Here, whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind, proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists.”²⁰

§ 189 (187). Burden in probate of wills—Testamentary incapacity.—The decisions which relate to the burden of proof in respect to the probate of wills cannot be said so much to be in conflict as to have separated themselves into two main divisions which are to a great extent controlled by the local statutes of the states. Those general expositions and treatises which abound in lengthy articles showing conflict after conflict are of comparatively little use to the practical student, whose duty must be to see what the line of decision in the particular state indicates and whether it is governed by statutory provision, extraordinary or otherwise. The grouping of the states which we have made will be found of use mainly to exhibit the two lines of thought which have resulted in different conclusions according as the proponent of the will is regarded as defendant being attacked by a contestant, or as plain-

²⁰ United States v. Chisholm, 153 Fed. 808.

tiff attacking the heirs.²¹ Let us examine each of these divisions. By *one line of reasoning* it is maintained that inasmuch as prior to the statute in the time of Henry VIII one could not make a will, and that by that statute persons making wills were required to be of sound mind, it follows that the *person offering a will* for probate *must assume the burden* of proving that the statutory formalities have been complied with, that the testator was of sound mind and that he was such a person as the statute authorizes to make a will. The following propositions were laid down in the leading case on the subject:²² 1. That in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory. 2. That this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will. 3. That if, upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate. 4. That when it is sought

²¹ See *In re Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441, dissenting opinion of Beatty, C. J. But, in favor of the heir of a decedent, every presumption is against testacy. This has always been the law, and is emphatically the statute law of this state. In the great will case of *Delafield v. Parish*, 25 N. Y. 9, which was argued by such eminent counsel as Charles O'Connor and William M. Evarts, and in which several elaborate opinions were filed by the different members of the court of ap-

peals, this proposition was upon an extensive review of the authorities established without dissent: "That the heirs of a deceased person can rest securely upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them, *by showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory.*"

²² *Delafield v. Parish*, 25 N. Y. 9.

to establish a posterior will, to overthrow a prior one made by the testator in health, and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made in enfeebled health, and in hostility to the provisions of the first one; in such cases the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. And also the prior will is to prevail, unless the subsequent one is so proven to speak the testator's intentions, as to leave no doubt that it does so speak them. 5. That it is not the duty of the court to strain after probate, nor in any case to grant it, where grave doubts remain unremoved, and great difficulties oppose themselves to so doing. 6. That the heirs of a deceased person can rest secured upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them, by showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory.²³ These decisions have been regularly followed in

²³ *Hodge v. Rambow*, 155 Ala. 175, 45 South. 678; *In re Lockwood*, 80 Conn. 513, 69 Atl. 8; *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Knox's Appeal*, 26 Conn. 20; *Evans v. Arnold*, 52 Ga. 169; *Barnes v. Barnes*, 66 Me. 286; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Cilley v. Cilley*, 34 Me. 162; *Crowninshield v. Crowninshield*, 2 Gray (Mass.), 526; *In re Mansbach*, 150 Mich. 348, 114 N. W. 65; *Moriarty v. Moriarty*, 108 Mich. 249, 65 N. W. 964; *McGinnis v. Kempsey*, 27 Mich. 363; *Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Brown v. Walker* (Miss. 1892), 11 South. 724; *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15; *Cowan v. Shaver*, 197 Mo. 203, 95 S. W. 200;

Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; *Tingley v. Cowgill*, 48 Mo. 291; *Murry v. Hennessy*, 48 Neb. 608, 67 N. W. 470; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Matter of Preston*, 113 App. Div. 732, 99 N. Y. Supp. 312; *Matter of Flansburgh*, 82 Hun (N. Y.), 49, 31 N. Y. Supp. 177; *Delafield v. Parish*, 25 N. Y. 9; *In re Pickett*, 49 Or. 127, 89 Pac. 377; *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *Prather v. McClelland* (Tex. Civ. App. 1894), 26 S. W. 657; *Beazley v. Denson*, 40 Tex. 416; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *McMeichen v. McMeichen*, 17 W. Va. 683, 41 Am. Rep. 682; *Appeal of Livingston*, 63 Conn. 68, 26 Atl. 470. The same is true on

California, Connecticut, Georgia, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Texas, Vermont, and West Virginia. In California, the law, as laid down in a leading case,²⁴ is that so far as the contest of a will is concerned, whether made before probate or after probate, the burden of proof is upon the contestant, as plaintiff, to prove every allegation contained in his contest, including the negative allegation of nonexecution of the will, when he alleges it as a ground of contest. The fact that the trial court first required the proponent of the will to establish a *prima facie* case of its execution before the contestant opened his case does not affect the rule that the contestant has the burden of proof to show the nonexecution of the will, when alleged by him as a ground of contest. It seems that the statute does not require any preliminary proof by the proponent before the contest is determined; but when the contestant fails to prove any ground of contest alleged, it should be withdrawn from the jury, and all questions not determined by the jury should be determined separately by the court, without the presence of the contestant, upon the hearing of the petition for the probate of the will. *On the other hand*, it is insisted that testators, like other persons, are presumed to be sane, until the contrary appears, and that the *burden of proof* is upon the one alleging insanity.²⁵ This

appeal from probate court: See note to *Prentiss v. Bates*, 17 L. R. A. 494. For the rule where fiduciary relations exist, see §§ 190, 191, *post*.

²⁴ *In re Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

²⁵ *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *McDaniel v. Crosby*, 19 Ark. 533; *Jenkins v. Tobin*, 31 Ark. 306; *In re Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *Matter of Motz*, 136 Cal. 558, 69 Pac. 294; *In re Shapter*, 35 Colo. 573, 117 Am.

St. Rep. 216, 6 L. R. A., N. S., 575, 85 Pac. 688; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Slaughter v. Heath*, 127 Ga. 747, 27 L. R. A., N. S., 1, 57 S. E. 69; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798; *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Pendlay v. Eaton*, 130 Ill. 69, 22 N. E. 853; *Steinkuehler v. Wempner*, 169 Ind. 154, 15 L. R. A., N. S., 673, 81 N. E. 482; *Young v. Miller*, 145 Ind. 652, 44 N. E. 757; *Rush v. Megee*, 36 Ind. 69; *Gates v. Cole*, 137 Iowa, 613, 115 N. W. 236; *Hull v. Hull*, 117 Iowa, 738,

view is adopted in Alabama, Arkansas, Delaware, Indiana, Iowa, Kentucky, Maryland, Mississippi, New Hampshire, New Jersey, Oregon, Pennsylvania, South Carolina, Tennessee, and Virginia. The principles which have guided these courts are well founded. The first principle is, that the presumption of law is in favor of capacity, and that he who insists on the contrary has the burden of proof, except where insanity in the testator has been shown to exist at a time previous to the execution of the will; in that case the *onus* is shifted, and the party offering the will is bound to show that it was executed at a lucid interval. 2. That the time of the execution of the will is the material period to which the court must look, to ascertain the state of mind of the testator; that although it is competent evidence to show the testator's mind at any time previous or subsequent to the execution of the will, yet such proof is always liable to be overcome if it be satisfactorily shown that the testator, at the time he executed the writing, had

89 N. W. 979; *Stephenson v. Stephenson*, 62 Iowa, 163, 17 N. W. 456; *Will of Coffman*, 12 Iowa, 491; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540; *Livering v. Russell*, 30 Ky. Law Rep. 1185, 100 S. W. 840; *Woodford v. Buckner*, 111 Ky. 241, 63 S. W. 617; *Fee v. Taylor*, 83 Ky. 259; *In re American Board*, 102 Me. 72, 66 Atl. 215; *Barnes v. Barnes*, 66 Me. 286; *Halley v. Webster*, 21 Me. 461; *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 65 Atl. 918; *Taylor v. Creswell*, 45 Md. 422; *Townshend v. Townshend*, 7 Gill (Md.), 10; *Geraghty v. Kilroy* (*In re Tierney*), 103 Minn. 286, 114 N. W. 838; *Mullins v. Cottrell*, 41 Miss. 291; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Riggin v. Westminster College*, 160 Mo. 570, 61 S. W. 803; *In re Powers*, 79 Neb. 680, 113 N. W. 198; *Perkins v. Perkins*, 39 N. H. 163; *Pettes v. Bingham*, 10 N. H. 514; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl.

525; *McCoon v. Allen*, 45 N. J. Eq. 708, 17 Atl. 820; *Harris v. Vanderveer*, 21 N. J. Eq. 561; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *In re Burns*, 121 N. C. 336, 28 S. E. 519; *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *Hoope's Estate*, 174 Pa. 373, 34 Atl. 603; *Grubbs v. McDonald*, 91 Pa. 236; *In re Moyer*, 220 Pa. 356, 69 Atl. 757; *Hobby v. Bobo*, 12 Rich. (S. C.) 247, note; *Bartee v. Thompson*, 8 Baxt. (Tenn.) 508; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Burton v. Scott*, 3 Rand. (Va.) 399; *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Will of Cole*, 49 Wis. 179, 5 N. W. 346; *Leach v. Burr*, 188 U. S. 510, 23 Sup. Ct. Rep. 393, 47 L. Ed. 567. See note to *State v. Scott*, 36 L. R. A. 733-740.

the possession of his faculties. 3. That of all the witnesses, the testamentary witnesses, and their opinions, and the facts they state as occurring at the time, are to be particularly regarded by the court. They are placed around the testator for the very purpose of attesting, after his death, to the circumstances under which so solemn an instrument is executed. 4. That the opinions of witnesses other than the testamentary witnesses, as to the capacity of the testator, are to be received as the slightest kind of evidence, except so far as those opinions are based on facts and occurrences which are detailed before the court. It is most evident, that if the mere opinion of a witness as to the testator's capacity was to prevail, it would become necessary for the court to become acquainted with the witnesses themselves; for while the view of such a question which a man of strong clear mind and knowledge might take, would be very important, that of another of a different character would have very little weight. Besides, it will be found that every witness has a standard of capacity of his own, and he judges all cases by that rule. Witnesses are to state the facts, and it is the business of the court from those facts to pronounce the opinion, upon settled rules and guides, whether the testator is competent or not. And 5. That old age, failure of memory, and even drunkenness, do not of themselves necessarily take away a testator's capacity. He may be ever so aged, very infirm in body, and in habits of intemperance, and yet in the eye of the law possess that sound mind necessary to a disposition of his estate.²⁶ The latter view is perhaps supported by the greater numerical authority, and it is by no means clear that it is not sustained by the better reasoning. The rule prevails in some jurisdictions, like Illinois and Wisconsin, that the party asserting the validity of the will is required in the first instance to make a *prima facie* case of the testator's sanity, but when this has been done and contradictory testimony

²⁶ Whitenack v. Stryker, *supra*.

is offered, the proof of sanity will prevail, unless the rebutting testimony is sufficient to overcome or neutralize the presumption of sanity as well as the affirmative testimony in support of the will.²⁷ In Illinois the law on the subject is well settled, and commends itself as being the nearest to sound logic. In that state, when the party insisting on the validity of a will has established the sanity of the testator at the time of the making of the will, by the oath or affirmation of two of the subscribing witnesses, and that the will was legally executed, acknowledged and witnessed, a *prima facie* case in favor of the will is made out, and the party asserting the validity of the will must prevail and the will must stand, unless the party seeking to contest the will on the ground of insanity has produced evidence of want of necessary capacity sufficient to overcome or neutralize the effect of the affirmative testimony given in favor of the validity of the will, and also to overcome and neutralize the presumption arising from the general rule of law, which is, that all men are presumed sane until the contrary is proven. Unless such *prima facie* case is so overcome or neutralized, the verdict should be in favor of the validity of the will. This throws the weight of the legal presumption in favor of sanity into the scale in favor of the proponent, from which it necessarily results that, upon the whole case, the burden of proof rests upon the contestants.²⁸ Some of the authorities which

²⁷ *Pendlay v. Eaton*, 130 Ill. 69, 22 N. E. 853; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Will of Silverthorn*, 68 Wis. 372, 32 N. W. 287; *Will of Cole*, 49 Wis. 179, 5 N. W. 346; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21. See long note to *In re Hess' Will*, 31 Am. St. Rep. 681 et seq.

²⁸ *Carpenter v. Calvert*, 83 Ill. 62, in which the court added: "Our statute, from an abundance of caution, provides that, in the first instance, the validity of a will shall not rest merely upon this presumption of law,

arising from the fact that the will was duly executed, but requires that the witnesses who subscribed to the will shall testify affirmatively to the testamentary capacity of the party making the will. When this has been done, however, and contradictory testimony is produced tending to show want of testamentary capacity, the party asserting the validity of the will must prevail, unless the contradictory testimony be sufficient to overcome or neutralize the effect, not only of the affirmative testimony given in

place the burden of proof upon the proponent of the will do not deny that the ordinary *presumption in favor of sanity* may have some application in such cases, but they urge that the presumption cannot have the force of an independent fact to serve as a make-weight against counter-proof, at least that the presumption only aids to make out a *prima facie case*,²⁹ while other cases deny that under the statute of wills any such presumption exists.³⁰ The *usual practice* is for the proponent to produce the subscribing witnesses, make the formal proof of compliance with the statutory formalities and give some proof of testamentary capacity. But he is not thereby precluded from calling witnesses after the contestant has given evidence tending to show insanity.³¹ This practice, modified in minor instances, is now becoming universal. The proceeding on a petition for probate is distinct from the proceeding on a contest of a will. The hearing of the necessary statutory evidence on the petition for probate must be heard by the court at some time, and this can properly be done as well before as after the hearing of the contest.³² "So far as contested issues are concerned, the burden of proof is on the contestant; it devolves on him to allege and prove the facts on which he relies to prevent

favor of the validity of the will, but also to overcome or neutralize that presumption arising from the general rule of law, that all men are presumed sane until the contrary is proven. In weighing the conflicting proofs, the party supporting the will is entitled to the benefit of this presumption." See, also, *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076.

²⁹ *Bims v. Collier*, 69 Ark. 245, 62 S. W. 593; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Home of Aged v. Bantz*, 107 Md. 543, 69 Atl. 376; *Fulton v. Umbehend*, 182 Mass. 487, 65 N. E. 829; *Richardson v. Bly*, 181 Mass. 97, 63 N. E. 3; *Crowninshield v. Crowninshield*, 2 Gray (Mass.),

524; *McGinnis v. Kempsey*, 27 Mich. 363; *Taff v. Hosmer*, 14 Mich. 309; *Sheehan v. Kearney*, 82 Miss. 688, 35 L. R. A. 102, 21 South. 41; *Matter of Barbineaus* (Sur. Ct.), 27 Misc. Rep. 417, 59 N. Y. Supp. 375.

³⁰ *Evans v. Arnold*, 52 Ga. 169; *Beazley v. Denson*, 40 Tex. 416; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359.

³¹ *Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Will of Silverthorn*, 68 Wis. 372, 32 N. W. 287; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Appeal of O'Brien*, 100 Me. 156, 60 Atl. 880.

³² *Estate of McDermott*, 148 Cal. 43, 82 Pac. 842.

probate of the will; his evidence is first called for and first submitted, and not until he rests is the proponent called upon to submit any evidence; as to matters or acts necessary to a valid will not put in issue by the contest, the contestant has no voice; it is with the court to require the proofs from the proponent."³³ Here the *conflict* arises, one line of authority holding that the burden remains upon the proponent throughout the case;³⁴ the other insisting that after the formal proofs are made the burden shifts to the contestant.³⁵ We think the gradual trend is to shake off the web of tradition, and very often poorly founded and worse interpreted precedent, and to come into line with a uniform principle, namely, to treat the contestant as an ordinary party to an action setting up an allegation and taking upon himself the full burden of proving it. It has been already suggested that the propounding of a will should be regarded much as the proving of a note. Let the preliminary proofs be made,

³³ Estate of Gregory, 133 Cal. 131, 65 Pac. 315. See 1 Ross' Probate Law and Practice, § 178.

³⁴ See cases above cited. One of the latest decisions in Michigan reported is *In re Hoyles' Estate*, 162 Mich. 275, 127 N. W. 284. The question of undue influence was withdrawn from the jury, and the sole question was as to the mental competency of the testatrix. There was evidence pro and con. upon this last question, and in our opinion it presented a fair question of fact for the jury to consider, and the burden of proof was on the proponent: *In re Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65.

³⁵ See cases above cited. Also note to *State v. Scott*, 36 L. R. A. 735. In South Carolina the latest utterance on the subject is found in *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049. The question under consideration was whether, on proof of the facts and circumstances therein mentioned, the

burden shifted to the proponent of the will to prove affirmatively testamentary capacity. Without undertaking to review the cases, the effect of the decisions of this court upon that question is that, when the formal execution of a will is admitted or proved, a *prima facie* case is made out; and, as a general rule, subject to some exceptions, the burden is then on the contestants to prove fraud, undue influence, incapacity, or other ground of objection to the will, and this burden remains upon them to the end: *Hobby v. Bobo*, reported in a note to *McKnight v. Wright*, 12 Rich. (S. C.) 247; *Black v. Ellis*, 3 Hill (S. C.), 68; *Scarborough v. Baskin*, 65 S. C. 558, 44 S. E. 63; *Thames v. Rouse*, 82 S. C. 40, 62 S. E. 254. In New York, to the same effect is *In re Blaine's Will*, 143 App. Div. 687, 128 N. Y. Supp. 186. In Missouri, *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314.

and if an attack is intended, the attacking party must win or lose by the strength of his own forces. Indeed, the language of some of the statutes making him plaintiff seems to contemplate this proposition. He is, *pro hac vice*, the plaintiff, and must suffer his nonsuit if he does not prove his case. In many of the cases the discussion is idle reading, for the term "burden of proof" is used where burden of evidence is meant, and the sought-for conclusion is elusive in proportion to the misuse of the terms.

§ 190 (188). **Burden of proof as between persons in a fiduciary relation.**—The rule is that the burden of proof is always upon the party alleging a fraud; but there is one large class of cases which forms an important exception. When a question arises between a trustee and a beneficiary or between other parties who are in a fiduciary relation as to the good faith of transactions between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation, the *burden of proof is cast upon the trustee* or other person holding the relation of trust to show that the transaction is fair and reasonable and that all proper information has been given to the other party. To state the rule more broadly, when confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them, resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least, suspended and that it was as fairly conducted as if between strangers.³⁶ In equity, persons standing in cer-

³⁶ Cooley v. Stringfellow, 164 Ala. 460, 51 South. 321; King v. White, 119 Ala. 429, 24 South. 710; Hanger v. Evins, 38 Ark. 334; Payne v.

Payne, 12 Cal. App. 251, 107 Pac. 148; Crawford v. Crawford, 134 Ga. 114, 19 Ann. Cas. 932, 67 S. E. 673; Watson v. Molden, 10 Idaho, 570, 79

tain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question, and if a gift or contract, made in favor of him who holds the position of influence, is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted *as if between strangers*; that the weaker was not unduly impressed by the natural influences of the stronger, or the inexperienced overreached by him of mature intelligence. The exception does not apply to wills.³⁷ One of the most important requisites of the validity of these transactions between persons acting under the influence of these confidential relations is, that the party presumably under the influence of the other should have had independent advice from a lawyer, who is devoted entirely to the interest of the party he is called upon to advise, and in whom that party has entire confidence.³⁸ This rule applies, for ex-

Pac. 503; *Beach v. Wilton*, 244 Ill. 413, 91 N. E. 492; *Hays v. Feather*, 244 Ill. 172, 18 Ann. Cas. 538, 91 N. E. 97; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74; *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58; *Hoeb v. Maschinot*, 140 Ky. 330, 131 S. W. 23; *Cumberland, C. & I. Co. v. Parish*, 42 Md. 598; *Trumbull v. January*, 123 Mich. 66, 81 N. W. 970; *Street v. Goss*, 62 Mo. 226; *Belden v. Belden*, 139 App. Div. 437, 124 N. Y. Supp. 225; *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. 218; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Atkins v. Withers*, 94 N. C. 581; *Wolf v. Harris*, 57 Or. 276, 106 Pac. 1016, 111 Pac. 54; *Ewan v. Louthan*, 110 Va. 575, 66 S. E. 869; *Bergeron v. Miles*, 88 Wis. 397, 43 Am. St. Rep. 911, 60 N. W. 783. The mere fact

of acquaintance and friendly relations would not justify a plaintiff in assuming that the defendant was not consulting his own interests rather than plaintiff's, in a purely business transaction: *Bosley v. Monahan*, 137 Iowa, 650, 112 N. W. 1102; *Beach v. Wilton*, 244 Ill. 413, 91 N. E. 492; *Lindley v. Kemp*, 38 Ind. App. 355, 76 N. E. 798; *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422; *Beare v. Wright*, 14 N. D. 26, 8 Ann. Cas. 1057, 69 L. R. A. 409, 103 N. W. 632; *Johnson v. Savage*, 50 Or. 294, 91 Pac. 1082.

³⁷ *Parfitt v. Lawless*, L. R. 2 P. & D. 468.

³⁸ *Pironi v. Corrigan*, *supra*. In *Rhodes v. Bate*, L. R. 1 Ch. App. 257, Lord Justice Turner says: "I take it to be a well-established principle of this court, that persons standing in a

ample, to agents.³⁹ It is possible for an agent dealing directly with his principal to make a contract which the courts will uphold, but such transactions, to be maintained, must be characterized by the utmost good faith. There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent, which might influence the principal; and the burden of establishing the perfect fairness of the contract, in such cases, rests upon the agent. Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked integrity, that *uberrima fides*, which removes all doubt respecting the fairness of the contract.⁴⁰ It applies to members of the learned professions: attorneys,⁴¹

confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, *unless they can show, to the satisfaction of the court, that the person by whom the benefits have been conferred had competent and independent advice in conferring them.*

³⁹ *Hemenway v. Abbott*, 8 Cal. App. 450, 97 Pac. 190; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666; *Webb v. Marks*, 10 Colo. App. 429, 51 Pac. 518; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Watson v. Clark* (Iowa), 122 N. W. 913; *Drefahl v. Security Sav. Bank*, 132 Iowa, 563, 107 N. W. 179; *Kerby v. Kerby*, 57 Md. 345; *Evans v. Evans*, 196 Mo. 1, 93 S. W. 969; *Duesman v. Hale*, 55 Neb. 577, 76 N. W. 205; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Poag v. Poag*, 1 Hill Eq. (S. C.) 285; *Hobart v. Vail*, 80 Vt. 152, 66 Atl. 820; *Jackson v. Pleasanton*, 95 Va. 654, 29 S. E. 680; *Dunne v. English*, L. R. 18 Eq. 524, 21 L. T. R., N. S., 75.

⁴⁰ *Condit v. Blackwell*, 22 N. J.

Eq. 481; *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Moore v. Moore*, 5 N. Y. 256; *Ex parte Lacey*, 6 Ves. 625, 31 Eng. Reprint, 1228; *Brookman v. Rothschild*, 3 Sim. 153, 57 Eng. Reprint, 957; *Rothschild v. Brookman*, 2 D. & C. 188, 6 Eng. Reprint, 699; *Gillett v. Peppercorne*, 3 Beav. 78, 49 Eng. Reprint, 31.

⁴¹ *Kidd v. Williams*, 132 Ala. 140, 56 L. R. A. 879, 31 South. 458; *Little v. Knox*, 96 Ala. 179, 11 South. 443; *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568; *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720; *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; *Boyle v. Read*, 138 Ill. App. 153; *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000; *Ryan v. Ashton*, 42 Iowa, 365; *Yeamans v. James*, 27 Kan. 195; *Palm v. Howard*, 129 Ky. 668, 112 S. W. 1110; *Carter v. West*, 93 Ky. 211, 14 Ky. Law Rep. 191, 19 S. W. 592; *Dunn v. Record*, 63 Me. 17; *Etsel v. Duncan*, 112 Md. 346, 350, 76 Atl. 493; *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564; *Hill v. Hall*, 191 Mass. 253, 77 N. E.

clergymen,⁴² and physicians.⁴³ It includes also partners,⁴⁴ trustees,⁴⁵ guardians,⁴⁶ and executors and administrators.⁴⁷ A similar rule is applied in the dealings of a *parent with his child*, when the circumstances are such that undue influence may naturally be inferred,⁴⁸ and to the dealings of a child with an old or infirm parent, when the circumstances are such that the former assumes a fiduciary

831; *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Hamilton v. Allen*, 86 Neb. 401, 125 N. W. 610; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922; *Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067; *Matter of Holland*, 110 App. Div. 799, 801, 97 N. Y. Supp. 202; *Couse v. Horton*, 23 App. Div. 198, 49 N. Y. Supp. 132; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Phipps v. Willis*, 53 Or. 190, 18 Ann. Cas. 119, 96 Pac. 866, 99 Pac. 935; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B, 181, 77 Atl. 201, 217; *Miles v. Ervin*, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623; *Planters' Bank v. Hornberger*, 4 Cold. (Tenn.) 531; *Barnes v. McCarthy* (Tex. Civ. App.), 132 S. W. 85, 87; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806; *Vanassee v. Reid*, 111 Wis. 303, 87 N. W. 192; *Jones v. Byrne*, 149 Fed. 457, 464; *United States v. Coffin*, 83 Fed. 337; *Pacific Ry. Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Holman v. Loynes*, 18 Jur. 839, 4 De Gex, M. & G. 270, 39 L. J. Ch. 529, 2 W. R. 205, 43 Eng. Reprint, 510. See note on "Assignment or Conveyance by Client to Attorney," in *Phipps v. Willis*, 18 Ann. Cas. 123.

⁴² *Good v. Zook*, 116 Iowa, 582, 88 N. W. 376.

⁴³ *Cadwallader v. West*, 48 Mo. 483; *Woodbury v. Woodbury*, 141

Mass. 329, 55 Am. Rep. 479, and note, 5 N. E. 275; *Unruh v. Lukens*, 166 Pa. 324, 31 Atl. 110. There is a Pennsylvania decision (*Audenreid's Appeal*, 89 Pa. 114, 33 Am. Rep. 731), to the contrary, but it is generally conceded to be bad law.

⁴⁴ *Maddeford v. Austwick*, 1 Sim. 89, 57 Eng. Reprint, 512.

⁴⁵ *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Porter v. Woodruff*, 36 N. J. Eq. 174.

⁴⁶ *Meek v. Perry*, 36 Miss. 190; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587, 19 N. E. 287; *Trader v. Lowe*, 45 Md. 1.

⁴⁷ *Humphreys v. Burleson*, 72 Ala. 1; *Statham v. Ferguson*, 25 Gratt. (Va.) 28; *Warner v. Warner*, 18 Abb. N. C. (N. Y.) 151.

⁴⁸ *Cooley v. Stringfellow*, 164 Ala. 460, 51 South. 321; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Miller v. Simonds*, 72 Mo. 669; *Bradshaw v. Yates*, 67 Mo. 221; *Justice v. Justice* (N. J. Eq.), 18 Atl. 674; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Miskey's Appeal*, 107 Pa. 611; *Cox v. Adams*, 35 Can. S. Ct. 393. See note on "Presumption and Burden of Proof of Undue Influence in Case of Conveyance Inter Vivos by Child to Parent," to *Hayes v. Feather*, 18 Ann. Cas. 539.

relation.⁴⁹ In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor. The same rule as to the burden of proof applies with equal, if not greater, force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child with whom the parent makes his home, and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren.⁵⁰ A voluntary conveyance by a child to its parent, during minority or within a short time thereafter, and while still under the parental control, is presumptively void. The burden is upon the parent to show, in the clearest and most satisfactory manner, that it is in every particular worthy of receiving the sanction of a court of equity.⁵¹ In the case last cited, a deed by a daughter conveying a life estate to her father, executed on the eve of her marriage, improvidently, without time for deliberation, and without any independent advice, was set aside, although the daughter testified that the father used no undue influence to induce

⁴⁹ *Martin v. Martin*, 1 Heisk. (Tenn.) 644; *Highberger v. Stiffer*, 21 Md. 338, 83 Am. Dec. 593; *Simpler v. Lord*, 28 Ga. 52; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Thorn v. Thorn*, 51 Mich. 167, 16 N. W. 324; *Day v. Day*, 84 N. C. 408; *Smith v. Loafman*, 145 Pa. 628, 23 Atl. 395; *Glover v. Hayden*, 4 Cush. (Mass.) 580; *Harrington v. Grant*, 54 Vt. 236; *Deem v. Phillips*, 5 W. Va. 168. See *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389, for an excellent disquisition on the subject and a carefully selected collection of cases. See

notes on "Presumption and Burden of Proof of Undue Influence in Case of Conveyance Inter Vivos by Parent to Child," to *Burton v. Burton*, 17 Ann. Cas. 989, and *Smith v. Smith*, 35 L. R. A., N. S., 944.

⁵⁰ *Taylor v. Taylor*, 8 How. (U. S.) 183, 12 L. Ed. 1040; *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747, 9 Sup. Ct. Rep. 420; *Mackall v. Mackall*, 135 U. S. 167, 34 L. Ed. 84, 10 Sup. Ct. Rep. 705; *Towson v. Moore*, 173 U. S. 17, 43 L. Ed. 597, 19 Sup. Ct. Rep. 332.

⁵¹ *Miller v. Simonds*, 72 Mo. 669.

her to sign it. So in the case of a voluntary deed from a son to a father, especially if the former is in an enfeebled state of health, the burden of proof is cast on the father to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and equitable.⁵² The same rule applies to donations made by a child to a parent recently after the child attains majority, or while he is under the constant and immediate influence of the parent, or while his property is in the possession or under the control of the parent.⁵³ A presumption of undue influence arises against a child in cases of gifts or conveyances to him from his aged or infirm parent, and the burden of proof is upon the beneficiary to show the entire good faith of the transaction.⁵⁴ From the confidential relations which exist between *husband and wife*, a presumption of undue influence arises in relation to any transfer of property between them, and in order to sustain a conveyance or gift by the wife to the husband, the burden of proof is upon him to show that the transaction was freely and deliberately made, and that it was fair and proper.⁵⁵ The relations between *brother and sister* may be of such reciprocal affection and confidence as to cast upon the one benefited the burden of proof to show the exact fairness of a transaction between them by which he or she is benefited.⁵⁶ A relation of trust and confidence exists between a *spiritualistic medium* and a believer in his alleged powers, so peculiar that where an advantage is gained through a contract by the former against the latter, a presumption of undue influence arises against the medium, which casts the burden of proof upon him to show that the contract was obtained by perfectly fair

⁵² Miskey's Appeal, 107 Pa. 611; Bradshaw v. Yates, 67 Mo. 221; Williams v. Williams, 63 Md. 371.

⁵³ Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918.

⁵⁴ Spargur v. Hall, 62 Iowa, 498,

17 N. W. 743; Fitch v. Reiser, 79 Iowa, 34, 44 N. W. 214.

⁵⁵ Boyd v. De la Montagnie, 75 N. Y. 498, 29 Am. Rep. 197; Farmer v. Farmer, 39 N. J. Eq. 211.

⁵⁶ Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1.

means and free from any undue influence whatever.⁵⁷ Where a person, living in *illicit sexual relations* with another, transfers to such person valuable property, especially when the donor in making the gift excludes natural objects of his bounty, the transaction will be viewed with the utmost suspicion, and the burden of proof rests on the donee to show that the transaction was the result of free volition, and not superinduced by undue influence.⁵⁸ The principles which govern the dealings of one standing in a confidential or fiduciary relation apply to persons who clothe themselves with a character which brings them within the range of the principle.⁵⁹ The rule is not limited to cases arising out of the relations which have been mentioned above, but applies in every case where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. In all such cases a presumption of undue influence is implied, and the burden of proof is upon the person taking securities or contracts inuring to his benefit to show that the transaction is just and fair.⁶⁰ Where a young man shortly after becoming of age conveyed his property for a grossly inadequate sum, while so ill that it was not believed that he could recover, to a woman who had been

⁵⁷ Connor v. Stanley, 72 Cal. 556, 1 Am. St. Rep. 84, and note, 14 Pac. 306; Leighton v. Orr, 44 Iowa, 679.

⁵⁸ Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Leighton v. Orr, 44 Iowa, 679.

⁵⁹ Reed v. Peterson, 91 Ill. 288.

⁶⁰ Fisher v. Bishop, 108 N. Y. 25, 2 Am. St. Rep. 357, 15 N. E. 331. So one who has obtained from a woman who is old and feeble in intellect, and who has put herself in his power in a transaction which particularly concerns his interests, a mortgage as security for the debt of another, without the knowledge of her family, is compelled to show, in support of the mortgage, that the woman

fully understood what she was doing, and that he had not abused the confidence thus reposed in him: Wartemberg v. Spiegel, 31 Mich. 400. And where an aged and infirm woman, a few days before her death, which resulted from an accident, conveyed the most of her property to a young man, who stood in the relation of an adopted son to her, and in whom she trusted, thus disinheriting her legal heirs, with whom she was friendly, and who were kept in ignorance of the transfer, the presumption of undue influence arises, and the burden of proof is upon the grantee to rebut the presumption: Davis v. Dean, 66 Wis. 100, 26 N. W. 737.

a member of the household since the grantor was four months old, who had always been his nurse, instructor, and manager of his property, and in whom he confided, the burden of proof was upon the grantee to show that the transaction was fair and honest, and that the deed was not procured by undue influence.⁶¹ And generally when contracts are executed by persons of very weak minds arising from age or sickness, intoxication or any other cause, although not amounting to absolute disqualification, undue influence by the person benefited by the transaction will be readily inferred; the burden of showing that the transaction is fair is placed upon the one so benefited.⁶² So when a note is taken from an habitual drunkard of weak intellect, the burden of proof is upon the person taking it to show a fair case, good consideration, and lack of undue influence.⁶³ When a person who is imbecile from habitual intoxication executes a voluntary and absolute deed of gift of all his property to his cousin, to the exclusion of his half-sisters, a presumption of undue influence arises, which must be rebutted by clear proof by the grantee before the deed will be allowed to stand.⁶⁴

§ 191 (189). Same—In respect to wills written by or for beneficiary.—It may be laid down as a general rule

⁶¹ Worrall's Appeal, 110 Pa. 349, 1 Atl. 380, 765. A conveyance by a nephew, a simple, ignorant, young man, to his uncle, an attorney at law, for an inadequate consideration, is presumptively obtained by undue influence: *Hall v. Perkins*, 3 Wend. (N. Y.) 626. In *Pressley v. Kemp*, 16 S. C. 334, 42 Am. Rep. 635, it was held, however, that a voluntary conveyance by an aged, feeble, and unmarried woman of her property which she had previously willed to charities, to a young unmarried man, twelve days before her death, in whose family she was living and to whom she was strongly attached, and who had acted as her agent, is not presumptively

void as having been obtained through undue influence.

⁶² *Moore v. Moore*, 56 Cal. 89; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Hale v. Brown*, 11 Ala. 87; *Samuel v. Marshall*, 3 Leigh (Va.), 567; *Harraway v. Harraway*, 136 Ala. 499, 34 South. 836; *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135. For general discussion, see note to *Richmond's Appeal*, 21 Am. St. Rep. 94, to which we acknowledge our obligation for useful propositions.

⁶³ *Hale v. Brown*, 11 Ala. 87.

⁶⁴ *Samuel v. Marshall*, 3 Leigh (Va.), 567.

that the existence of a confidential relation between the testator and a legatee, such as guardian and ward, attorney and client, physician and patient, or religious adviser and layman, gives peculiar opportunities outside of the family relation for unduly influencing the mind of a testator, and creates a grave suspicion that such influence was exercised; so that whenever it appears that the will was executed through the intervention of one occupying such favored relation to his especial advantage, the presumption of undue influence arises, and the suspicion must be put to rest by evidence adduced to sustain the validity of the will by showing it to be the free and voluntary act of the testator.⁶⁵ Undue influence will not be presumed, but the party asserting it assumes the burden of proving its existence.⁶⁶ If there are testamentary capacity and knowledge on the part of the testator of the contents of the will, and the testamentary requirements of the statute are complied with in its execution, it can be avoided only by proof of influence amounting to force or coercion; and the burden is upon the party making the allegation of showing that the testator was imposed upon or overcome by the act or practices of the beneficiary.⁶⁷ In the case of absence of direct proof, the charge of undue influence must be established by such an array of circumstances as to make the inference of its exercise irresistible. The con-

⁶⁵ In the valuable note to Richmond's Appeal, 21 Am. St. Rep. 94, referred to, will be found much useful information on this subject. When confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of proof upon the person benefited, to show that the confidential relation has been, as to that transaction at least, suspended, and that it

was fairly conducted as between strangers: *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. 218.

⁶⁶ *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Matter of Nelson's Will*, 97 App. Div. 212, 89 N. Y. Supp. 865; *Matter of Mondorf*, 110 N. Y. 450, 18 N. E. 256.

⁶⁷ *Matter of Martin*, 98 N. Y. 193; *Matter of Mabie*, 5 Misc. Rep. 179, 183, 24 N. Y. Supp. 855; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Matter of Williams* (*Carpenter v. Hall*), 64 Hun, 636, 19 N. Y. Supp. 778.

testant must show facts utterly inconsistent with the hypothesis of the execution of the will by any other means than undue influence.⁶⁸ The existence of confidential relations between the testator and legatee or devisee excites the suspicion and jealousy of the court, and casts upon the proponent of the will the duty of showing by affirmative evidence the testator's capacity, volition, and free agency.⁶⁹ The subject divides itself into the two classes suggested by the headline to this section—those in which the will is written by or at the direction of the beneficiary and those in which that fact is not an element in the alleged undue influence. On an analogous principle to that discussed in the last section it has been held that, when the draftsman of a will is a stranger to the blood of the testator and there is a provision in the will giving him a considerable legacy, there is a presumption that the testator does not know the contents of the will, and that the burden is upon the proponent to rebut this presumption.⁷⁰ But the mere fact that the *writer of a will is a beneficiary* under it does not defeat the will; and it may be laid down that such fact only changes the burden of proof according

⁶⁸ Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Webber v. Sullivan, 58 Iowa, 260, 12 N. W. 319; King v. King (Ky.), 42 S. W. 347; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880; Gibony v. Foster, 230 Mo. 106, 130 S. W. 314; Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641; Sehr v. Lindemann, 153 Mo. 276, 54 S. W. 537; Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650; In re Hall's Estate, 68 Misc. Rep. 581, 125 N. Y. Supp. 253; Gardiner v. Gardiner, 34 N. Y. 155; Loder v. Whelpley, *supra*; Marx v. McGlynn, 88 N. Y. 357; Matter of Murphy, 41 App. Div. 153, 58 N. Y. Supp. 450; Matter of Snelling, 136 N. Y. 515, 32 N. E. 1006; Matter of Lyddy's Will, 53 Hun, 629,

5 N. Y. Supp. 639; Salter v. Ely, 56 N. J. Eq. 357, 39 Atl. 365; Salinas v. Garcia (Tex. Civ. App.), 135 S. W. 588; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682. But in Michigan it is held that where will is drawn by legatee, the burden rests on proponents: Bush v. Delano, 113 Mich. 321, 71 N. W. 628.

⁶⁹ Daniel v. Hill, 52 Ala. 430; Moore v. Spier, 80 Ala. 129; Jones v. Roberts, 37 Mo. App. 163; Herster v. Herster, 116 Pa. 612, 11 Atl. 410; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7.

⁷⁰ Hughes v. Meredith, 24 Ga. 325, 71 Am. Dec. 127; Tompkins v. Tompkins, 1 Bail. (S. C.) 92, 19 Am. Dec. 656. As to burden of proof as to testamentary capacity, see § 189, *ante*.

to circumstances. The burden of proving capacity, as shown in previous sections hereof, and the fact of execution are upon the proponent; and from these facts the knowledge and assent of the testator are generally implied. We cannot persuade ourselves that the weight of authority shows that there is no presumption of fraud or undue influence from the mere fact that the will contains provisions beneficial to the scrivener, although he is the attorney of the testator. There is undoubtedly a conflict on the point, due mainly to the New York decisions which rest themselves on the proposition that the rule which prevails as to transactions *inter vivos* between client and attorney does not apply to a will made by the client in favor of his attorney.⁷¹ Not only do these cases conflict with the older New York cases, but they establish this fallacious proposition, that in a dealing between attorney and client in the lifetime of the latter, the transaction being questioned, the attorney must show *uberrima fides*, the client being competent to challenge it; but when the client is dead, the transaction in the nature of a will, kept ordinarily secret till the death of the only other one who could speak definitely of its terms is lifted beyond the pale of attack and the attorney surrounded with "a divinity that doth hedge a king"! Let us now see what other courts have said. In Pennsylvania it has been held that where the testator was an aged man, and it appeared that his mind, originally strong, was impaired, and that the will was prepared by his confidential adviser, who was made a devisee, to the deprivation of legatees named in a former will, the burden of proof was on such confidential adviser and beneficiary to show affirmatively that, at the time of the execution of the last will, the testator was informed

⁷¹ In re Smith, 95 N. Y. 516; In re Suydam's Will, 84 Hun, 514, 32 N. Y. Supp. 449; Haughian v. Conlan, 86 App. Div. 290, 83 N. Y. Supp. 830; In re Weed's Will, 143 App. Div. 822, 127 N. Y. Supp. 966; In re Kindberg's Will, 141 App. Div. 188, 126

N. Y. Supp. 33. In the last-named case the court says the fact that the principal beneficiary was the testator's attorney and prepared the will and superintended its execution, standing alone, would not be sufficient to warrant an inference of undue influence.

and had knowledge of the approximate amount of his estate, and the proportionate amount thereof which would pass to such devisee thereby, and that the testator's mind was free from undue influence exercised by such adviser.⁷² Where the testator is aged, the fact that a person whose advice has been sought and taken by the testator receives a large benefit under the will raises a presumption of undue influence, and the burden rests on the beneficiary to rebut the presumption affirmatively, and show mental capacity and the absence of undue influence.⁷³ In Virginia, it is determined that where an attorney writes a will under which he takes a benefit, it is a circumstance to excite the suspicion of the court, and to call upon it to be vigilant and jealous in examining the evidence in support of the will, which ought not to be pronounced valid until the suspicion is removed, and it is satisfactorily established to be the free and voluntary act of the testator.⁷⁴ We feel that one in such close confidential relation with testator as his attorney is called upon, where he is a beneficiary under a will written by himself, to negative the suspicion of undue influence which the very existence of the will undoubtedly suggests. The mere fact that the person writing the will is made a legatee under it, while it is a suspicious circumstance, does not, it seems, alone raise any legal presumption of undue influence. Thus the fact that a will was drawn by a favored legatee does not, of itself, invalidate it.⁷⁵ Nor will the fact that the draftsman of the will was made the executor, and that his relatives received a large part of the property devised, raise any presumption of undue influence over the testator.⁷⁶ And so where an attorney and confidential friend was appointed executor but was not named as legatee.⁷⁷ In other cases

⁷² *Yardley v. Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765.

⁷³ *Wilson v. Mitchell*, 101 Pa. 495.

⁷⁴ *Riddell v. Johnson*, 26 Gratt. (Va.) 152.

⁷⁵ *Rusling v. Rusling*, 36 N. J. Eq. 603.

⁷⁶ *Carter v. Dixon*, 69 Ga. 82; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690.

⁷⁷ *Appeal of Livingston*, 63 Conn. 68, 26 Atl. 470.

the weight of authority is that there is no presumption of undue influence from the mere fact of the will containing provisions beneficial to the writer of it, although he happens to hold some confidential or fiduciary relation with the testator; and in such cases it is incumbent upon the person attacking the will to give some evidence tending to show fraud or undue influence.⁷⁸ These decisions strengthen the views we expressed. *Expressio unius, exclusio alterius*, and the presumption in the case of a non-professional man of no influence, so described in the various opinions, strengthens, however indirectly, the necessity for greater guard in the case of the professional adviser. For even though the fact is that the writer of the will is nonprofessional and that *undue influence* may not be predicated on that alone, yet when the *draftsman* of a will provides for a *legacy for himself*, it is a *suspicious* circumstance of more or less weight according to the degree of relationship, the amount of the legacy and all the other circumstances of the case.⁷⁹ It is a circumstance which calls for the scrutiny of the court and which may have great weight on the question of undue influence, or in leading to the conclusion that the testator did not know the real nature of the instrument.⁸⁰ The same rule obtains although the will is not written by the beneficiary, if he procures it to be drawn and dictates its contents. *Qui facit per alium, facit per se*.⁸¹ Although in the class of cases under consideration stronger proof of the knowledge of the contents of a will on the part of the testator may be required, such evidence may be circumstantial in its nature.⁸² The fact of a trifling legacy to the attorney who

⁷⁸ *Montague v. Allen*, 78 Va. 592, 49 Am. Rep. 384; *Carter v. Dixon*, 69 Ga. 82; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Horah v. Knox*, 87 N. C. 483; *Critz v. Pierce*, 106 Ill. 167.

⁷⁹ *Beall v. Mann*, 5 Ga. 456; *Garratt v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 South. 326; *Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Rusling v. Rusling*, 36 N. J. Eq.

603; *In re Barney's Will*, 70 Vt. 352, 40 Atl. 1027.

⁸⁰ See cases last cited and also cases cited in note to *Hughes v. Meredith*, 71 Am. Dec. 129-134, and note to *Snodgrass v. Smith*, 15 Ann. Cas. 551.

⁸¹ *Delafield v. Parish*, 25 N. Y. 9.

⁸² *Raworth v. Marriott*, 1 Mylne & K. 643, 39 Eng. Reprint, 824; *Nexsen v. Nexsen*, 3 Abb. Dec. (N. Y.) 360.

drew the will should neither, on the principle of *de minimis*, affect the document or the gift, or interfere with the well-considered principles which otherwise regulate dealings between professional men in confidential situations and those with whom the dealings are conducted. Where the testator has excluded the natural objects of his bounty, the circumstances develop a source of inquiry.⁸³

§ 191a (189). Same—Wills not written by beneficiary—Exclusion of natural objects of bounty.—The courts have presumed that *undue influence* had been used and have thrown upon the legatees or devisees the burden of rebutting by satisfactory evidence the presumption in numerous cases where the beneficiaries were in a situation to take advantage of a confidential relation sustained toward the testator, as where the testator excluded the natural objects of his bounty and then made bequests to his attorney,⁸⁴ or to other persons in such confidential relations.⁸⁵ Thus where the relation of guardian and ward

⁸³ See next section.

⁸⁴ *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Yardley v. Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, and note, 22 Atl. 82. See, also, *Riddell v. Johnson's Ex.*, 26 Gratt. (Va.) 152.

⁸⁵ *In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787; *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597; *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Hutchinson v. Hutchinson*, 250 Ill. 170, 95 N. E. 143; *Huffman v. Graves*, 245 Ill. 440, 92 N. E. 289; *Brackey v. Brackey*, 151 Iowa, 99, 130 N. W. 370; *Barber's Exr. v. Baldwin*, 138 Ky. 710, 128 S. W. 1092; *Gillispie's Exr. v. Gillispie* (Ky.), 128 S. W. 1078; *In re Du Bois*, 164 Mich. 8, 17 Det. Leg. N.

1017, 128 N. W. 1092; *McConnell v. Woodworth* (*Woodworth's Estate*), 162 Mich. 683, 17 Det. Leg. N. 645, 127 N. W. 808; *Kletschka v. Kletschka*, 113 Minn. 228, 129 N. W. 372; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7; *Aumack v. Jackson*, 78 N. J. Eq. 189, 78 Atl. 749; *Byard v. Conover*, 39 N. J. Eq. 244, where the bequest was to a housekeeper; *In re Hock's Will*, 74 Misc. Rep. 15, 129 N. Y. Supp. 196; *Seaman v. McLaury*, 142 App. Div. 547, 127 N. Y. Supp. 1; *In re Crumb's Estate*, 127 N. Y. Supp. 269; *In re Kindberg's Will*, 141 App. Div. 188, 126 N. Y. Supp. 33; *In re Frank's Will*, 124 N. Y. Supp. 171; *Auld v. Cathro*, 20 N. D. 461, Ann. Cas. 1913A, 90, 32 L. R. A., N. S., 71, 128 N. W. 1025; *Greenwood v. Cline*, 7 Or. 17, where, under peculiar circum-

existed at the time of the execution of a gift or devise from one to the other, and the parties were so situated with reference to each other that undue influence could have been used, the law presumes that it was used, and the one seeking to derive advantage from the gift or devise must rebut the presumption by competent and convincing proof.⁸⁶ Where a bequest to the wife of the guardian by the ward was made, it was, in the case last cited, held to be within the operation of this rule. Again, where a person makes a will in favor of his priest, or spiritual or religious adviser, to the exclusion of the heirs and natural objects of the testator's bounty, the law presumes undue influence and some proof besides the making of the will is required, in order to sustain it.⁸⁷ So where a convert to spiritualism, whose life was dominated thereby, and who was influenced by the person through whom he had embraced that belief to become alienated from his wife and child, made a will in favor of his adviser, these facts are sufficient to raise the presumption of undue influence.⁸⁸ But where a testatrix, by will executed five days before her death, gave the bulk of her estate to her spiritual adviser, to the exclusion of her sisters, but there was no direct evidence of undue influence, and the testatrix had formerly expressed an intention to omit her sisters from her will, it was decided that the presumption of undue influence did not arise.⁸⁹ The necessity of the beneficiary bearing the burden of proof is increased if in addition there exists the infancy of the testator. During that period bequests by will, gifts, grants, or donations obtained from the ward by the guardian; from *cestui que trust* by trus-

stances, children received the whole inheritance to the exclusion of others; Snyder v. Erwin, 229 Pa. 644, 140 Am. St. Rep. 737, 79 Atl. 124; Breining v. Born, 230 Pa. 24, 79 Atl. 167.

⁸⁶ Meek v. Perry, 36 Miss. 190; Garvin v. Williams, 44 Mo. 465, 100

Am. Dec. 314, and note; Bridwell v. Swank, 84 Mo. 455.

⁸⁷ Marx v. McGlynn, 88 N. Y. 357; Schofield v. Walker, 58 Mich. 96, 24 N. W. 624.

⁸⁸ Thompson v. Hawks, 14 Fed. 902, 11 Biss. 440.

⁸⁹ Figueira v. Taafe, 6 Dem. (N. Y.) 166.

tee, from child by parent, or from client by attorney, are watched with great and jealous scrutiny, and generally held to be presumptively void and obtained through undue influence. A bequest by will from ward to guardian is presumed void, and will not be allowed to stand if the period between the making of the will and the coming of age of the ward is short, unless it is shown most satisfactorily, and beyond a reasonable doubt, that there exists the utmost good faith on the part of the guardian. Where it appeared that the devisee had been appointed the guardian of the testator when the latter was a child; and from the time of such appointment until his death he resided in the family of the guardian; that the latter had exclusive control and management of his estate, and his entire confidence; that just prior to arriving at age, a settlement was had between them, and on the next day the ward made his will in favor of the guardian and his family, almost totally disinheriting his relatives; that at the time he was too ill to attend to business, and showed no interest in what was going on, and about a month afterward died, it was held that the will was presumptively void and the burden of proving its validity was upon the beneficiaries under it.⁹⁰ If a testator is under guardianship as a *non*

⁹⁰ *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314, to which is appended the following reference to other Missouri decisions: The law looks with distrust and suspicion upon all transactions where persons occupying special or confidential relations seek to obtain an advantage inconsistent with their position: *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491. The doctrine of undue influence is chiefly invoked between guardian and ward, parent and child, principal and agent, and patient and medical adviser, though it is not confined to these narrow limits. In all such cases there exists no necessity to show fraud or imposition practiced on the

one bestowing the confidence that is presumed, and it is only necessary to show that during the pendency of the intimate relations the conveyance was made; the burden of proof is then on the beneficiary to show the honesty and utmost good faith in the transaction: *Street v. Goss*, 62 Mo. 226; *Garvin v. Williams*, 50 Mo. 206; *Ranken v. Patton*, 65 Mo. 378; *McKinney v. Hensley*, 74 Mo. 326; *Caspari v. First German Church*, 82 Mo. 649, 652, 12 Mo. App. 293; *Bridwell v. Swank*, 84 Mo. 455; *Miller v. Simonds*, 5 Mo. App. 33; *Miller v. Lullman*, 11 Mo. App. 419, all citing *Garvin v. Williams*, *supra*.

compos mentis, he is *prima facie* incapable of making a will, and a presumption of undue influence arises against his guardian, who is also made a legatee and executor under such will, and it is incumbent on the latter to show affirmatively, beyond a reasonable doubt, that the testator had both mental capacity and freedom of will and action, such as are requisite to render a will legally valid.⁹¹ Accordingly, where a testator seventy years of age and an habitual drunkard for fifty years, several years prior to his death had inherited some money, at which time a guardian of his person and property was appointed, subsequently went to live with his brother, who offered him a home so long as he should live, with full opportunity to drink when and what he pleased, and who resisted the efforts of his guardian to remove him, and he, the testator, had been drinking on the day that he executed his will making his brother sole legatee, these facts are sufficient to raise a presumption of undue influence, and to justify the jury in finding that it was exercised.⁹² Where a will is unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the members of his family, the presumption of undue influence is raised, and the burden of proof is thrown on the proponents of the will to give at least some reasonable explanation of its unnatural character, and to show that it was not the result of mental defect or perversion.⁹³ Where a testator, without apparent cause, virtually disinherits four out of six children, or their descendants, giving to two sons substantially all his property, such gross inequality in the disposition of his estate places on the proponents of the will the burden of proof to show its validity and freedom from their undue influence.⁹⁴ And again, where the estate was bestowed upon one daughter, to the exclusion of other children having equal claim upon the testator, the favored child being alone present at the

⁹¹ Breed v. Pratt, 18 Pick. (Mass.) 115.

⁹² Will of Slinger, 72 Wis. 22, 37, N. W. 236.

⁹³ In re Budlong, 18 Civ. Proc. Rep. 18, 7 N. Y. Supp. 289.

⁹⁴ Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7.

time of the execution of the will, and the transaction kept secret from the other children, while the testator became imbued with a groundless suspicion and aversion of a son with whom such testator had formerly lived, while it also appeared that the testator, during his last sickness, made large donations to the legatee named in the will, and one day before his death canceled a mortgage held against such legatee, all of which was kept secret from the other children, these facts were sufficient to raise a presumption of undue influence.⁹⁵ If a will was copied from a writing made by one who, by its terms, was to receive a large part of the testator's estate, to the exclusion of his heirs, and the testator was aged, infirm, and unable to read, the presumption of undue influence arises, and proof alone of the formal execution of the will does not entitle it to probate. The beneficiary must also show that the testator correctly understood the contents of the paper signed by him.⁹⁶ But, as a rule, the burden of proof is *not changed by the fact that there are inequalities* or injustice in respect to some of the testator's children. Inequality, or even injustice, toward some of the testator's children, in the amounts given them by the will, does not raise the presumption of undue influence. It is not raised by proof of interest and opportunity alone;⁹⁷ nor does such presumption arise from the

⁹⁵ Greenwood v. Cline, 7 Or. 17.

⁹⁶ Kelly v. Settegast, 68 Tex. 13, 2 S. W. 870. In Byard v. Conover, 39 N. J. Eq. 244, where a single man seventy-two years of age, while dying, signed a will giving his property to his housekeeper, who had lived with him for years, and who had prepared the paper four years previously, and had repeatedly requested him to sign it, and none of the testator's brothers or sisters were present, or informed thereof, although one brother lived in an adjoining house, it was decided that these facts raised a presumption of undue influence and want of capacity in the testator

to execute his will, and it was accordingly refused probate. Where a testator, after making his will, became an inmate of the house of his brother in law, and being feeble and decrepit, was detained there against his will, plied with false statements and induced to alter it in favor of other persons, the presumption of undue influence is raised, and the burden of proof is on those claiming under the will to show that it was the free act of the testator: Swenarton v. Hancock, 22 Hun (N. Y.), 38.

⁹⁷ Turnure v. Turnure, 35 N. J. Eq. 437.

fact that the testator was on his death-bed, surrounded by certain of his children, who were benefited by his will, while another child, who was the contestant, was absent.⁹⁸ The facts that the testatrix was eighty-one years of age at the time of the execution of the will, and that she thereby gave to her daughter, with whom she and her husband had lived for more than twenty years, a larger share of her estate than she gave to her other daughters, although such legatee and her husband had received compensation for taking care of the testatrix's husband, who died before her, is not sufficient to raise the presumption of undue influence by such daughter over the testatrix.⁹⁹ So where a mother gave nearly all of her property to one of two sons, by will, at a time when she had *resentment* against the other son, because of a business transaction between them, and the son receiving the bulk of her estate was her business adviser and amanuensis, and gave instructions for the drawing of the will, and aided her in obtaining it from the attorney who drew it, it was decided that in the absence of proof of threats, restraint, or coercion of any kind, or of importunity or persuasion, inducing her to make the will, the presumption of undue influence was not raised.¹⁰⁰ But the terms "*unequal*" and "*unnatural*" must not be confused. An *unequal* disposition of property *per se* raises no presumption of undue influence, nor of testamentary incapacity, nor is it of itself unnatural; but the unequal treatment of those who ostensibly have equal claims upon the testator's bounty, or the preference of one to the exclusion of another, may under the circumstances of a particular case, be deemed *unnatural*. In such a case, an *unnatural* disposition is a fact to be ascertained and considered by the jury upon either of the issues stated.¹ There is no legal presumption against the valid-

⁹⁸ *Bundy v. McKnight*, 48 Ind. 502. See note on "Unnatural or Unreasonable Character of Will as Evidence of Undue Influence," to *Meier v. Buchter*, 7 Ann. Cas. 894.

⁹⁹ *Kise v. Heath*, 33 N. J. Eq. 239.

¹⁰⁰ *Dale v. Dale*, 36 N. J. Eq. 269.

¹ *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314, and cases therein cited.

ity of any provision which a husband may make in his wife's favor, for she may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in a condition to exercise his faculties as a free agent.² Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence, to vitiate the will.³ And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise the presumption of undue influence on her part.⁴ When a husband had made two wills, dividing his property between his wife and his sister, and a few days subsequent to the making of the second will, and after several days of his last illness he made another will, revoking the former ones, without apparent reason, and leaving all his property to his wife, this, in the absence of any other evidence of undue influence, will not raise the presumption of such influence so as to require the submission of that question to the jury.⁵ Where the husband asked an attorney to come to his dwelling, as his wife wanted him to draw her will, and the attorney wrote a will in accordance, with statements made by the husband as to what his wife wished, and subsequently took it to the wife, who was ill, and reading it to her, asked her if

² Latham v. Udell, 38 Mich. 238.

³ Hughes v. Murtha, 32 N. J. Eq. 288.

⁴ Rankin v. Rankin, 61 Mo. 295.

⁵ Will of Nelson (Stockton v. Thorn), 39 Minn. 204, 39 N. W. 143. In support of this rule, it was said in Small v. Small, 4 Me. 220-423, 16 Am. Dec. 253, that if a wife, by her virtues, has gained such an ascendancy over her husband, and has so riveted his affections, that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor,

even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will of such kind as to be peculiarly acceptable to her, and to the prejudice and disappointment of others.

it contained what she wished, and saying it did, she then executed it, giving all her property to her husband, with direction to give their grandson, their only descendant, a collegiate education, though she was over seventy years of age, it was decided that these facts were not sufficient to raise a presumption of undue influence on the part of the husband.⁶ The fact that the wife of a testator had both opportunity and motive, and that the will makes provision for her beyond what the law would have given her, creates no presumption of undue influence, nor does the fact that the will was executed six weeks after the testator had drawn a radically different will.⁷ Mere bad treatment of her children, by the wife, many years previous to the making of his will by the husband, although coupled with their disinheritance, does not necessarily raise the presumption of undue advantage by the wife; but in order to have that effect, it must be followed with proof showing that undue influence was acquired by her in consequence, and that it existed at the time that the will was executed.⁸ The services of a friend or relative of a testator may be lawfully urged as an argument to persuade him to the giving of a legacy, without raising the presumption of undue influence. Something is due to the dictates of humanity, and it must not be said of the child who attempts to soothe the last sufferings of a parent, that he is guilty of imposition, even if the allegation is made by those who have shielded themselves from suspicion of influence by carefully abstaining from offices of affection.⁹ So mere proof of earnest solicitations on the part of such

⁶ *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. 407.

⁷ *Mason v. Williams*, 53 Hun, 398, 6 N. Y. Supp. 479.

⁸ *Tingley v. Cowgill*, 48 Mo. 291. The presumption that undue influence was exerted by a mother on the testatrix is not raised, where it appears that the latter had been obliged by her husband's cruelty to leave him,

and return to her mother's house, where she died, leaving a will making the mother her sole legatee, and desiring her to have the care and custody of the testatrix's infant child in preference to the father: *Will of Andrews*, 33 N. J. Eq. 514.

⁹ *Estate of Williams*, 13 Phila. 302.

beneficiaries in procuring a will to be in their favor will not raise such presumption;¹⁰ since motives of natural affection and gratitude on the part of the testator and solicitations or arguments which appeal to such motives, do not constitute undue influence.¹¹ No presumption of undue influence arises from the fact that a bequest is made by the testator to one with whom he is living in *illicit intercourse*.¹² Nor is the presumption raised by the facts that a will was drawn by the confidential friend of the testator and that his wife was a beneficiary.¹³ The fact that the sole beneficiary under a will was the confidential business adviser of testatrix several years before her death does not cast the burden on him of proving the will to be the free act of the testatrix, where there is no evidence that he took advantage of his position or relation, or that he participated in the preparation or execution of the will, or knew of its existence and contents until after its execution.¹⁴ The presumption of undue influence does not arise from business or social relations existing between the testator and legatee or devisee in all cases. Therefore, the fact that the principal beneficiary was a partner of the testator at the time of his death, and for many years before, is not sufficient, of itself, to raise the presumption.¹⁵ Nor does the fact that the will was made in favor of one with whom the testatrix had not formerly been on

¹⁰ Wait v. Breeze, 18 Hun (N. Y.), 403.

¹¹ Will of Jackman, 26 Wis. 104; Will of Gleespin, 26 N. J. Eq. 523; McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590, where it was decided that the beneficiaries under the will, having by kind offices and congenial intercourse acquired considerable influence over the testatrix, and having requested her to make provision in her will in their favor, is not sufficient to establish the presumption of undue influence.

¹² Dickie v. Carter, 42 Ill. 376; Wainwright's Appeal, 89 Pa. 220;

Porschett v. Porschett, 82 Ky. 93, 56 Am. Rep. 880; Monroe v. Barkley, 17 Ohio St. 302, 93 Am. Dec. 620; Main v. Ryder, 84 Pa. 217; Will of Donnelly, 68 Iowa, 126, 26 N. W. 23, where the wife was testatrix. An extended note on the topic of "What Influence or Importunity Invalidates a Will" is appended to Small v. Small, 16 Am. Dec. 257.

¹³ Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384.

¹⁴ Wheeler v. Whipple, 44 N. J. Eq. 141, 14 Atl. 275.

¹⁵ Estate of Brooks, 54 Cal. 471.

friendly terms raise the presumption.¹⁶ While any of these facts, standing alone, is not enough to raise a presumption of undue influence and to change the general burden of proof, yet *such circumstances are to be considered* in connection with other facts; and when taken in connection with facts tending to show improper influence, they may have great weight.¹⁷ It is not necessary that undue influence be shown by direct evidence; for, more often than otherwise, it must be established, if at all, by collateral facts and circumstances; but the circumstances relied upon for that purpose will not be sufficient if, upon a fair review of the whole case, they are equally consistent with the theory of good faith.¹⁸

§ 192 (190). **Burden as to crimes—Fraud.**—Notwithstanding the law of burden of proof of crimes is so well settled, there have occasionally crept in difficult questions, such as we have dealt with, for instance where insanity is used as a defense. Between the application of the principles which regulate the burden in criminal cases and those purely civil cases such as those *ex contractu*, there lies another class—that of wrongs where fraud is alleged either in defense or support of a claim. On the general principle that the burden of proof is upon the actor, the one asserting a fact, he who alleges that another has committed a crime or wrongful act assumes the *onus probandi* in respect to such issue. But there is an additional reason for the application of the principle in such cases, which is that innocence and right conduct are to be presumed, rather than delinquency or crime—*Odiosa et inhonesta non sunt in lege praesumenda*. It is beyond the scope of this work to discuss the principle in its application to the

¹⁶ Estate of McDonald (Appeal of McCaully), 130 Pa. 480, 18 Atl. 617.

¹⁷ For a great deal of the matter in this section we acknowledge our indebtedness to the excellent note to Richmond's Appeal, 21 Am. St. Rep. 94.

¹⁸ Brackey v. Brackey, 151 Iowa, 99, 130 N. W. 370; Council v. Maybaw, 172 Ala. 295, 55 South. 314; Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641; In re Everett's Will, 153 N. C. 83, 68 S. E. 924.

criminal law. It suffices to call attention to the familiar rule that in criminal procedure the state has not only the burden of proving its claim by a preponderance of evidence, but *beyond a reasonable doubt*. In other words, if after the comparison and consideration of all the evidence the minds of the jurors are in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, the prosecution fails.¹⁹ On its *civil* side the law furnishes abundant illustrations that the burden of proof is upon the one who asserts that a wrong has been committed. As we have already seen, it is a familiar principle that the burden of proof is on him who complains of *negligence*. "He must not only show that he suffered harm in such a manner that it might be caused by the defendant's negligence, he must show that it was so caused; and to do this he must prove facts inconsistent with due diligence on the part of the defendant."²⁰ The principle is equally familiar in the law of *fraud*. Thus, while it is error to charge the jury that fraud must be proved "beyond reasonable doubt" by the party alleging it,²¹ or by "clear and undoubted proof,"²² or by "irresistible" evidence, still parties are presumed to be free from fraud until the contrary is proved, and the burden rests upon him who asserts fraudulent conduct to make good the charge by *clear and satisfactory* proofs of the fraud alleged and the defendant's responsibility for it.²³ He has chosen to allege that the defendant knowingly

¹⁹ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Davis v. State, 54 Neb. 177, 74 N. W. 599; State v. Kavanaugh, 4 Penne. (Del.) 131, 53 Atl. 335; State v. Newton, 39 Wash. 491, 81 Pac. 1002. See §§ 177, 186, *ante*.

²⁰ Pollock, Torts, 7th ed., p. 434; Cooley, Torts, 3d ed., p. 1439. For qualification of the rule where facts are peculiarly within the knowledge of the party, see §§ 181, 183, *ante*, as to negligence cases.

²¹ Aetna Ins. Co. v. Johnson, 11 Bush (Ky.), 587, 21 Am. Rep. 223; Kane v. Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239; Lee v. Pearce, 68 N. C. 76; Sparks v. Dawson, 47 Tex. 138; Washington Ins. Co. v. Wilson, 7 Wis. 169; Blaeser v. Milwaukee M. M. I. Co., 37 Wis. 31, 19 Am. Rep. 747.

²² Abbey v. Dewey, 25 Pa. 413.

²³ Moses v. Katzenberger, 84 Ala. 95, 4 South. 237; Joseph v. Baker, 95 Ark. 150, 128 S. W. 864; Del

and intentionally deceived him, and that his loss or damage was caused thereby, and on him rests the burden of proving it.²⁴ He who charges fraud as the basis of a recovery must prove fraud. Thus where a mortgagor ab-

Vecchio v. Savelli, 10 Cal. App. 79, 101 Pac. 32; *Allen v. Elrick*, 29 Colo. 118, 66 Pac. 891; *Marsh v. Cramer*, 16 Colo. 331, 27 Pac. 169; *Griffin v. Star Printing Co.*, 1 Boyce (Del.), 169, 74 Atl. 1072; *Crawford v. Crawford*, 134 Ga. 114, 19 Ann. Cas. 932, 67 S. E. 673; *Beach v. Wilton*, 244 Ill. 413, 91 N. E. 492; *Barrie v. Frost*, 105 Ill. App. 187; *Carter v. Gunnels*, 67 Ill. 270; *Louisville Ry. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. 18, 9 N. E. 357; *Whiteanack v. Wagoner* (Iowa), 115 N. W. 475; *Baker v. Mathew*, 137 Iowa, 410, 115 N. W. 15; *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa, 203, 94 N. W. 568; *Turner v. Younker*, 76 Iowa, 258, 41 N. W. 10; *Hearsey v. Craig*, 126 La. 824, 53 South. 17; *Abrahams v. King*, 111 Md. 104, 73 Atl. 694; *Wood v. Massachusetts Mut. Acc. Assn.*, 174 Mass. 217, 54 N. E. 541; *Bly v. Brady*, 113 Mich. 176, 71 N. W. 521; *Ray County Saving Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067; *Mullinax v. Lowry*, 140 Mo. App. 42, 124 S. W. 572; *Redpath v. Lawrence*, 48 Mo. App. 427; *Upton v. Levy*, 39 Neb. 331, 58 N. W. 95; *Tannenbaum v. Schaffer*, 122 N. Y. Supp. 180; *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064; *Urtz v. New York Cent. & H. R. R. Co.*, 137 App. Div. 404, 121 N. Y. Supp. 879; *Lane v. Fenn*, 65 Misc. Rep. 336, 120 N. Y. Supp. 237; *Tomlinson v. Payne*, 53 N. C. 108; *O'Neill v. Edson, Keith & Co.*, 55 Or. 122, 104 Pac. 725; *Deppen v. Light*, 228 Pa. 79, 77 Atl. 247; *Messinger v. Hagen-*

buch, 2 Whart. (Pa.) 410; *Reeves v. McCracken* (Tex.), 128 S. W. 895; *Milmo Nat. Bank v. Cobbs* (Tex. Civ. App.), 128 S. W. 151; *Weatherred v. Finley*, 57 Tex. Civ. App. 50, 121 S. W. 895; *Carson v. Houssels* (Tex. Civ. App.), 51 S. W. 290; *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *Sansom v. Wolford*, 60 W. Va. 380, 55 S. E. 1020; *Coates v. Marsden*, 142 Wis. 106, 124 N. W. 1057; *Smith v. Reed*, 141 Wis. 483, 124 N. W. 489; *Miles v. Pike Min. Co.*, 124 Wis. 278, 102 N. W. 555; *Dotson v. Kirk*, 180 Fed. 14, 103 C. C. A. 368; *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 97 C. C. A. 486; *Brandom v. McCausland*, 171 Fed. 402, 96 C. C. A. 358; *Sanborn v. Stetson*, 21 Fed. Cas. No. 12,291, 2 Story, 481. See, also, the Canadian cases: *Morton v. Nihan*, 5 A. R. 20; *Rice v. Bryant*, 4 A. R. 542; *Pacaud v. Reg.*, 29 Can. S. Ct. 637. See *Crosby v. Ardois* (Tex. Civ. App.), 145 S. W. 709 (forgery charged). See note on "Presumptions and Burden of Proof as to Fraud," to Central of Georgia R. Co. v. Goodwin, 1 Ann. Cas. 809.

²⁴ *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32; *Bennett v. Gibbons*, 55 Conn. 450, 12 Atl. 99; *Hock v. Jorgeson*, 137 Ill. App. 199; *Hiner v. Richter*, 51 Ill. 299; *Smith v. Packard*, 152 Iowa, 1, 130 N. W. 1076; *Clement v. Swanson*, 110 Iowa, 106, 81 N. W. 233; *Serrano v. Miller etc. Commission Co.*, 117 Mo. App. 185, 93 S. W. 810; *Bevan v. Roach*, 142 App. Div. 541, 127 N. Y. Supp. 68; *Anderson v. Smitley*, 141 App. Div. 421, 126 N. Y. Supp. 25; *Duryea v. Zimmerman*, 121 App. Div. 560, 106

solutely conveyed part of the mortgaged property to the mortgagee and alleged that the mortgagee obtained such conveyance by fraud, the court said: "It will take little evidence, perhaps, to make a *prima facie* showing of fraud in such a case; the fact that the relation of a debtor and creditor existed, and the fact that no part of the debt was discharged, or that the consideration was not fairly adequate, will call for complete and satisfactory explanation and proof on the part of the mortgagee, but this does not change the rule that the burden of proof is with the plaintiff, and that he should put in all his evidence tending to show fraud, either direct or circumstantial, while making his case."²⁵ Thus the burden is upon the party plaintiff or defendant, who asserts that a contract²⁶ or conveyance was obtained by fraudulent representations,²⁷ or that a will was obtained by fraud or undue influence,²⁸ or that property has been conveyed in fraud of creditors,²⁹ or when false representations of any kind are alleged as a defense.³⁰

N. Y. Supp. 237; *Postal v. Cohn*, 83 App. Div. 27, 81 N. Y. Supp. 1089; *Buchall v. Higgins*, 109 App. Div. 607, 66 N. Y. Supp. 241; *Willoughby v. Fredonia Nat. Bank*, 68 Hun, 275, 23 N. Y. Supp. 46; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Morris v. Talcott*, 96 N. Y. 100; *Marsh v. Falker*, 40 N. Y. 562; *Scott v. Heisner*, 33 Pa. Sup. Ct. 286; *Reed v. Holloway* (Tex. Civ. App.), 127 S. W. 1189; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621; *Mosher v. Post*, 89 Wis. 602, 62 N. W. 516; *Schagun v. Scott Mfg. Co.*, 162 Fed. 209, 89 C. C. A. 189; *Garland v. Thompson*, 9 Ont. 376.

²⁵ *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220; *Coates v. Marsden*, *supra*.

²⁶ *Tompkins v. Nichols*, 53 Ala. 197; *Bowden v. Bowden*, 75 Ill. 143; *Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497; *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713; *Hill v. Reif-*

snider, 46 Md. 555; *Beatty v. Fishel*, 100 Mass. 448; *Smith v. Ogilvie*, 127 N. Y. 143, 27 N. E. 807; *London Chartered Bank v. Lampriere*, L. R. 4 P. C. 572, 5 Moak Rep. 137.

²⁷ *Wellborn v. Tiller*, 10 Ala. 305; *Thomas v. Ryan*, 24 S. D. 71, 123 N. W. 68; *Mays v. Pelly* (Ky.), 125 S. W. 713; *Tannenbaum v. Schaffer*, 122 N. Y. Supp. 180. See note to *Brown v. Mitchell*, 11 Am. St. Rep. 758, on "Burden of Proof in Fraudulent Conveyances."

²⁸ *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697.

²⁹ *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713. See notes to *Adoue v. Spencer*, 90 Am. St. Rep. 550-556, and *Feder v. Ervin*, 36 L. R. A. 361-363.

³⁰ *Campbell v. New England Ins. Co.*, 98 Mass. 381; *Briggs v. Humphrey*, 5 Allen (Mass.), 314.

Where a party brings a petition to reopen, on the ground of fraud, a settlement which has been closed by note, and the defendant prays judgment against the plaintiff on the note, the burden of proof is on the plaintiff.³¹ Where the shipper produces the receipts of a carrier, issued by its authorized agent, showing the delivery of goods for safe carriage, and demands an accounting, the burden rests upon the carrier to prove either that the goods were never, in fact, delivered to it, and that the receipt was issued in fraud; or that the goods have been safely carried to their destination and there delivered to the consignee, subject to the exceptions lawfully included in its contract.³² When there are no indications of falsity on the face of a deed, the presumption of law is that it has been executed upon the day of its date. This presumption is controllable, of course, by evidence *aliunde*, but the mere suggestion of fraud or falsity does not put upon the party producing it the burden of proving that the deed was actually made upon the day of its date.³³ Although the evidence of fraud must be satisfactory and convincing, it need not be direct in character, but may consist of *circumstantial* or presumptive evidence from which the fraud may be inferred.³⁴

³¹ Hale v. Owensby, 133 Ga. 631, 66 S. E. 781.

³² Smith v. Austro-American S. S. Co., 125 La. 763, 51 South. 841.

³³ Nelson v. Brown, 164 Ala. 397, 137 Am. St. Rep. 61, 51 South. 360; Hauerwas v. Goodloe, 101 Ala. 162, 13 South. 567; Aldridge v. Branch Bank of Decatur, 17 Ala. 45; Pullen v. Hutchinson, 25 Me. 249; Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399, 50 N. E. 460; Smith v. Porter, 10 Gray (Mass.), 66; Costigan v. Gould, 5 Denio (N. Y.), 290; McFarlane v. Loudon, 99 Wis. 620, 67 Am. St. Rep. 883, 75 N. W. 394.

³⁴ Russell v. Brooks, 92 Ark. 509, 122 S. W. 649; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Provi-

dence Jewelry Co. v. Nagel, 157 Cal. 497, 108 Pac. 312; Marsh v. Cramer, 16 Colo. 331, 27 Pac. 169; Reed v. Noxon, 48 Ill. 323; Maxwell v. McWilliams, 145 Ill. App. 155; Gandy v. Seymour Slack Stave Co. (Ind. App.), 90 N. E. 915; Friedersdorf v. Lacy, 173 Ind. 429, 90 N. E. 766; Lowry v. Beckner, 5 B. Mon. (Ky.) 41; Borchers v. Barckers, 143 Mo. App. 72, 122 S. W. 357; Blaisdell v. Davis Paper Co., 75 N. H. 497, 139 Am. St. Rep. 735, 77 Atl. 485; Fay v. Lester Piano Co., 39 Pa. Super. Ct. 87; Commonwealth v. Hyde, 39 Pa. Super. Ct. 261; Trainer v. McGarrity, 40 Pa. Super. Ct. 57; Kaine v. Weigley, 22 Pa. 179; Reed v. Holloway (Tex. Civ. App.), 127 S. W.

And though, as we have just shown, it requires but little evidence to show fraud *prima facie*, the difficulty of the proof does not dispense with the necessity of the proof. "It must not be deduced from mere suspicion. It is not proved by insinuation and innuendo. It is never given body and form by mere presumptions. So that, where one of two views are open, as in the case at bar, the one noble and the other ignoble, courts of justice out of tenderness to humanity will not belittle mankind by taking the ignoble rather than the noble view."³⁵

§ 193 (191). Burden in *quo warranto* proceedings.—The ordinary rules of evidence as to the burden of proof do not apply to all cases of *quo warranto*, and it is necessary to see how and why the burden in one case is on the relator and in another on the respondent. As a rule the proceeding is adopted (1) by the state when it intends to question by legal procedure the right of the holder of a

1189; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154; *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072; *Harvey v. Nutter*, 66 W. Va. 208, 66 S. E. 363; *Rea v. Missouri*, 17 Wall. (U. S.) 532, 21 L. Ed. 707.

³⁵ *Ray County Savings Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47. The general rule is that in matters *ex contractu* a third person dealing with the known agent of another, whether that other be a person or a corporation, is deemed to deal not on the credit of the agent, but on that of the principal. If that rule does not obtain in a given case, it is because fraud avoids the rule, and thereby the door to liability swings wide open to an action *ex delicto*. Now, fraud is commonly deeply hid away. Often it can only be got at by inference. It is scarcely ever proved by admissions; for it blows no trumpet. One cannot put his finger on it and say,

"Lo, here it is!" or "There it is!"—palpable to the touch. But it is got at by following its tracks from results back to the inception of the affair or from the inception of the affair forward to results. To that end courts are full of solicitude, and look well with a jealous and anxious eye. Therefore they permit a minute search and a wide one in pursuit of fraud; for it may now and then be seen through a small crevice, and seemingly indifferent things, without sinister significance when taken separately, may, when properly dovetailed together, establish fraud. Courts are fond of saying so much as that: *Black v. Epstein*, 221 Mo. 286, 120 S. W. 754; *State v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062; *St. Francis Mill Co. v. Sugg*, 206 Mo. 148, 104 S. W. 45; *Ray County Savings Bank v. Hutton*, *supra*.

public office to such office; (2) by private persons claiming title to test the same questions; and (3) to test the right to a corporate franchise. One who is exercising the privilege of a public office is considered a usurper unless he can maintain his title; and in a proceeding by the public, the *burden* of showing his right to the office is cast upon the *respondent*. High says,³⁶ "An important feature of the law governing *quo warranto* informations, and one which most distinguishes this remedy from ordinary civil actions at law, is that the prosecutor is not obliged to show title in himself to sustain the action, or to put the respondent upon the necessity of proving his title. And the principle is well established that the burden rests upon the respondent of showing a good title to the office whose functions he claims to exercise, the state being obliged to answer only the particular claim of title asserted." He qualifies the cases he has cited by referring to a New York case apparently holding differently.³⁷ The New York case referred to was to determine the rights of the respective parties to the offices of warden and vestrymen of the French Protestant Episcopal Church *du St. Esprit* in the city of New York. So far as we can see, there is a consensus of opinion upon the point. The only case noted as adverse is from Kansas,³⁸ but an examination of it shows that it is not out of line with the best decisions, though it was the first case of the kind in that state. The learned judge (Burch) who delivered the opinion of the court had a thorough grasp of the subject. It was a statutory proceeding in the nature of *quo warranto* against the county attorney, not for any usurpation of office but to remove him for misconduct, the relators making specific charges, and the *onus* was properly upon them to prove them. It may be taken that in the cases classed as proceedings by the state against a public officer the burden is always upon the respondent.³⁹ If the defendant is unable to show good

³⁶ High on Ex. Leg. Rem., § 629.

³⁷ *People v. Lacoste*, 37 N. Y. 192.

³⁸ *State v. Trinkle*, 70 Kan. 396,
78 Pac. 854.

³⁹ *State v. Waldrop*, 158 Ala. 86,

48 South. 394; *State v. Foster*, 130

Ala. 154, 30 South. 477; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460;

title to the office the people are entitled to a judgment of ouster.⁴⁰ It is no defense to the incumbent that a relator who seeks to assert his right may fail to establish such claim; judgment of amotion may nevertheless be rendered;⁴¹ but where the proceeding is on the relation of a *person claiming title*, he has the burden of proof to establish his claim.⁴² In *quo warranto* proceedings undertaken

Frisch v. Ard, 34 Colo. 66, 81 Pac. 247; People ex rel. Saunier v. Stratton, 33 Colo. 464, 81 Pac. 245; State v. Hatch, 82 Conn. 122, 72 Atl. 575; State v. Lashar, 71 Conn. 540, 44 L. R. A. 197, 42 Atl. 636; State v. Saxon, 25 Fla. 342, 5 South. 801; Garms v. People, 108 Ill. App. 631; People v. Crawford, 28 Mich. 88; People v. Mayworm, 5 Mich. 146; People v. Miles, 2 Mich. 348; State v. Grimm, 220 Mo. 483, 119 S. W. 626; State v. Davis, 64 Neb. 499, 90 N. W. 232; People v. Perley, 80 N. Y. 624; People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State v. Allen (Tenn. Ch. App. 1900), 57 S. W. 182; State v. Beardsley, 13 Utah, 502, 45 Pac. 569; State v. Norton, 46 Wis. 332, 1 N. W. 22; Rex v. Leigh, 4 Burr. 2143, 98 Eng. Reprint, 117.

⁴⁰ Proceedings in *quo warranto* are governed by the same principles and rules that govern in other civil actions, and in such a proceeding a motion to strike out a plea or answer or some matter thereof for irrelevancy is proper but not proper on the ground of insufficiency in law. That should be met by demurrer. *Non usurpavit* is not a relevant plea in *quo warranto* brought by the attorney general to oust a party from public office, but an allegation of the party that he was elected to the office is relevant, though it may not be sufficient of itself to prevent ouster. In such *quo warranto*, whether brought on the relation of

one claiming the office or not, the burden is on the respondent to show that he holds the office rightfully; and it is not enough to show due appointment or election, but for full and complete title he must also show that all the requisites required to qualify him to take possession of the office have been complied with. If an oath, bond, and commission be required, as in the case of clerks of the circuit court in this state, he will be ousted if he has not qualified accordingly: State ex rel. Law v. Saxon, 25 Fla. 342, 5 South. 801; People v. Ridgley, 21 Ill. 65; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; State v. Harris, 3 Ark. 570, 36 Am. Dec. 460, and cases cited above.

⁴¹ State ex rel. Swenson v. Norton, 46 Wis. 332, 1 N. W. 22; Relender v. State ex rel. Utz, 149 Ind. 283, 49 N. E. 30; Clark v. People, 15 Ill. 213. Nor does a failure of defendant prove the title of relator to the office: People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

⁴² State v. Wheatley, 160 Ind. 183, 66 N. E. 684; People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People v. Lacoste, 37 N. Y. 192; Miller v. English, 21 N. J. L. 317; State ex rel. Blessing v. Davis, 64 Neb. 499, 90 N. W. 232; Attorney General v. May, 99 Mich. 538, 25 L. R. A. 325, 58 N. W. 483; People v. Nestrand, 46 N. Y. 375.

by the people, the burden is so far cast upon the respondent that he cannot rely upon presumptions, but he must prove the continued existence of every qualification necessary to the enjoyment of the office.⁴³ Although the proper official certificate is *prima facie* evidence of the election to an office,⁴⁴ it is a familiar rule that the *certificate* and *returns* on which it is based are *open to investigation* and that judgment will be rendered according to *real facts*.⁴⁵ As to the second class of cases referred to, proceedings in the nature of a *quo warranto* on the relation of private persons claiming title to or testing the validity of an office of any kind, the law is that the burden is on the relators and not on the respondents. In a Minnesota case we find, "But the sole question here is, which of the parties, relators or appellants, have the title to an office in a private corporation? The relators must, therefore, show title in themselves before they can properly inquire by what authority the respondents (appellants here) exercise their office."⁴⁶ High says: "As regards the title necessary to be shown by the prosecutor in order to support the information, a distinction is taken between cases affecting merely private rights, where the proceedings are instituted in behalf of a private citizen, and cases affecting public interests where the people are the real as well as nominal prosecutor. For example, when the object of the information is to remove respondents from certain corporate offices of which they are incumbents, it is necessary that the relators show a title in themselves before they can properly inquire by what authority the respondents exercise their office or franchise, and a failure to show such

⁴³ State v. Beecher, 15 Ohio, 723; People v. Mayworm, 5 Mich. 146; State ex rel. Blessing v. Davis, 64 Neb. 499, 90 N. W. 232; Tillman v. Otter, 93 Ky. 600, 29 L. R. A. 110, 20 S. W. 1036.

⁴⁴ State ex rel. Swenson v. Norton, 46 Wis. 332, 1 N. W. 22; People v. Thacher, 55 N. Y. 525, 14 Am. Rep.

312; State ex rel. Leonard v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

⁴⁵ People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People v. Lacoste, 37 N. Y. 192; State ex rel. Swenson v. Norton, 46 Wis. 332, 1 N. W. 22.

⁴⁶ State v. Oftedal, 72 Minn. 498, 75 N. W. 692.

title is fatal to the application."⁴⁷ In a New York case⁴⁸ we find, "although as against the people, the defendants might have been called upon to show that their possession of the office was lawful . . . as between the relators and the defendants the burden was upon the former to make out a better title."⁴⁹ On an attack upon a corporate franchise the *onus* is on the respondents to prove the existence of the corporate franchise which they are alleged to have usurped, and their title to the offices with the wrongful claim or usurpation of which they are charged.⁵⁰ For example, in an action in the nature of a *quo warranto* against a toll-road company for the usurpation of a franchise, and to have the road upon which it has collected toll declared a public highway and to enjoin the company from collecting tolls thereon, where the answer admits that the defendant claims and is exercising the disputed franchise, the burden of proof is upon it to show by what warrant or authority it claims and exercises the franchise; and where there is no attempt to show any warrant or authority whatever, a judgment in favor of the plaintiff is proper.⁵¹ When the respondents assumed to be a body politic and corporate under the name of a certain village, the real question tried, and on which the case depended, was whether the territory organized as a village contained at the time three hundred inhabitants, and the burden was on the respondents to prove that it did. The people were not required, in the first instance, to prove anything.⁵² The

⁴⁷ High on Ex. Leg. Rem., § 652; Miller v. English, 1 Zab. (N. J. L.) 317.

⁴⁸ People ex rel. Watkins v. Perley, 80 N. Y. 624.

⁴⁹ State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265; State v. Davis, 64 Neb. 499, 90 N. W. 282; State v. Moores, 52 Neb. 634, 72 N. W. 1056; People v. Perley, 80 N. Y. 624; People v. Lacoste, 37 N. Y. 192; State v. Hay, Wright (Ohio), 96; Commonwealth v. Filer, 13 Pittsb. Leg. J.,

N. S. (Pa.), 286; State v. Hunton, 28 Vt. 594.

⁵⁰ State v. Sharp, 27 Minn. 38, 6 N. W. 408.

⁵¹ People v. Volcano Canyon T. Co., 100 Cal. 87, 34 Pac. 522.

⁵² McGahan v. People, 191 Ill. 493, 61 N. E. 418. See, also, on same point, Lyons etc. Toll Road Co. v. People, 29 Colo. 434, 68 Pac. 275; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; State v. Hogan, 163 Mo. 43, 63 S. W. 378.

position is supported by Beatty, C. J., in a Nevada case. where the additional contingency of the respondent's title being admitted to be good is dealt with. "The general rule in cases of this character is that the person claiming the franchise must plead and prove a good title thereto, and that the state is bound to prove nothing; but when, as in this case, it is admitted that the defendant has had a good title, and the only ground of the proceeding is a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state."⁵³

§ 194 (192). **Burden as to statutes of limitation.**—There is no longer need to deal with the *onus* of proof where the statute of limitations is pleaded. Common sense has found its level notwithstanding the vicissitudes through which it has passed, as evidenced by the earlier cases. It can easily be understood that in the days when litigation was the luxury of the few, that it was a relief to the lawyers to have a new statute to dissect, and that they crowded into the operating theater to watch the removal of some legal appendix. Hence it is that in dealing with the plea of the statute we find the results of early and faulty experiments which it has taken years to correct, and that cases arising under statute of limitations have presented an apparent exception to the general rules. It was held in numerous early cases that when an issue is raised as to the statute, the burden of proof is upon the plaintiff to show that the action accrued within the statutory period.⁵⁴ In

⁵³ State v. Haskell, 14 Nev. 209.

⁵⁴ Taylor v. Spears, 1 Eng. (6 Ark.) 381, 44 Am. Dec. 519; Leigh v. Evans, 64 Ark. 26, 41 S. W. 427; Pond v. Gibson, 5 Allen (Mass.), 19, 81 Am. Dec. 724, and note; Hurst v. Parkes, 2 Chit. 249; Slocum v. Riley, 145 Mass. 370, 14 N. E. 174; Robinson v. State, 20 Fla. 804; Moore v. Garner, 101 N. C. 374, 7 S. E. 732; Graham v. O'Bryan, 120 N. C. 463, 27 S. E. 122; Apperson v.

Pattison, 11 Lea (Tenn.), 484; Stansbury v. Stansbury, 20 W. Va. 23. In Arkansas the older decisions were passed over in Kelly v. Kansas City etc. Co., 92 Ark. 465, 123 S. W. 663, where the court says: "The plea of the statute of limitations is an affirmative defense and must be sustained by evidence. In Alabama, however, in Lord v. Calhoun, 162 Ala. 444, 50 South. 402, Mayfield, J., says: "When the statute of limita-

some of the states the earlier decisions seem still to stand, but Tennessee has adopted the modern rule.⁵⁵ The later cases show the true rule, namely, that since the plea of the statute of limitations is an *affirmative defense*, the burden should rest upon the defendant to prove the facts which entitle him to its benefit.⁵⁶ We cannot understand the reasoning which relegated the proof to the plaintiff. The statute of limitations always had to be pleaded, and it logically follows that the burden was on the supporter of the plea. The plea of the statute of limitations impliedly admits the existence of the demand, and the burden of proving a bar by the statute is on the party pleading it, as in the case of a plea of payment. It has been held accordingly, that where a portion of a demand is claimed to have been barred, the party so claiming must prove the specific amount; mere proof that some portion is barred,

tions is pleaded, the burden rests upon the plaintiff to prove the cause of action within the period of the bar." It is true it is an *obiter dictum*, inasmuch as the statute was not pleaded at all in the action referred to—it was the statute of frauds.

⁵⁵ *Pickett v. Gore* (Tenn. Ch.), 58 S. W. 402.

⁵⁶ *St. Louis etc. R. Co. v. Berry*, 86 Ark. 309, 110 S. W. 1049; *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204; *Schell v. Weaver*, 225 Ill. 159, 8 Ann. Cas. 339, 80 N. E. 95; *Haines v. Amerine*, 48 Ill. App. 570; *Elliott v. Capital City State Bank*, 149 Iowa, 309, 128 N. W. 369; *Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52; *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925; *Clark v. Logan County*, 138 Ky. 676, 128 S. W. 1079; *Kidd v. Bell* (Ky.), 122 S. W. 232; *First Nat. Bank of Cincinnati v. Thomas*, 8 Ky. Law Rep. 690, 3 S. W. 12; *Montamat's Succession*, 15 La. Ann. 332; *Pemiscott Land etc. Co. v. Davis*, 147

Mo. App. 194, 126 S. W. 218; *McKee v. Downing*, 224 Mo. 115, 124 S. W. 7; *Wojtylak v. Kansas etc. Coal Co.*, 188 Mo. 260, 87 S. W. 506; *Campbell v. Laclede Gas Co.*, 84 Mo. 352; *Bradford v. Brennan*, 12 Okl. 333, 71 Pac. 655; *Hunter v. Hunter*, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; *Lafferty v. Stevenson* (Tex. Civ. App.), 135 S. W. 216; *Cunningham v. Frandtzen*, 26 Tex. 34; *Duggan v. Cole*, 2 Tex. 381; *Tate v. Rose*, 35 Utah, 229, 99 Pac. 1003; *Thomas v. Glendinning*, 13 Utah, 47, 44 Pac. 652; *Goodyear etc. Rubber Co. v. Baker*, 81 Vt. 39, 15 Ann. Cas. 1207, 17 L. R. A., N. S., 667, 69 Atl. 160; *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200; *Goodell's Exrs. v. Gibbons*, 91 Va. 608, 22 S. E. 504; *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529; *Buck v. Newberry*, 55 W. Va. 681, 47 S. E. 889; *Borland v. Haven*, 37 Fed. 394, 13 Saw. 551; *Mortgage etc. Co. v. Daly*, 10 Man. 425. See note to *Pond v. Gibson*, 81 Am. Dec. 725.

not showing the amount, is not sufficient to establish that the bar of the statute applies to any. In the case of a running account, embracing only one entire transaction or liability, the bar only attaches from the date of the last item.⁵⁷ It is, of course, an entirely different thing when an exception to the statute is relied on. In such case it is clear that one who claims the benefit of any *exception to the statute* must prove the facts upon which he relies; and if on the plaintiff's own showing the statute stands in the way, he must prove such facts as are necessary to take the case out of the operation of the statute.⁵⁸ Thus when the defendant in a suit for the recovery of land pleaded and proved his adverse possession for the statutory period, the burden was upon the plaintiff to prove his disability tolling the statute;⁵⁹ so, also, when the time of a debtor's absence from the state is excluded from the period limited by the statute.⁶⁰ In an action on a promissory note made by three persons against one of the makers who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note before the bar was complete, the burden is upon him to prove that the payment was made by the defendant before the cause of action was barred.⁶¹ The same rule applies in the case of a new promise in a suit against husband and wife, to recover upon the debt of the wife, contracted by her *dum sola*, and for which the husband is sought to be charged by reason of his intermarriage with her, and where the statute was pleaded and a new promise by him relied upon.⁶² A party claiming to have acquired title by the bar

⁵⁷ *Borland v. Haven*, 37 Fed. 394, 13 Saw. 551.

⁵⁸ *Davenport v. Wynne*, 6 Ired. (28 N. C.) 128, 44 Am. Dec. 70; *Apperson v. Pattison*, 11 Lea (79 Tenn.), 484; *Gross v. Disney*, 95 Tenn. 592, 32 S. W. 632; *Yell v. Lane*, 41 Ark. 53; *Vail v. Halton*, 14 Ind. 344.

⁵⁹ *Dessaunier v. Murphy*, 33 Mo. 184.

⁶⁰ *Phillips v. Holman*, 26 Tex. 276.

⁶¹ *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693.

⁶² *Moore v. Leseur*, 18 Ala. 606.

Where the statute of limitations is pleaded to a stale claim, the burden is on the plaintiff to take the case out of the statute. If he prove fraudulent concealment, he shifts the burden of proof on defendant. The

of the statute of limitations must prove the bar as against one who claims under an otherwise valid title.⁶³ Sometimes the complaint itself unnecessarily shows that the claim is barred by the statute. The statute of limitations is an affirmative defense, which must be pleaded, and a plaintiff is not bound to anticipate a plea of the statute by setting forth in his complaint the payments or memorandum that he intends to rely upon to take the case out of its operation. All that is required is that the complaint state facts sufficient to make out a cause of action, and if the answer sets up a defense which, if true, would destroy that cause of action, plaintiff may meet it by proof in rebuttal or avoidance.⁶⁴ Where a complaint shows on its face that more than six years have elapsed since the cause of action accrued, and the answer sets up the statute of limitations, the burden is on the plaintiff to show, if possible, that the running of the statute has been suspended.⁶⁵

§ 195 (193). Burden and weight of proof where crime is in issue in civil cases.—It not infrequently happens that the elements of a crime committed are discovered in civil records. They occur principally in those cases in which damages are sought for the commission of an act, criminal in its nature, and in the defense to claims which are challenged on the ground of being the direct outcome of a crime. We shall deal with other specific instances later on, but at present suggest only such cases as claims by one insured from fire against an insurer who charges the claimant with arson, actions for assault, for libel and slander which may involve the establishment of a crime under a

statute of limitations is a statute of repose, and, as a defense, it is not looked upon by the courts with disfavor: *Spuryer v. Hardy*, 4 Mo. App. 573.

⁶³ *Stewart v. Cheatham*, 3 Yerg. (11 Tenn.) 60; *Hood v. Hood*, 2 Grant, Cas. (Pa.) 229; *Richardson v. Williamson*, 24 Cal. 289; *Greer v.*

Perkins, 5 Humph. (24 Tenn.) 588; overruling, in effect, *Lawrence v. Bridleman*, 3 Yerg. (11 Tenn.) 496.

⁶⁴ *Ramsay v. Barnes*, 16 Daly, 478, 12 N. Y. Supp. 726; *Metropolitan Life Ins. Co. v. Meeker*, 85 N. Y. 614.

⁶⁵ *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837.

plea of truth, and other cases of like nature. Where a crime is imputed in a civil action, the question as to the amount of proof necessary to establish the existence of the crime is one upon which there has been some diversity of opinion among text-writers and judges. But there is now no doubt that the very great preponderance of modern authority is in favor of the rule, that in civil cases it is sufficient to establish the existence of the crime by such evidence as would suffice to prove any other fact involved in a civil controversy. The existence of a crime may, in such cases, be proved by a preponderance of testimony, and it is not required to be proved beyond a reasonable doubt, as in criminal prosecutions. By the English rule "if the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond a reasonable doubt."⁶⁶ In the earlier authorities the same rule was sometimes declared in this country, and it has been preferred in a limited number of states more recently.⁶⁷ But undoubtedly the prevailing rule in this country is that, in civil actions, it is sufficient to prove the issue, whether civil or criminal, by a *preponderance of testimony*.⁶⁸ In several states in which the earlier decisions

⁶⁶ Reynolds' Steph. Ev., art. 94; Thurtell v. Beaumont, 1 Bing. 339, 8 Moore, 612, 130 Eng. Reprint, 136; Wilmett v. Harmer, 8 Car. & P. 695; Chalmers v. Shackell, 6 Car. & P. 475. See article in 10 Am. Law Rev. 642, 656.

⁶⁷ Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Merk v. Gelzhauser, 50 Cal. 631; Tucker v. Call, 45 Ind. 31; Polston v. See, 54 Mo. 291; Williams v. Gunnels, 66 Ga. 521; Steinman v. McWilliams, 6 Barr (6 Pa.), 170; Lanter v. McEwen, 8 Blackf. (Ind.) 495; Coulter v. Stuart, 2 Yerg. (Tenn.) 225; Shultz v. Pacific Ins. Co., 14 Fla. 73. See, also, Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523, and extended note.

⁶⁸ Bell v. State, 124 Ala. 94, 27 South. 414; Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49, overruling Steele v. Kinkle, 3 Ala. 352 and Tompkins v. Nichols, 53 Ala. 197; Brown v. Tourtelotte, 24 Colo. 204, 50 Pac. 195; Mead v. Husted, 52 Conn. 53, 52 Am. Rep. 554; Munson v. Atwood, 30 Conn. 102; State v. Goldsborough, 1 Houst. C. C. (Del.) 316 (302); Schnell v. Toomer, 56 Ga. 168; Thompson v. Cornwell, 133 Ill. App. 261; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336; Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 59 Am. Rep. 194, 10 N. E. 636; Bissell v. Wert, 35 Ind. 54; Riley v. Norton, 65 Iowa, 306, 21 N. W. 649, expressly overruling Bradley v. Ken-

leaned toward the English rule the courts have since adopted the American rule on the subject. The following quotation from a decision of the supreme court of Maine indicates the reason for the old rule and the reason of its abandonment: "We think it time to limit the application of a rule, which was originally adopted *in favorem vitæ* in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or encumber the action of juries in civil suits sounding

nedy, 2 G. Greene (Iowa), 231; Coit v. Churchill, 61 Iowa, 296, 16 N. W. 147; Kendig v. Overhulser, 58 Iowa, 195, 12 N. W. 265; Behrens v. Germania Ins. Co., 58 Iowa, 26, 11 N. W. 719; Welch v. Jugenheimer, 56 Iowa, 11, 41 Am. Rep. 77, 8 N. W. 673, and Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131; Aetna Ins. Co. v. Johnson, 11 Bush (Ky.), 587, 21 Am. Rep. 223; Wightman v. Western M. & F. I. Co., 8 Rob. (La.) 442; Hoffman v. Western M. & F. I. Co., 1 La. Ann. 216; Campbell v. Burns, 94 Me. 127, 46 Atl. 812; Decker v. Somerset M. F. I. Co., 66 Me. 406; Ellis v. Buzzel, 60 Me. 209, 11 Am. Rep. 204; Roberge v. Burnham, 124 Mass. 277; Gordon v. Parmelee, 15 Gray (Mass.), 413; Schmidt v. New York U. M. F. I. Co., 1 Gray (Mass.), 529; Baird v. Abbey, 73 Mich. 347, 41 N. W. 272; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809; People v. Evening News, 51 Mich. 11, 16 N. W. 185, 691; Semon v. People, 42 Mich. 141, 3 N. W. 304; Thoreson v. Northwestern Ins. Co., 29 Minn. 107, 12 N. W. 154; Rothschild v. American C. I. Co., 62 Mo. 356; Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; Folsom v. Brawn, 25 N. H. 114; Kane v. Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239; reversing

38 N. J. L. 441, 20 Am. Rep. 409; Blackmore v. Ellis, 70 N. J. L. 264, 57 Atl. 1047; Johnson Service Co. v. MacIernon, 142 App. Div. 677, 127 N. Y. Supp. 431; Seybolt v. New York Ry. Co., 95 N. Y. 562, 47 Am. Rep. 75; Davis v. Rome etc. R. Co., 56 Hun, 372, 10 N. Y. Supp. 334; Johnson v. Agricultural Ins. Co., 25 Hun (N. Y.), 251; Barfield v. Britt, 2 Jones (47 N. C.), 41, 62 Am. Dec. 190; Kincade v. Bradshaw, 3 Hawks (N. C.), 63; Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673; Lyon v. Fleahmann, 34 Ohio St. 151; Strader v. Mullane, 17 Ohio St. 624; Young v. Edwards, 72 Pa. 257; McBee v. Bowman, 89 Tenn. 132, 14 S. W. 481; Hills v. Goodyear, 4 Lea, 233, 40 Am. Rep. 5; Heiligmann v. Rose, 81 Tex. 222, 26 Am. St. Rep. 804, and note, 13 L. R. A. 272, 16 S. W. 931; Weston v. Gravlin, 49 Vt. 507; Bradish v. Bliss, 35 Vt. 326; Blaeser v. Milwaukee M. M. I. Co., 37 Wis. 31, 19 Am. Rep. 747; New York Acc. Ins. Co. v. Clayton, 59 Fed. 559, 8 C. C. A. 213; Scott v. Home Ins. Co., Fed. Cas. No. 12,533, 1 Dill. 105; Howell v. Hartford F. I. Co., 3 Ins. L. J. 649, Fed. Cas. No. 6780; 2 Wharton on Evidence, § 1246; May on Insurance, § 583; Cooley on Torts, 208.

only in damages.”⁶⁹ Judge Cooley says: “Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt. This is a general rule where the question of criminality is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other fact involved in a civil controversy.”⁷⁰ It is sufficient in a civil case to prove by a preponderance of evidence the charge of *false representations*,⁷¹ or a trespass which might subject the trespasser to a criminal prosecution.⁷² In an action for assault and battery with attempt to ravish, the plaintiff was not required to prove the charge beyond a reasonable doubt,⁷³ and the same has been held by a great preponderance of authority in regard to the *willful burning* of property in insurance cases.⁷⁴ To

⁶⁹ *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Adams v. Thornton*, 78 Ala. 489, 56 Am. Rep. 49; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239.

⁷⁰ Cooley on Torts, 208.

⁷¹ *Munson v. Atwood*, 30 Conn. 102; *Coit v. Churchill*, 61 Iowa, 296, 16 N. W. 147; *Gordon v. Parmelee*, 15 Gray (Mass.), 413; *Hough v. Dickinson*, 58 Mich. 89, 24 N. W. 809; *Thoreson v. Northwestern Ins. Co.*, 29 Minn. 107, 12 N. W. 154; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752.

⁷² *Weston v. Gravlin*, 49 Vt. 507.

⁷³ *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

⁷⁴ *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194; 10 N. E. 636; *Behrens v. Germania Ins. Co.*, 58 Iowa, 26, 11 N. W. 719; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.), 587, 21 Am. Rep. 223; *Hoffman v. Western M. & F. Ins. Co.*, 1

La. Ann. 216; *Wightman v. Western Ins. Co.*, 8 Rob. (La.) 442; *Decker v. Somerset Ins. Co.*, 66 Me. 406; *Schmidt v. New York V. M. F. I. Co.*, 1 Gray (Mass.), 529; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107, 12 N. W. 154; *Rothschild v. American Ins. Co.*, 62 Mo. 356; *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Weir v. Aetna Ins. Co.*, 91 Hun, 217, 36 N. Y. Supp. 216; *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. C. 821, 21 S. E. 922; *Lyon v. Fleahmann*, 34 Ohio St. 151; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. 80, 56 Am. Rep. 307, 4 Atl. 355; *Hart v. Niagara F. Ins. Co.*, 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213; *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474; *Blaeser v. Milwaukee M. M. I. Co.*, 37 Wis. 31, 19 Am. Rep. 747;

many of the cases holding otherwise, there have been subsequent explanations and distinctions which have still further weakened a weak minority.⁷⁵ In prosecutions for *bastardy*, it is held by all the authorities that the charge may be proved by a preponderance of evidence. The proceeding, though criminal in form, is a civil action, and not a criminal one.⁷⁶ And the same is true of an action to recover the forfeiture for *selling liquor to minors*.⁷⁷ And although an action brought by a wife for causing the intoxication of her husband is regarded as penal, yet it is not necessary that the evidence in such a case should exclude all reasonable doubt. A preponderance of evidence is sufficient;⁷⁸ and where the defendant had been convicted of receiving money, knowing it had been stolen, it was sufficient to prove by a preponderance of evidence in a civil action for the recovery thereof, that the money found in defendant's possession belonged to the plaintiff.⁷⁹ The same rule prevails in actions for *slander and libel* where the charge is that a criminal offense has been committed,⁸⁰

Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795; Mack v. Lancashire Ins. Co., 4 Fed. 59, 2 McCrary, 211.

⁷⁵ Germania Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; McConnell v. Delaware etc. Ins. Co., 18 Ill. 228; Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131; Schultz v. Pacific Ins. Co., 14 Fla. 73.

⁷⁶ Mann v. People, 35 Ill. 467; Maloney v. People, 38 Ill. 62; Allison v. People, 45 Ill. 37; People v. Christman, 66 Ill. 162; Knowles v. Scribner, 57 Me. 495; Young v. Makepeace, 103 Mass. 50; Semon v. People, 42 Mich. 141, 3 N. W. 304; State v. Nichols, 29 Minn. 357, 13 N. W. 153.

⁷⁷ Roberge v. Burnham, 124 Mass. 277.

⁷⁸ Hall v. Barnes, 82 Ill. 228; Lyon v. Fleahmann, 34 Ohio St. 151.

⁷⁹ United States Express Co. v. Jenkins, 73 Wis. 471, 41 N. W. 957.

⁸⁰ Merk v. Gelzhaenser, 50 Cal. 631; Atlanta Journal v. Mayson, 92 Ga. 640, 44 Am. St. Rep. 104, 18 S. E. 1010; Williams v. Gunnels, 66 Ga. 521; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Fowler v. Wallace, 131 Ind. 347, 31 N. E. 53; Riley v. Norton, 65 Iowa, 306, 21 N. W. 649; Sloan v. Gilbert, 12 Bush (Ky), 51, 23 Am. Rep. 708; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Finley v. Widner, 112 Mich. 230, 70 N. W. 433; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329, 13 L. R. A. 59, 16 S. W. 881; Polston v. See, 54 Mo. 291; Folsom v. Brawn, 25 N. H. 114; Barfield v. Britt, 47 N. C. 41, 62 Am. Dec. 190; Kincade v. Bradshaw, 3 Hawks (N. C.), 63; Burek-

and in actions for *divorce* on the ground of adultery,⁸¹ and generally in all such or similar actions, notwithstanding that an adverse judgment may establish the guilt of the party charged with the crime in the civil action.⁸² In a few courts it has been held that a criminal offense *charged in the pleadings* in a civil case must be proved beyond a reasonable doubt, but that the same rule does not apply where the charge comes only *incidentally* in issue.⁸³ But it will be found that while in many of the cases already cited to support the general rule, the charge was directly in issue by the pleadings, no such distinction was recognized; and it seems plain that on principle no distinction exists. But where the issue involves a charge of moral turpitude, the *presumption of innocence* obtains in civil as well as in criminal cases; hence when in a civil action

halter v. Coward, 16 S. C. 435; Bradish v. Bliss, 35 Vt. 326. See note on "Burden of Proving Malice in Action for Libel or Slander Where Communication is Privileged," to Denver Public Warehouse Co. v. Holloway, 7 Ann. Cas. 844.

⁸¹ Poertner v. Poertner, 66 Wis. 644, 29 N. W. 386; Allen v. Allen, 101 N. Y. 658, 5 N. E. 341; Chesnut v. Chesnut, 88 Ill. 548; Smith v. Smith, 5 Or. 186; though in Berckmans v. Berckmans, 17 N. J. Eq. 453, Judge Van Dyke expressed himself very strongly the other way.

⁸² Smith v. Smith, 16 Colo. App. 333, 65 Pac. 401; Seymour v. Bailey, 76 Ga. 338; Miller v. Balthasser, 78 Ill. 302; Bissel v. Wert, 35 Ind. 54; Welch v. Jugenheimer, 56 Iowa, 11, 41 Am. Rep. 77, 8 N. W. 673; Sinclair v. Jackson, 47 Me. 102, 74 Am. Dec. 476; Roberge v. Burnham, 124 Mass. 277; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952; Shaul v. Norman,

34 Ohio St. 157; Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638; Nelson v. Pierce, 18 R. I. 539, 28 Atl. 806; Cox v. Crumley, 5 Lea (Tenn.), 529; Heiligmann v. Rose, 81 Tex. 222, 26 Am. St. Rep. 804, 13 L. R. A. 272, 16 S. W. 931; Weston v. Gravlin, 49 Vt. 507; United States Express Co. v. Jenkins, 73 Wis. 471, 41 N. W. 957.

⁸³ Hahnemannian Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519; Schmidt v. New York Ins. Co., 1 Gray (Mass.), 529. See, also, Kane v. Hibernia Ins. Co., 38 N. J. L. 441, 20 Am. Rep. 409, 39 N. J. L. 697, 23 Am. Rep. 239. In Illinois this the settled law. In McInturff v. Ins. Co. of North America, 248 Ill. 92, 140 Am. St. Rep. 153, 21 Ann. Cas. 176, 93 N. E. 369, the court said: "In Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 612, 22 N. E. 489, 492, this court said, that in this state it has been held that where in civil cases a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt." (Citing cases.)

a party is charged with crime, the evidence should be sufficient to overcome the presumption of innocence; and for this purpose more evidence may be necessary than in ordinary cases. This principle is firmly established in all the cases. Every man charged with a crime is entitled to the presumption of innocence, and the party who brings the charge is bound to overcome that presumption by evidence. "It does not follow, however, that a party who is charged in a civil case with crime or moral dereliction may not have the benefit of good character and the presumption of law in favor of innocence. Evidence of good character is admitted in criminal prosecutions, because the intent with which the act charged as a crime was done is of the essence of the issue; and the prevailing character of the defendant's mind, as evinced by his previous habits of life, is a material element in discovering that intent. Upon the same principle the like evidence ought to be admitted in all other cases, whatever be the form of proceeding, when the intent, to be found as a fact, is involved in the issue."⁸⁴ To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own building should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in setoff; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evi-

⁸⁴ Hills v. Goodyear, 4 Lea (Tenn.), 233, 40 Am. Rep. 5.

dence should be required to establish grave charges than to establish trifling or indifferent ones.⁸⁵ When fraud or criminal conduct is imputed, the decisions frequently declare that something more than a mere preponderance of evidence must be produced, and that the proof must be clear and satisfactory.⁸⁶ The written instrument of a person, entered into by him with another, and on which contractual rights between the two are founded, cannot be impeached by such person, upon the ground that he had

⁸⁵ *Decker v. Somerset, M. F. I. Co.*, 66 Me. 406. (Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumptions as well as the opposing evidence.) And *McIlvaine, C. J.*, in delivering the opinion of the court in *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752, said: "Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged; and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumption of law arising in the case, preponderates in favor of the charge that its truth should be found; but when so found by discreet and reasonable triers, the issue should be determined in accordance with the preponderance, although it may not be said that the proof has removed all reasonable doubts": *Munson v. Atwood*, 30 Conn. 102; *Abraham v. Baldwin*, 52 Fla. 151, 10 Ann. Cas. 1148, 20 L. R. A., N. S., 1051, 42 South. 591; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336;

Decker v. Somerset Mut. F. Ins. Co., 66 Me. 406; *Wagoner v. Wagoner* (Md.), 10 Atl. 221; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797; *Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107, 12 N. W. 154; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Lyon v. Fleahmann*, 34 Ohio St. 151; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. 30, 21 Atl. 638; *Sparta v. Lewis*, 91 Tenn. 370, 23 S. W. 182; *Hills v. Goodyear*, 4 Lea (Tenn.), 233, 40 Am. Rep. 5; *Bradish v. Bliss*, 35 Vt. 326; *Armstrong v. Gage*, 25 Grant Ch. (U. C.) 1. See extended note to *Sprague v. Dodge*, 95 Am. Dec. 525, to which we are indebted for numerous well-stated propositions.

⁸⁶ Proof must be "convincing": *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024; "clear and satisfactory": *Lalonde v. United States*, 164 U. S. 255, 41 L. Ed. 425, 17 Sup. Ct. Rep. 74; *Dohmen Co. v. Niagara etc. Ins. Co.*, 96 Wis. 38, 71 N. W. 69; "clear, unequivocal and convincing": *United States v. American Bell Tel. Co.*, 167 U. S. 224, 241, 42 L. Ed. 144, 17 Sup. Ct. Rep. 809. As to suicide relied on as defense to action on life insurance policy or benefit certificate, see note to *Metropolitan Fire Ins. Co. v. DeVault*, 17 Ann. Cas. 32.

been fraudulently induced to execute it, by slightly more evidence than is adduced in its support. In such case the evidence of fraud should be clear, decided, and satisfactory, and it is error to instruct that "the preponderance of evidence need only be slight, so that the jury are enabled to say there is a little more evidence upon the one side than upon the other."⁸⁷ The United States supreme court has said "that canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for alleged fraud, unless the fraud is made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been injured thereby."⁸⁸

§ 196 (194). **Statutes as to burden of proof.**—That statutes can be enacted to regulate the burden of proof is now beyond question; that they should be enacted for such purposes is the natural outcome of the desire to expedite business as well as to lessen the work of the courts. In much the same way as presumptions became effective at common law, so the regulation of the burden of proof is the evolution of the principle demanded by progress. Statutes exist in some jurisdictions changing the general rule as to the burden of proof. For example, in England many statutes have been enacted which in certain criminal proceedings place upon the defendant the burden of explaining the possession of *counterfeit money* or tools or implements used in housebreaking. And in respect to many other offenses statutes in a similar manner, both in England and in this country, regulate the burden of proof as to certain facts peculiarly within the knowledge of the defendant. In civil cases there can remain no doubt that it is within the power of the legislature to determine on which party the burden of proof shall rest, and, having made such deter-

⁸⁷ Kansas M. O. M. Ins. Co. v. Remmelsberg, 58 Kan. 531, 50 Pac. 446.

⁸⁸ Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. Ed. 112.

mination, it may change it from time to time, and thus shift the burden as in its discretion shall seem proper. The power of the legislature in this respect, whether affecting proof of existing rights, or as applicable to rights subsequently acquired, or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted.⁸⁹ While the legislature cannot take from parties vested rights without compensation, the remedies by which rights are to be enforced or defended are within the absolute control of that branch of the government. The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to modification and control by the legislature.⁹⁰ "The changes which are enacted from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rule for future controversies. It may be conceded for all the purposes of this power that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by

⁸⁹ *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777; *Hickox v. Tallman*, 38 Barb. (N. Y.) 608; *Cooley*, Const. Lim., 368.

⁹⁰ It is not within the province of the legislature to divest rights by prescribing to the courts what should be *conclusive* evidence. This matter was fully considered in the case of *Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131, which arose under a statute, which endeavored to make a county clerk's deed of lands, sold for taxes, *conclusive* of its recitals against the

true owner. Justice Walker, in delivering the opinion, remarked: "The legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property": *Little Rock etc. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

contradictory and better evidence. That this may be done is well settled by authority."⁹¹ The legislature possesses the whole legislative power of the people, except so far as such power may be limited by the constitution, and therefore a statute may make the existence of certain facts *prima facie* evidence of the commission of a crime, though the explanation of the facts from which the presumption arises is not peculiarly within the knowledge of the person accused. The courts are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question.⁹² The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper.⁹³ Owing to the

⁹¹ *Hand v. Ballou*, 12 N. Y. 541; *Hickox v. Tallman*, *supra*; *Commonwealth v. Williams*, 6 Gray (Mass.), 1; *Cooley*, Const. Lim., 367.

⁹² *Board of Commrs. v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484. See notes to *State v. Thomas*, 6 Ann. Cas. 746; *Hammond v. State*, 14 Ann. Cas. 734; *Mobile etc. R. Co. v. Turnipseed*, Ann. Cas. 1912A, 465, and to *Banks v. State*, 2 L. R. A., N. S., 1007.

⁹³ A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the

guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict, unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted: *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Common-*

difficulty of obtaining direct evidence of violations of statutes with respect to *gambling* and similar offenses, statutes in some jurisdictions have declared that if any of the implements or devices commonly used by gamblers in gambling-houses are found in any house, it shall be *prima facie* evidence that such house is kept for gambling purposes.⁹⁴ Similar statutes have been enacted making the possession or delivery of *intoxicating liquors* under certain conditions *prima facie* evidence of their unlawful sale.⁹⁵ Although the *constitutionality of legislation* of this character has been attacked, the clear weight of authority sustains the view that it is competent for the legislature to prescribe rules of evidence both in civil and criminal cases and to regulate the burden of proof by statute. Even *conclusive presumptions* regulating the burden of proof have been created by statutes and upheld by the courts in respect to *tax proceedings*; and it has been held that the legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all nonessentials or as to matters of routine which rest in mere expediency, acts which need not have been required by the statute in the first place and which the legislature may, by a curative act, excuse when omitted.⁹⁶ Of course, in such cases, the statute cannot interfere with rights; it can only regulate the

wealth v. Williams, *supra*; Commonwealth v. Wallace, 7 Gray (Mass.), 222.

⁹⁴ Wooten v. State, 24 Fla. 335, 1 L. R. A. 819, 5 South. 39; Morgan v. State, 117 Ind. 569, 19 N. E. 154. As to the general subject of this section, see extended note to People v. Cannon, 36 Am. St. Rep. 682, 689.

⁹⁵ Commonwealth v. Rowe, 14 Gray (Mass.), 47; Board of Commissioners v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; Edwards v. State, 121 Ind. 450, 23 N. E. 277; State v. Morgan, 40 Conn. 44; Lincoln v. Smith, 27 Vt. 328; State v. Cunningham, 25 Conn. 195; State v. Hur-

ley, 54 Me. 562; State v. Mellor, 13 R. I. 666. As to power of legislature to make possession of intoxicating liquor *prima facie* evidence of an attempt to violate the law against illegal sales, see note to State v. Barrett, 1 L. R. A., N. S., 626.

⁹⁶ Phelps v. Meade, 41 Iowa, 470; De Treville v. Smalls, 98 U. S. 516, 25 L. Ed. 174; Turpin v. Lemon, 137 U. S. 51, 47 L. Ed. 70, 23 Sup. Ct. Rep. 20; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Matter of Lake, 40 La. Ann. 142, 3 South. 479; Rollins v. Wright, 93 Cal. 395, 29 Pac. 58.

assertion of rights by directing the method or burden of proving facts. Statutes cannot enact that a fact with which an accused person is not necessarily connected shall be *prima facie* evidence that he had committed such act and of his intent.⁹⁷ The legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings, so far as they rest in the discretion of the legislature, and an omission to perform them may subsequently be cured or excused by it; but it cannot make such deed more than *prima facie* evidence of the performance of any act, or of the existence of any fact, essential to the validity of the transaction; and to do so would be to deprive the party of his property without due process of law, contrary to the

⁹⁷ In *People v. Lyon*, 27 Hun (N. Y.), 180, it was held that a statute providing that whenever any person is seen to drink spirituous liquors in any place in which they are forbidden to be drunk, it shall be *prima facie* evidence of an illegal sale, etc., is unconstitutional. The court said: "If the legislature can declare that a certain fact is *prima facie* evidence of the defendant's guilt, such a declaration means that the jury must convict unless the defendant explains away this evidence; and if they can declare a fact to be *prima facie*, it would seem to follow that they might declare it conclusive evidence. . . . But this clause of the statute must stand, if at all, irrespective of any natural tendency in the fact of such drinking to convince a jury of the defendant's guilt. To illustrate: If the legislature can legally enact such a clause, they might enact that the drinking of liquors a mile distant from such a house, or shop, should be *prima facie* evidence of a sale in such house or shop, with intent that the liquor so sold should be drunk on the premises. Or again: They might enact that if a dead body

were found in any house that should be *prima facie* evidence that the occupant of the house had murdered the deceased. Because the legislative enactment is merely arbitrary, and need have no regard to the connection, or want of connection, between the evidence and the conclusion which is to be proved, it is urged on the part of the people that this clause of the statute is but analogous to certain common-law presumptions, such, for instance as that the possession of recently stolen property affords a presumption that the possessor is guilty of the larceny: *Wills' Circ. Evid.*, 53; *Knickerbocker v. People*, 43 N. Y. 177. But this presumption is only the natural inference which the jury may properly draw from circumstances with which the party accused is connected: 3 *Greenl. Ev.*, § 31. On the contrary, this clause of the statute declares a fact, with which the accused is not necessarily connected, to be *prima facie* evidence of an illegal act of the accused and of the intent with which it was done. Thus this clause comes within the condemnation expressed by Judge Selden, in *Wynehamer v. People*, 13 N. Y. 378."

fourteenth amendment.⁹⁸ Dillon, J., laid down the rule well and tersely in these words: "We state the principle, which must be legally and logically true, in this wise: If any given step or matter in the exercise of the power to tax (as, for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and, with respect to that, the owner cannot be excluded from showing the truth by a mere legislative declaration to that effect."⁹⁹ A *special tax bill* issued in pursuance of the charter of St. Louis, in payment for labor and material furnished by the contractor in improving a public street of the city, when certified by the proper authorities thereof, is *prima facie* evidence, as above stated, of all the necessary facts to create a lien upon the property affected, and to entitle the holder, in a suit thereon, to a judgment foreclosing and enforcing the same. And such tax bill, when properly identified and introduced in evidence, establishes a *prima facie* case in favor of a plaintiff which can only be overcome by proof offered by a defendant of facts which destroy its validity or regularity.¹⁰⁰ It was held in Arkansas that the legislature had no power to make a *donation deed* conclusive evidence of title.¹ Statutes quite generally exist creating a presumption of *fraud* as against creditors in the *sale of goods* in possession, unless accompanied by immediate delivery, and placing the burden of proving good faith upon the person claiming under such sale; other statutes place

⁹⁸ Marx v. Hanthorn, 30 Fed. 579,

⁹⁹ Allen v. Armstrong, 16 Iowa, 508; Abbott v. Lindenbower, 42 Mo. 162.

¹⁰⁰ Section 25, art. 6, Charter of St. Louis; Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382; Cushing v. Powell, 130 Mo. App. 576, 579, 109 S. W. 1054; Granite etc. Co. v. McManus, 144 Mo. App. 593, 129 S. W. 448. In Patton v. Tate, 145 Mo. App. 273, 129 S. W. 1022, it was held that

the charter provisions of Kansas City, which gave a *prima facie* character to *special tax* bills, apply only to suits on the tax bills and not to other actions.

¹ They are only *prima facie* evidence: Winn v. Whitehouse, 96 Ark. 42, 131 S. W. 70; Kirby's Dig., §§ 2741, 4820; Cracraft v. Meyer, 76 Ark. 450, 88 S. W. 1027; Cairo etc. R. Co. v. Parks, 32 Ark. 131.

the burden of showing good faith upon the holders of *chattel mortgages* in contests between such mortgagees and the creditors of the debtor. It is within the legislative power not only to legalize as evidence a presumption that the insolvency of a bank was caused by the *fraudulent act* of the officers directly charged with its affairs, but also to place upon such officers the burden of rebutting this presumption. There is no hardship in this rule to the official who has honestly, though unsuccessfully, administered the affairs of a bank.² In *bastardy* cases, statutes have provided that the examination of the woman taken and returned shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant. This carries with it the force and effect of changing the burden of the issue as to the paternity of the child, and that, on the introduction of the affidavit on the part of the mother, the testimony introduced and relevant must be considered and the question determined according to this ruling.³ The legislature has authority to provide, in appeals from orders of the *State Railway Commission*, that the burden of proof should rest upon the party seeking to set aside the decision of the commissioners to show by clear and satisfactory evidence that the order is unreasonable and unjust, and that the record should be *prima facie* evidence that the order is just and reasonable.⁴ The *protest* of any foreign or inland bill of exchange or promissory note certified by a notary public may be made legal evidence of the facts stated in such protest, and the statute giving it that effect is constitutional, and is not restricted to pro-

² *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383.

³ *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002; *State v. McDonald*, 152 N. C. 802, 67 S. E. 762.

⁴ *Chicago etc. Co. v. Nebraska State Ry. Commission*, 85 Neb. 818, 26 L. R. A., N. S., 444, 124 N. W. 477. (In such a case the evidence must

outweigh that offered by the defendant, and it must be of the same clear and satisfactory nature as that required in other cases where presumptions of validity attach to the instrument sought to be set aside, or to the transaction sought to be declared void.)

tests made before its enactment.⁵ A statute authorizing the appointment of an auditor in *actions of account* for the purpose of stating the account between the parties, and of making a report to the court, which report may, under the direction of the court, be given in evidence to the jury, may have the effect of changing the burden of proof, because the report must be assumed *prima facie* to be correct. The statute is nevertheless valid and free from constitutional objection.⁶ It goes without saying that where facts are made by statute *prima facie* evidence, in civil cases the burden of evidence (so generally mis-called burden of proof that we have used the terms indiscriminately) is immediately shifted,⁷ but the general burden of proof remains as in ordinary cases.⁸ For other statutes on the subject of which these are only illustrations, the practitioner should consult the statutes of his jurisdiction.⁹

⁵ *Fales v. Wadsworth*, 23 Me. 553.

⁶ *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Allen v. Hawks*, 11 Pick. (Mass.) 359; *Morgan v. Morse*, 13 Gray, 150.

⁷ *Chandler v. Northrop*, 24 Barb. (N. Y.) 129; *Wallace v. Western N. C. R. Co.*, 104 N. C. 442, 10 S. E. 552.

⁸ *Inhabitants of Cohasset v. Moors*, 204 Mass. 173, 90 N. E. 978.

⁹ Other cases of interest are *Chicago etc. R. Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499 (commissioners' condemnation report); *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 35 L. R. A. 176, 45 N. E. 303 (banker's failure within thirty days after receiving deposit); *Bertrand v. Taylor*, 87 Ill. 235 (burnt record act); *Murphy v. Williamson*, 85 Ill. 149 (plaintiff in ejectment proving possession); *Broadie v. Carson*, 81 Kan. 467, 106 Pac. 294 (records of land sales); *Jones v. Hickey*, 80 Kan. 109, 133 Am. St. Rep. 190,

102 Pac. 247 (service of process); *Grinky v. Durfee*, 137 Mich. 49, 100 N. W. 171 (insanity certificates); *Irwin v. Pierro*, 44 Minn. 490, 47 N. W. 154 (probate decrees); *Belcher v. Mhoon*, 47 Miss. 613 (fixing inferences to be drawn from facts); *Chiles v. School Dist. of Buckner*, 103 Mo. App. 240, 77 S. W. 82 (presumption of satisfaction of judgment); *Coe v. Ritter*, 86 Mo. 277 (recitals in deeds); *Howard v. Moot*, 64 N. Y. 262 (testimony taken *de bene esse*); *State v. Kline*, 50 Or. 426, 93 Pac. 237 (intoxicating liquors); *Northern Liberties v. St. John's Church*, 13 Pa. 104 (claims in municipal assessment suits); *Sims v. Sealy*, 53 Tex. Civ. App. 518, 116 S. W. 630 (certified copies); *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504 (birth and death records); *Ehle v. Brown*, 31 Wis. 405 (sheriff's deed); *Lumsden v. Cross*, 10 Wis. 282 (tax lists); *State v. King*, 64 W. Va. 546, 63 S. E. 468 (recitals in deeds).

§ 197 (195). **The right to begin and reply.**—Strictly speaking, the discussion of the right to begin and reply should find place in a work on Trial rather than here; but it is so closely connected with the subject of burden of proof, that the busy practitioner may look for some reference to the very practical question as to who has the right to begin the introduction of evidence, and the right to open and reply in the argument to the court or jury. This is for the determination¹⁰ of the court in the absence of statutory provision on *inspection of the pleadings*.¹¹ The rule which has come to prevail is that “the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict or as to the amount of damages to which he conceives the proof of such facts may entitle him.”¹² The defend-

¹⁰ This determination is a matter of right, not privilege: *Davis v. Mason*, 4 Pick. (Mass.) 156; *Porter v. Still*, 63 Miss. 357; *Judge of Probate v. Stone*, 44 N. H. 593; *Farmers' Nat. Bank v. Gaskill*, 9 N. J. L. J. 204; *Lake Ont. Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Smith v. Traders' Nat. Bank*, 74 Tex. 541, 12 S. W. 221. Although in some states it lies strictly within the discretion of the court: *Smith v. Coopers*, 9 Iowa, 376; *Aultman v. Falkum*, 47 Minn. 414, 50 N. W. 471; *Lucas v. Sullivan*, 33 Mo. 389; *Smith v. Frazier*, 53 Pa. 226; *Woodward v. Iowa L. Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020; and there are decisions which, while not going that length, allow the court discretion in cases where there is doubt as to the balance of the issues: *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727; *Metropolitan Life Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836.

¹¹ *Dahlman v. Hammel*, 45 Wis. 466; *Richards v. Nixon*, 20 Pa. 19.

See note to *Brunswick etc. R. R. Co. v. Wiggins*, 61 L. R. A. 513-526; *Mason v. Seitz*, 36 Ind. 516; *Trenkmann v. Schneider*, 23 Misc. Rep. 336, 51 N. Y. Supp. 232; *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719; *Pontifex v. Jolley*, 9 Car. & P. 202, 38 Eng. Com. L. 127. The *admission of facts* at the opening of the trial by the defendants does not change the rule: *Lake Ontario Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

¹² *Lord Denman in Mercer v. Whall*, 5 Q. B. 447, 5 Ad. & E., N. S., 447, 114 Eng. Reprint, 1318; *Lake Ontario Bank v. Judson*, 122 N. Y. 638, 25 N. E. 392; *Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925 (slander); *Welsh v. Burr*, 56 Neb. 361, 76 N. W. 905; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. Y. 837, 100 N. W. 930, 103 N. W. 455; *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120 (execution of a note); *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; *Perkins v. Ermel*,

ant who may wish to take the right of opening and concluding the trial must so frame his pleading as to present no issue upon any allegation of the complaint essential to the plaintiff's alleged cause of action. If the defendant fails to do that, no matter how little proof the remaining issues require or how easily or in what manner it may be established by evidence, the right of the plaintiff to open and close is not denied him.¹³ It must be borne in mind

2 Kan. 325; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141; *Pierce v. Lyman*, 28 Ark. 550; *Johnson v. Josephs*, 75 Me. 544; *Love v. Dickerson*, 85 N. C. 5; *Dille v. Lovell*, 37 Ohio St. 415 (*assault, plea of justification*); *Young v. Highland*, 9 Gratt. (Va.) 16 (*assault and battery, plea of justification*); *Graham v. Gautier*, 21 Tex. 111 (*action for physician's bill, counterclaim for want of skill*); *Camp v. Brown*, 48 Ind. 575 (*where proof was necessary to show reasonable attorney fee in a note*); *Wright v. Abbott*, 85 Ind. 154 (*action on account, cause of action denied, plea of payment*); *Dahlman v. Hammel*, 45 Wis. 466 (*action on guaranty of notes, answer denying indebtedness and setting up fraud*); *Buzzell v. Snell*, 25 N. H. 474 (*goods sold, plea general issue and tender*). Some of the older cases, however, do not conform to this rule, but are cited for reference. For example, *Ransome v. Christian*, 56 Ga. 351 (*slander*); *Moses v. Gatewood*, 5 Rich. (S. C.) 234 (*libel and slander*); *Downey v. Day*, 4 Ind. 531 (*assault*); *Goldsberry v. Stuteville*, 3 Bibb (Ky.), 345 (*assault*); *McKenzie v. Milligan*, 1 Bay (S. C.), 248 (*assault*); *Page v. Carter*, 8 B. Mon. (Ky.) 192. In Massachusetts, the tendency of the decisions is to allow the plaintiff to open and close in all cases: *Dorr v. Tremont Bank*, 128 Mass. 349.

¹³ *St. Louis etc. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598; *Macdermid v. Watkins*, 41 Colo. 231, 92 Pac. 701; *Young v. Newark F. Ins. Co.*, 59 Conn. 41, 22 Atl. 32; *Lofland v. McDaniel*, 1 Penne. (Del.) 416, 41 Atl. 882; *Widincamp v. Widincamp*, 135 Ga. 644, 70 S. E. 566; *Horton v. Pintchuck*, 110 Ga. 355, 35 S. E. 663; *Bemis v. Horner*, 165 Ill. 347, 46 N. E. 277; *Long etc. Co. v. Branes*, 162 Ind. 22, 69 N. E. 454; *Craggs v. Bohart*, 4 Ind. Ter. 443, 69 S. W. 931; *Wilson v. Big Joe Block Coal Co.*, 142 Iowa, 521, 119 N. W. 604; *Baugman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *Givens v. Berkeley*, 108 Ky. 236, 56 S. W. 158, 21 Ky. Law Rep. 1653; *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Young v. Haydon*, 3 Dana (Ky.), 145; *Daviess v. Arbuckle*, 1 Dana (Ky.), 525; *Beaulieu v. Furst*, 3 Rob. (La.) 345; *Hurley v. O'Sullivan*, 137 Mass. 86; *Viehman v. Boelter*, 105 Minn. 60, 116 N. W. 1023; *Porter v. Still*, 63 Miss. 357; *James v. Mutual Reserve Fund L. Assn.*, 148 Mo. 1, 49 S. W. 978; *Judge of Probate v. Stone*, 44 N. H. 593; *Farmers' Nat. Bank v. Gaskill*, 9 N. J. L. J. 204; *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759; *Love v. Dickerson*, 85 N. C. 5; *Beatty v. Hatcher*, 13 Ohio St. 115; *Von Storch v. Von Storch*, 196 Pa. 545, 46 Atl. 1062; *Beckham v. Southern R. Co.*, 5 S. C. 25, 27 S. E. 611; *Parks*

we are referring to the general practice, for while in many states the right to begin and reply is regulated by rule of court, on the other hand, in some states it has formed matter for statutory enactment. In Alaska, California, Idaho, Louisiana, North Dakota, South Dakota, Oregon, and Utah, for instance, the plaintiff has the right by virtue of code or statutory provision, to open and close without regard to the burden of proof or affirmative of the issue.¹⁴ For ourselves, we cannot but think that the code provisions last referred to are to be preferred, in that they aim at that general uniformity which conduces to the proper expedition of business. To return, however, to the position as at present defined, it is laid down as a general rule that the party who has the affirmative of the issue to maintain shall begin and close. This rule, however, has been held subject to several limitations, and been more or less fluctuating both in England and America; so much so, that it would be difficult, perhaps, at the present time, to lay down any definite rules of practice as well sustained by authority which could not be contradicted by other authority equally respectable. Some jurisdictions hold it to be a matter of right, while others decide that it rests in the legal discretion of the court at the trial. Wherever the pleadings admit the plaintiff's whole cause of action, and attempt to avoid it by new matter, the defendant has the right to begin and close. But where the whole is not admitted and anything is left for the plaintiff to show, the right to commence and close is with him.¹⁵ In considering which party ought to begin, it is not so much the form of the issue which is to be regarded as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make

v. Young, 75 Tex. 278, 12 S. W. 986; Goss v. Turner, 21 Vt. 437; Overton v. Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; McDougall v. Walling, 19 Wash. 80, 52 Pac. 530; Armstrong v. United States, 1 Fed. Cas. No. 548, Gilp. 399.

¹⁴ From the full and instructive note to Brunswick & W. R. Co. v. Wiggins, 61 L. R. A. 513, from which we have extracted numerous well-edited propositions and authorities.

¹⁵ Thurston v. Kennett, 22 N. H. 151.

it out.¹⁶ Whenever the general issue is in the case, the plaintiff has the right to open and close.¹⁷ The *test* is where the plaintiff, upon the pleadings without any proof, is entitled to recover upon the causes of action alleged in his complaint. If he is so entitled to recover and if the defendant alleges any counterclaim, controverted by the plaintiff's pleading, or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action which is the subject of trial, the defendant has the right to open and close, otherwise not.¹⁸ Accordingly, in all actions

¹⁶ *Bills v. Vose*, 27 N. H. 212.

¹⁷ *Jarboe v. Scherb*, 34 Ind. 350; *Cox v. Vickers*, 35 Ind. 37; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Kearny v. Gough*, 5 Gill & J. (Md.) 457; *Toppan v. Jenness*, 21 N. H. 232; *Hudson v. Wetherington*, 79 N. C. 3; *Harvey v. Brouillette*, 61 Vt. 525, 17 Atl. 722; *Farrington v. Jennison*, 67 Vt. 569, 32 Atl. 641; *Price v. Seaward*, Car. & M. 23. In the natural course of litigation, this burden and right usually reside with the plaintiff, the party who initiates the action, proceeding or suit; and, this being so, it follows that, so long as the affirmative of any substantial issue, however slight, remains with the plaintiff, he retains the right to open and close, even though the affirmative of a majority of such issues is with the defendant. But where the latter, either in positive terms, or by the nature and character of his pleading, absolutely admits the cause of action, thereby absolving the plaintiff from the necessity of making any proof thereof, in order to succeed, the burden and right are said to shift and rest with the defendant. (From the note to *Brunswick etc. R. R. Co. v. Wiggins*, 61 L. R. A. 513, above referred to.)

¹⁸ *Jones v. Seymour*, 95 Ark. 593, 130 S. W. 560; *Pierce v. Lyman*, 28

Ark. 550; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Pyles v. Piedmont Mt. Airy Guano Co.*, 58 Fla. 348, 50 South. 872; *Widincamp v. Widincamp*, 135 Ga. 644, 70 S. E. 566; *Brunswick etc. R. Co. v. Wiggins*, 113 Ga. 842, 61 L. R. A. 513, 39 S. E. 551; *Convert v. Bishop etc. Co.*, 152 Ill. App. 516; *Chronister v. Anderson*, 73 Ill. App. 524; *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; *Names v. Boston Dwelling House Ins. Co.*, 95 Iowa, 642, 64 N. W. 628; *Hawkins Furniture Co. v. Morris*, 143 Ky. 738, 137 S. W. 527; *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7, 29 Ky. Law Rep. 1193; *Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558; *Crapson v. Wallace*, 81 Mo. App. 680; *Kraus v. Clark*, 81 Neb. 575, 116 N. W. 164; *Thurston v. Kennett*, 22 N. H. 151; *Phyfe v. Dale*, 69 Misc. Rep. 637, 126 N. Y. Supp. 92; *Lake Ontario National Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Murray v. New York L. Ins. Co.*, 85 N. Y. 236; *Stronach v. Bledsoe*, 85 N. C. 473; *Sanders v. Sanders*, 30 S. C. 207, 9 S. E. 94; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 663; *Mercer v. Whall*, 5 Adol. & El., N. S., 447, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 Eng. Com. L. 447, 14 Eng. Reprint, 1318; *Miller v. Confederation L. Assur. Co.*,

where the *damages are unliquidated* and the amount is not admitted, whether in tort¹⁹ or contract,²⁰ the plaintiff opens the proof and has the right to open and close the argument. But in those actions where the pleadings are so framed that the allegations of the complaint are admitted and the answer consists of a substantive defense, and where the damages are liquidated, the *defendant takes the initiative* and has the opening and the close in introducing evidence as well as in the argument.²¹ Where there

11 Ont. 120. Another method has been suggested in the note to Brunswick etc. R. R. Co. v. Wiggins, 61 L. R. A. 513, referred to: "Thus the two general rules for determining the *onus probandi* are, (1) to conceive the negative and affirmative allegations by which the issue is joined both struck out of the record, and the *onus probandi* lies on the party against whom judgment must, in their absence, pass; (2) to consider at the trial which party would succeed if no evidence at all were given, as the *onus probandi* must lie upon his adversary."

19 Cunningham v. Gallagher, 61 Wis. 170, 20 N. W. 925; Vifquain v. Finch, 15 Neb. 505, 19 N. W. 706; Burekhalter v. Coward, 16 S. C. 435; Fry v. Bennett, 28 N. Y. 324; St. Louis Ry. Co. v. Taylor, 57 Ark. 136, 20 S. W. 1083. Cases in slander and libel: Young v. Highland, 9 Gratt. (Va.) 16; Johnson v. Josephs, 75 Me. 544; Shulse v. McWilliams, 104 Ind. 512, 3 N. E. 243; Louisville Journal v. Weaver, 13 Ky. Law Rep. 599, 17 S. W. 1018. Assault: Lunt v. Wowrmell, 19 Me. 100. Trespass: Ayer v. Austin, 6 Pick. (Mass.) 225; Cheeseman v. Hart, 42 Fed. 98, 16 Morr. Min. Rep. 263.

20 Mercer v. Whall, 5 Q. B. 447, 5 Ad. & E., N. S., 447, 114 Eng. Reprint 1318 (action for dismissing a

servant); Graham v. Gautier, 21 Tex. 111 (action for pay for physician's services); Camp v. Brown, 48 Ind. 575 (action on notes providing for reasonable attorney's fees). But the admission of the cause of action, except as to questions of value, does not give defendant this right: Sanders v. Bridges, 67 Tex. 93, 2 S. W. 663. See next section.

21 Donahoe v. Rich, 2 Ind. App. 540, 28 N. W. 1001 (action for rent and attorneys' fees under a lease); Fiss v. Warren, 6 Misc. Rep. 68, 26 N. Y. Supp. 75 (action on a note, the defendant, by claiming and being allowed the affirmative, assumes the burden of proof; and the same is held on the reverse state of facts in Burgess v. Burgess, 44 Neb. 16, 62 N. W. 242, where, without objection, one party assumes the burden of proof, he also has the right to open and close to the jury). This is true in actions on *notes and bills*: Warner v. Haines, 6 Car. & P. 666; List v. Kortepeter, 26 Ind. 27; Harvey v. Ellithorpe, 26 Ill. 418; Tipton v. Triplett, 1 Met. (Ky.) 570; Hudson v. Wetherington, 79 N. C. 3; Blackledge v. Pine, 28 Ind. 46; Fairbanks v. Irwin, 15 Colo. 366, 25 Pac. 701; Montgomery v. Hunt, 93 Ga. 438, 21 S. E. 59; *insurance policies*: Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Young v. Newark Fire Ins. Co.,

is but one issue, and the affirmative is upon the defendant, or where the affirmative of all the issues is upon him, then he has the right to begin.²² And so, where the defendant pleads by way of confession and avoidance, or in such other manner as to admit the plaintiff's cause of action, or in open court, before entering upon the trial, he admits the plaintiff's cause of action, and thus obviates the necessity of any proof on his part; the defendant will be entitled to open and close.²³

§ 198 (196). *Same, continued.*—We have now to consider the nature of admissions made by the defendant. The rule is not changed by the fact that there are *admissions* in the answer of the facts alleged in the complaint, unless such admissions were such that the plaintiff is not required to introduce any evidence in the first instance to entitle him to judgment, but such admissions must cover the whole cause of action to entitle the defendant to be-

59 Conn. 41, 22 Atl. 32; *Murphy v. New York Life Ins. Co.*, 85 N. Y. 236; check: *Elwell v. Chamberlin*, 31 N. Y. 611; in actions where defendant sets up an *affirmative defense* or counterclaim, as *usury*: *Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205; *Harvey v. Ellithorpe*, 26 Ill. 418; *Elwell v. Chamberlin*, 31 N. Y. 611; *Seekel v. Norman*, 78 Iowa, 254, 43 N. W. 190; *tender*: *Auld v. Hepburn*, Fed. Cas. No. 650, 1 Cranch C. C. 122; *discharge* in bankruptcy or insolvency: *Richard v. Nixon*, 20 Pa. 19; *failure of consideration* of a note: *Towsey v. Shook*, 3 Blackf. (Ind.) 267, 25 Am. Dec. 108; *want of jurisdiction*: *Tipton v. Triplett*, 1 Met. (Ky.) 570; *List v. Kortepeter*, 26 Ind. 27; *fraud* or duress: *Elwell v. Chamberlin*, 31 N. Y. 611; *Hoxie v. Greene*, 37 How Pr. (N. Y.) 97; *want of consideration*: *Crabtree v. Atchison*, 93 Ky. 338, 20 S. W. 260; action on judgment, *plea of satisfac-*

tion: *Pinson v. Puckett*, 35 S. C. 178, 14 S. E. 393. The plaintiff has the right to open and close when answer consists of *general denial*: *Dahlman v. Hammel*, 45 Wis. 466; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838; or of *specific* allegations constituting a denial: *Amos v. Hughes*, 1 Moody & R. 464; *Ayer v. Austin*, 6 Pick. (Mass.) 225; *Toppin v. Jenness*, 21 N. H. 232; *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; *Cox v. Vickers*, 35 Ind. 27; *Perkins v. Ermel*, 2 Kan. 325; *Judge of Probate v. Stone*, 44 N. H. 593; *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; but *waiver* by plaintiff of *opening argument* does not waive close, if defendant makes an argument: *Trask v. People*, 151 Ill. 523, 38 N. E. 248.

²² *McRae v. Lawrence*, 75 N. C. 289.

²³ *Aurora v. Cobb*, 21 Ind. 492.

gin.²⁴ Where there are *several issues*, as to one of which only the defendant has the affirmative, the plaintiff has both the opening and the closing, as "it is not usual to divide the issues and allow them to be argued piecemeal."²⁵ The right of the plaintiff to open and close is not necessarily defeated by the act of the defendant in setting up some special plea or defense. Such *special defense* may be in effect *a denial of the plaintiff's title* or of some of the allegations of the complaint, and not an admission.²⁶ Thus, where the plaintiff's right of action depends upon proof of *bona fide* ownership, his right to open and close is not taken away by allegations in the answer that his title is fraudulent.²⁷ It is held in some jurisdictions that the determination of this question by the court does not affect the merits of the case, and that an erroneous decision is not a ground for reversal in the appellate court, although it may be a ground for granting a new trial by

²⁴ Rahm v. Deig, 121 Ind. 283, 23 N. E. 141; Seymour v. Bailey, 76 Ga. 338. See note to Brunswick etc. R. R. Co. v. Wiggins, 61 L. R. A. 513-563; Phoenix Ins. Co. v. Gray, 113 Ga. 424, 38 S. E. 992; Hyatt v. Clements, 65 Ind. 12; Goodpaster v. Voris, 8 Iowa, 334, 74 Am. Dec. 313; Louisville etc. R. Co. v. Schwab, 127 Ky. 82, 105 S. W. 110, 31 Ky. Law Rep. 1313; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Sanders v. Bridges, 67 Tex. 93, 2 S. W. 663; Doe v. Tucker, M. & M. 536, 22 Eng. Com. L. 580; Mann v. Dempster, 181 Fed. 76, 104 C. C. A. 110.

²⁵ Bertrand v. Taylor, 32 Ark. 470; Comstock v. Hadlyme, 8 Conn. 254, 20 Am. Dec. 100; Carpenter v. Joliet First Nat. Bank, 119 Ill. 352, 10 N. E. 18; Bowen v. Spears, 20 Ind. 146; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Jennings v.

Maddox, 8 B. Mon. (Ky.) 430; Abat v. Sigura, 5 Mart., N. S. (La.), 73; Lunt v. Wormwell, 19 Me. 100; Ayer v. Austin, 6 Pick. (Mass.) 225; Porter v. Still, 63 Miss. 357; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Buzzell v. Snell, 25 N. H. 474; Chesley v. Chesley, 37 N. H. 229; Lake Ontario Bank v. Judson, 122 N. Y. 278, 25 N. E. 367; Stilwell v. Archer, 64 Hun, 169, 18 N. Y. Supp. 888; Johnson v. Maxwell, 87 N. C. 18; Churchill v. Lee, 77 N. C. 341; Lexington F. etc. Ins. Co. v. Paver, 16 Ohio, 324; Montgomery v. Swindler, 32 Ohio St. 224; Dixon, C. J., in Central Bank v. St. John, 17 Wis. 157; Curtis v. Wheeler, 4 Car. & P. 196, 1 Moody & M. 493.

²⁶ Beatty v. Hatcher, 13 Ohio St. 115 (answer admitted an assignment, but alleged to be fraudulent).

²⁷ Churchill v. Lee, 77 N. C. 341.

the trial judge.²⁸ But the rule which more generally prevails is that the denial of a right to a party who is entitled to open and reply so far affects the merits as to afford *ground for reversal* on appeal when the question is presented by the bill of exceptions.²⁹ In other states the question is deemed one of *judicial discretion*, and the decision of the trial judge will not be disturbed, except in cases of manifest abuse, where it appears that the complaining party has been injured by the erroneous ruling.³⁰ The subject of this and the preceding section have been well summarized in a valuable work of reference on the subject³¹ that the "burden of proof with its incident right to open and close, naturally and necessarily is, in the first

²⁸ *Lancaster v. Collins*, 115 U. S. 222, 29 L. Ed. 373, 6 Sup. Ct. Rep. 33; *Day v. Woodworth*, 13 How. (U. S.) 363, 14 L. Ed. 181; *Cothran v. Forsyth*, 68 Ga. 560; *Reichard v. Manhattan Ins. Co.*, 31 Mo. 518; *Aultman v. Falkum*, 47 Minn. 414, 50 N. W. 471, by statute; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Hall v. Weare*, 92 U. S. 728, 23 L. Ed. 500; *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *Montgomery v. Swindler*, 32 Ohio St. 224.

²⁹ *Davis v. Mason*, 4 Pick. (Mass.) 156; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Royal Ins. Co. v. Schwing*, 87 Ky. 410, 9 S. W. 242; *Millerd v. Thorn*, 56 N. Y. 402; *Porter v. Still*, 63 Miss. 357; *Benham v. Howe*, 2 Cal. 387, 56 Am. Dec. 342; *Johnson v. Maxwell*, 87 N. C. 18; *Blackledge v. Pine*, 28 Ind. 466; *Young v. Highland*, 9 Gratt. (Va.) 16.

³⁰ *Denver Land etc. Co. v. Rosenfeld Constr. Co.*, 19 Colo. 539, 36 Pac. 146; *Greene v. Georgia Cent. R. Co.*, 112 Ga. 859, 38 S. E. 360; *Nagle v. Schnadt*, 239 Ill. 595, 88 N. E. 178; *Geringer v. Novak*, 117 Ill. App. 160; *Gentry v. Singleton*, 4 Ind. Ter. 346,

69 S. W. 898; *Fenton v. Iowa State Traveling Men's Assn.*, 139 Iowa, 166, 117 N. W. 257; *Dent v. Smith*, 53 Iowa, 262, 5 N. W. 143; *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727; *State v. Waltham*, 48 Mo. 55; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Citizens' State Bank v. Baird*, 42 Neb. 219, 60 N. W. 551; *Seely v. Manhattan L. Ins. Co.*, 73 N. H. 339, 61 Atl. 585; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Dille v. Lovell*, 37 Ohio St. 415; *Ney v. Rothe*, 61 Tex. 374; *Belt v. Raguette*, 27 Tex. 471; *Stephens v. Harvey*, 7 Leigh (Va.), 501; *Ogle v. Adams*, 12 W. Va. 213; *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220; *Bannon v. Insurance Co. of North America*, 115 Wis. 250, 91 N. W. 666; *Kaime v. Trustees of Omro*, 49 Wis. 371, 5 N. W. 838; *New York Dry Goods Store v. Pabst Brewing Co.*, 112 Fed. 381, 50 C. C. A. 295; *Florence Oil etc. Co. v. Farrar*, 109 Fed. 254, 48 C. C. A. 345.

³¹ The note referred to in *Brunswick etc. R. R. Co. v. Wiggins*, 61

instance, with the plaintiff or party who initiates the action, suit, or proceeding, and remains with such party so long as it continues incumbent on him to make any proof whatever. That when the defendant, either by an admission in express and absolute terms, or by refraining from denial of plaintiff's cause of action and alleging affirmative matter in avoidance of it renders it wholly unnecessary for the plaintiff to give any evidence whatever to have a complete recovery of all that he claims,—the burden and right are with the defendant. That, when the defendant has secured the right to begin by admitting plaintiff's cause of action and alleging affirmative matter in avoidance of it, if the plaintiff, in reply, does not deny the same, but in turn alleges new matter avoiding it, the burden and right is then said to again shift, and return to and remain with the plaintiff."³²

L. R. A. 513, on the effect of admissions to change the burden of proof and right to open and close.

³² Courts differ as to when and how such admissions should be made. It would look as though the weight of decision favors the doctrine that it must be at the very commencement of the trial and from an inspection of the pleadings alone. But there is a strong array of judges who take an opposite view, and in England, particularly, the admission is often made

in open court during the trial, and frequently at the suggestion of the judge. And in Iowa (by code provision) the right to conclude cannot be determined until after the evidence is in. Such admissions, and their effect and character, are, as has been said, like many other questions, dependent to a large extent upon the facts and circumstances of the individual case. (From the note to *Brunswick etc. R. R. Co. v. Wiggins*, 61 L. R. A. 513, *supra*.)

CHAPTER 7.

BEST EVIDENCE.

- § 199. Rule as to Best Evidence.
- § 200. Primary and Secondary Evidence.
- § 200a. Application of the Rule—Illustrations.
- § 201. Same—Private Writings.
- § 201a. Same—Illustrations.
- § 202. The Rule Does not Exclude Evidence Unless Objection is Made.
- § 203. Qualifications of the Rule—Independent and Collateral Facts.
- § 203a. Same—Illustrations.
- § 204. Same—Corporate Acts.
- § 204a. Same—Illustrations.
- § 205. Appointment and Acts of Public Officers.
- § 205a. Same—Illustrations.
- § 205b. Writings Practically Incapable of Production.
- § 205c. Same—Public Records—Statutes—Books of Corporations.
- § 206. Multiplicity of Documents—General Results.
- § 207. Parol Proof of Admissions of Self-harming Evidence Concerning Writings—English Rule.
- § 208. Same—Rule in the United States.
- § 209. Same—Copies not the Best Evidence—Duplicates.
- § 210. The General Rule as Applied to Telegrams—Mode of Proof.
- § 211. Communications by Telephone.
- § 212. Proof of Lost Instruments.
- § 213. Same—Diligence Necessary Before Secondary Evidence is Allowed.
- § 214. Same—Further Illustrations.
- § 215. Importance of Documents as Affecting Diligence.
- § 215a. Same—Time of Search.
- § 216. Competency of Witnesses to Prove Loss—Hearsay Admissions—Affidavit.
- § 217. Documents Beyond the Jurisdiction of the Court.
- § 217a. Documents of Which Production cannot be Compelled.
- § 217b. Destruction of Documents—Abstraction to Prevent Production.
- § 218. Effect of Notice to Produce.
- § 219. Object of Notice to Produce—Time of Giving.
- § 219a. Same—Illustrations.
- § 220. Efficacy and Requisites of Notice.
- § 221. Notice to Produce—On Whom Served.
- § 222. Effect of Nonproduction After Notice.
- § 223. When Notice to Produce is not Necessary.
- § 224. Same, Continued.
- § 225. Duplicates—Recorded Deeds.
- § 226. Effect of the Production of Papers upon Notice.
- § 227. Proof of the Contents of Lost Documents.
- § 228. Degrees of Secondary Evidence.

- § 229. Same—Cases Illustrating the American Rule—The Admissibility of Circumstantial Evidence Thereunder.
- § 230. Same—Parol Evidence not Allowed When the Law Requires Copies—Original Always Admissible.
- § 231. Cross-examination of Witnesses as to Writings.

§ 199 (197). Rule as to best evidence.—As these commentaries are for the use of the practicing lawyer, we do not propose to deal at length with those theories and speculations, highly interesting and instructive though they undoubtedly are, as to whether the best evidence rule is the first rule of evidence, the others being rules for procedure or pleading as the case may be, nor with its historical vicissitudes. At our day these may be omitted without appreciable loss, for much of the argument around them is purely academic. The rule is here in vital exercise and we need rather its application than its pedigree.¹ What is of greater concern is, What is the rule? What is it for? And how is it to be interpreted? Greenleaf gives us the definition in these words: “A fourth rule, which governs in the production of evidence, is that which requires *the best evidence of which the case, in its nature, is susceptible*. This rule does not demand the greatest amount of evidence, which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that the better evidence is withheld, it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of

¹ The writer recalls a case in which two witnesses corroborated a plaintiff as to a conversation alleged between plaintiff and defendant. One witness testified to hearing it in a named room in a building, the other positively averred it occurred in another room. The learned trial judge put it

that though one of the witnesses might have been mistaken as to place, they both testified to the fact. So with the best evidence rule. Whether it is first or fourth, it is the rule and the elimination of other rules would neither augment nor diminish its virility.

justice. In requiring the production of the best evidence applicable to each particular fact, it is meant, that no evidence shall be received, which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence, which itself indicates the existence of more original sources of information. But where there is no substitution of evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed. Thus a title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence, of which the case is susceptible; and its nonproduction would raise a presumption that it contained some matter of apparent defeasance. But being produced, the execution of the deed itself may be proved by only one of the subscribing witnesses, though the other also is at hand. And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. So, in proof or disproof of handwriting, it is not necessary to call the supposed writer himself. And, even where it is necessary to prove negatively, that an act was done without the consent, or against the will of another, it is not, in general, necessary to call the person, whose will or consent is denied."² Taylor's and Best's definitions add little to that of Greenleaf.³ Blackstone says: "And the one general rule that runs through all the doctrine of trials is this, *that the best evidence the nature of the case will admit of shall always be required*, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than

² Greenl. on Ev., § 82.

³ See Thayer, Prel. Treat., c. 11, for a concise historical sketch of the expression from the time of the Revolution in England to the present, tracing its use by Holt, C. J., Chief Baron Gilbert, in his work on Evi-

dence (about 1726), Blackstone (1768), Lord Loughborough (1792), Burke's attack on it in the trial of Warren Hastings (1794), Christian's defense of it (1820), and such other writers as Peake, Phillips, Starkie, Greenleaf and Best.

is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed.”⁴ To Thayer we are also indebted for Christian’s note on Blackstone’s definition. “No rule of law,” he says, “is more frequently cited and more generally misconceived than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best legal evidence cannot possibly be produced, the next best legal evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But in general the want of better evidence can never justify the admission of hearsay, interested witnesses, copies of copies, etc. Where there are exceptions to general rules, these exceptions are as much recognized by the law as the general rule; and where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule and what the exception.” No language can better or more tersely describe its present day use than Thayer employed, and indeed the brilliant writer might well have included in his denunciation of slipshod use many other terms which we perforce use for want of authority to discard them. He says that the term “would probably have dropped naturally out of use long ago; if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts, and does not hold out in its application; and in so far as it does apply, it is unnecessary and uninformative. It is roughly descriptive of two or three rules which have their own reasons and their own name and place, and are well enough known without

⁴ Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative,

as that it cannot be found, or the like), then an attested copy may be produced; or *parol* evidence be given of its contents: 2 Cooley’s Blackstone, 1128.

it. When explained theoretically, and treated as a working rule, it is restricted to the situation where the evidence which is offered discloses, on its face, that there is something behind it for which it is a substitute."⁵ Let us now see what our own courts have said upon the subject. The rule is elementary which requires the production of the best evidence of which the case, in its nature, is susceptible. The rule does not demand the greatest amount of evidence which can be given on the litigated fact; but its design is to prevent the introduction of any, where, from the nature of the case, the law presumes, or the proof shows, that better evidence is in the possession, or under the control, of the party. The object of the rule which requires the best evidence of which, in its nature, the case is susceptible, is the prevention of fraud. Where the law raises the presumption, or where the proof shows, that the party has in his possession, or under his control, better evidence, it is fair to presume that the party withholds it from some sinister motive, and that, if produced, his design would be thwarted. The reason of the rule is to insure the pure administration of justice. This rule forbids the introduction of secondary evidence so long as the original and primary evidence can be had. The rule only excludes that evidence which indicates the existence of more original sources of information.⁶ Nothing more is intended by the rule of the production of best evidence than

⁵ Thayer, *Prel. Treat. on Ev.*, 497. The learned author sums up his interesting chapter by suggesting that "we drop the name and the notion of any specific separate rule of the Best Evidence. In doing that, we need not dismiss the great maxim of fair dealing that animated the judges who brought in this phrase and, in many applications, used it for a century in shaping the law; a principle which says, not that one must always furnish the best evidence, and, in the absence of it, have all else excluded;

or, that if one does the best he can, this will always be enough, but that always, morally speaking, the fact that any given way of proof is all that a man has, must be a strong argument for receiving it, if it be in a fair degree probative; and the fact that a man does not produce the best evidence in his power must always afford strong ground of suspicion."

⁶ *United States Sugar Refinery v. E. P. Allis Co.*, 56 Fed. 786, 6 C. C. A. 121.

that evidence which is merely substitutionary in its nature shall not be received so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed or other written instrument to be proved by parol when the instrument itself can be produced. It has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable.⁷ The best attainable evidence should be adduced to prove every disputed fact. There are few rules of evidence more frequently invoked in the trial of causes than this, and there certainly is no rule more strongly supported by adjudicated cases. It rests upon the presumption that one who withholds testimony of a higher grade and seeks to substitute therefor testimony of an inferior kind does so from some improper motive, and because he is conscious that his claim would not be supported by the testimony which he declines to produce. The enforcement of the rule serves the double purpose of affording the court satisfactory rather than unsatisfactory evidence, and of preventing the innumerable *frauds* which would be attempted, if parties were at liberty at any time to prove the contents of writings by parol.⁸ "The rule of law is that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents."⁹ "It is a rule of evidence, too ancient and too well understood to require proof of its existence, that the original instrument is better evidence than a copy, and that the primary source of in-

⁷ State v. McDonald, 65 Me. 466.

⁸ Slatham v. Poolin, 6 Mees. & W. 664.

⁹ Chief Justice Marshall in Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275.

formation is better than the secondary. The latter is only resorted to after the necessity for doing so is shown to exist in an inability to produce the former. If the original instrument be lost or destroyed, this is a sufficient ground for secondary evidence. So if it be shown to be in the hands of the opposite party, who refuses to produce it on notice. But a preliminary step to proof of contents, after proof of existence, is proof of notice to produce it. This is indispensable to the admission of secondary evidence. Inconvenience or absence from the state is not an excuse for omitting this notice."¹⁰ There is another obvious reason for the rule. If copies are to be used, there is the possibility, often the strong probability, of error in copying. If the memory is relied on for the reproduction in court of written instruments, *mistake* is almost certain, and in important documents the change of a word or phrase might result in great injustice. The rule relating to best evidence does not mean that the most satisfactory evidence, or that which in a given case might be most convincing, must always be produced. It relates to the *quality* or grade of the testimony rather than to its strength or quantity. Thus if two persons witnessed an assault, one in close proximity to the act and the other from a long distance, neither would be excluded from testifying by this rule. A bystander who has listened to a conversation may be called as a witness as well as the participants.¹¹ If the condition of clothes or of other articles is to be shown they need not be produced in court, but may be described;¹² and one who witnessed where the lines of a private survey were run, though not a surveyor, may state the fact.¹³ So handwriting may be proved, not only by the writer, but by another who is familiar with it.¹⁴ Many other instances

¹⁰ Mr. Justice Thompson in *Carland v. Cunningham*, 37 Pa. 228; *Security Trust Co. v. Robb*, 142 Fed. 78, 73 C. C. A. 302.

¹¹ *Richardson v. Milburn*, 17 Md. 67.

¹² *Commonwealth v. Pope*, 163 Mass. 440.

¹³ *Richardson v. Milburn*, 17 Md. 67.

¹⁴ *Ainsworth v. Greenlee*, 1 Hawks (N. C.), 190; *Fairlie v. Hastings*, 10

might be given as illustrations that this rule does not exclude evidence merely because it is not of the most conclusive character or because it is not all of the evidence which might be offered.¹⁵ The words "best evidence," as used in the rule, have thus gained a *legal signification* as distinguished from their proper meaning. Testimony is not excluded by reason of the rule requiring the best evidence unless it shows upon its face that there is a higher grade of testimony; in other words, that there is an attempted substitution of an inferior for a better class of testimony.¹⁶ One important element, perhaps the most important, is that in determining which is the best evidence the nature of the case will admit of, and which is secondary evidence, regard must be had, to some extent, to the nature and character of the business to which the evidence relates and the method of its conduct.¹⁷ It will be noted that almost the same words are here used as in the great leading English case where Lord Hardwicke said: "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow."¹⁸ These statements lead naturally to a consideration of the subject under the head of primary and secondary evidence which forms the subject matter of the next section.

§ 200 (198, 199). Primary and secondary evidence.—In speaking of the best evidence it must be remembered that

Ves. Jr. 123, 32 Eng. Reprint, 791; Rex v. Benson, 2 Camp. 508. See § 545 et seq., *post*.

¹⁵ Phil. Ev., p. 436; 1 Greenl. Ev., § 82; United States v. Reyburn, 6 Pet. (U. S.) 352, 367, 8 L. Ed. 424.

¹⁶ This is illustrated by the cases already cited. See, also, note to State v. Turner, on the admissibility of evidence wrongfully obtained, in 136 Am. St. Rep. 135.

¹⁷ Pittsburg etc. Ry. Co. v. City of Chicago, 242 Ill. 178, 134 Am. St. Rep. 316, 89 N. E. 1022.

¹⁸ Omychund v. Barker, Willes Rep. 550, 1 Atk. 21, 26 Eng. Reprint, 15. Burke's famous response to this was, "This, then, the master rule that governs all the subordinate rules, does, in reality, subject itself and its own virtue and authority to the nature of the case, and leaves no rule at all of an independent, abstract, and substantive quality." (Works of Burke, Little & Brown's ed., XI, 77; Thayer, Prel. Treat. on Ev., 492.)

the word "best" is not to be used as synonymous with primary. It may and frequently does happen that secondary evidence is the best evidence a party can furnish. It will be found that the cases illustrating the application of the rule under discussion generally relate in some way to written evidence, or to the attempted substitution of parol for documentary evidence. Indeed, the term "*best evidence*" has been described as a convenient short description of the rule as to proving the contents of a writing.¹⁹ The terms have been accurately described in the statutes of the code states. Primary evidence is that which suffices for the proof of a particular fact until contradicted or overcome by other evidence. It is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question and in itself does not indicate the existence of other and better proof.²⁰ Secondary evidence is that which is inferior to primary—which from necessity in some cases is substituted for stronger and better proof.²¹ Where living witnesses are placed on the stand, one is in law on the same footing with another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable. There are some questions on which some witnesses cannot testify at all for want of knowledge. No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts.²² The term "best evidence" is confined to cases where the law has divided testimony into primary and secondary. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather

¹⁹ Thayer, Prel. Treat. on Ev., 497.

²⁰ California, Georgia and Oregon Codes.

²¹ California and Georgia Codes. In the Oregon Code secondary evidence is defined as a copy of the original writing or object, or oral evi-

dence thereof. This expressly recognizes the limitation of secondary evidence to proof of written matter. See, also, *O'Connor v. United States*, 11 Ga. App. 246, 75 S. E. 110.

²² *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

than by other testimony, which is open to danger of inaccuracy. The best evidence rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party. For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially when it appears, or has been shown, to be in his possession or power, and must and should, in all cases, exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled.²³ There may be infinite discussion as to the relative weight of different kinds of oral testimony, but

²³ *Clifton v. United States*, 4 How. (U. S.) 242, 11 L. Ed. 957. (It is well observed by Mr. Evans (2 Evans' Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party,

the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.)

there is no room for doubt but that a deed affords better evidence of its own contents than the statements of a person who has read it. The deed itself is not only more convincing and satisfactory evidence, but a *higher grade* of evidence.²⁴ When an original document is placed in evidence, it affords what is known as *primary evidence* of its contents. In the case just mentioned the deed is such primary evidence, and is in a strict legal sense the best evidence of what it contains. As distinguished from this class, any evidence of a lower degree, as, for example, a copy or the recollection of the witness, is *secondary evidence*. It is the most important application of the general rule under discussion that secondary evidence of the contents of written instruments cannot be given, unless some legal excuse is shown for failing to produce the original. What constitutes such legal excuse will be discussed hereafter; but it is very clear that mere neglect or inattention constitutes no such excuse. It is incumbent on litigants to prepare their testimony in advance; and if it is discovered during the trial, for the first time, that the best evidence of the fact to be proved is a writing, the rule that the writing must be produced will nevertheless be enforced.²⁵ The wide application of the rule under discussion will be best shown by giving instances in which it has been held that the original documents must be produced

²⁴ State v. McDonald, 65 Me. 466.

²⁵ Scarborough v. Reynolds, 12 Ala. 252; Hoitt v. Moulton, 21 N. H. 586. This is illustrated by many of the cases below cited. See, also, §§ 213, 214, *post*. In addition to those cases, see, also, the following recent decisions: Flint River etc. R. Co. v. Maples, 10 Ga. App. 573, 73 S. E. 957; Lyons Lumber Co. v. Stewart, 147 Ky. 653, 145 S. W. 376; Meyer v. Frenkil, 116 Md. 411, Ann. Cas. 1913C, 875, 82 Atl. 208; New York etc. Line v. Baer (Md.), 84 Atl. 251; Potomac Lodge v. Mitter (Md.), 84 Atl. 554; State v. Heffernau, 243 Mo.

442, 148 S. W. 90; Robson v. Fenniman Co. (N. J.), 85 Atl. 356; Di Palma v. Weinman, 16 N. M. 302, 121 Pac. 38; Whitlock v. Alexander (N. C.), 76 S. E. 538; Williams v. Joins (Okl.), 126 Pac. 1013; Word v. Houston Oil Co. (Tex. Civ. App.), 144 S. W. 334; National State Bank v. Ricketts (Tex. Civ. App.), 152 S. W. 646; United Iron Works v. Hurley Mason Co. (Wash.), 128 Pac. 209; Loomis v. Besse, 148 Wis. 647, 135 N. W. 123; St. Louis Union Trust Co. v. Galloway Coal Co., 193 Fed. 106.

in evidence or their absence excused in some of the modes hereafter explained. The illustrations given in the following sections will be found to cover almost the entire area of the subject.

§ 200a (198, 199). Application of the rule—Illustrations.—The best evidence of the *conviction* of a criminal offense is the *record* thereof;²⁶ of a *judgment*, the judgment itself;²⁷ of an *adoption*, the instrument of adoption;²⁸ of the *ballots* cast, the ballots;²⁹ of how a man voted, the ballot if it can be identified;³⁰ of a *subscription for stock*, the subscription list.³¹ The record, or, in proper cases, certified copies of the record, should be produced to show transactions in *judicial proceedings*, such as the order of a court *nunc pro tunc*,³² or other orders,³³ a plea in *abatement*,³⁴ *former recovery*,³⁵ contents of a *verdict*,³⁶ record of a former proceeding,³⁷ petition in bankruptcy,³⁸ affidavit and warrant on which action for malicious prosecution was founded.³⁹ Testimony that the commissioner's court of a county passed an order authorizing the county judge to execute a deed to the defendant is inadmissible, as proof of such an order could be made by the records

²⁶ *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425; *People v. Reinhart*, 39 Cal. 449; *State v. Edwards*, 19 Mo. 674; *People v. Benjamin*, 2 Park. Cr. (N. Y.) 201; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Baltimore & O. Ry. Co. v. Rambo*, 59 Fed. 75, 8 C. C. A. 6.

²⁷ *Northrop v. Chase*, 76 Conn. 146, 36 Atl. 518; *McNeil v. Donahue*, 44 Ill. App. 42; *Mills v. Barnes*, 4 Blackf. (Ind.) 438; *Stromburg v. Earick*, 6 B. Mon. (Ky.) 578.

²⁸ *McCollister v. Yard*, 90 Iowa, 621, 57 N. W. 447.

²⁹ *Hartman v. Young*, 17 Or. 150, 11 Am. St. Rep. 787, and note, 2 L. R. A. 596, 20 Pac. 17.

³⁰ *Lane v. Bailey*, 29 Mont. 548, 71 Pac. 191.

³¹ *Taussig v. Glenn*, 51 Fed. 409, 2 C. C. A. 314.

³² *Ludlow v. Johnston*, 3 Ohio, 553, 17 Am. Dec. 609.

³³ *State v. Lougineau*, 6 La. Ann. 700; *State v. Smith*, 12 La. Ann. 349.

³⁴ *Woodard v. Stark*, 4 S. D. 588, 57 N. W. 496.

³⁵ *Inman v. Jenkins*, 3 Ohio, 271.

³⁶ *Abrams v. Smith*, 8 Blackf. (Ind.) 95.

³⁷ *Spencer v. Spencer*, 31 Mont. 631, 79 Pac. 320.

³⁸ *First Nat. Bank v. Robinson* (Tex. Civ. App.), 124 S. W. 177.

³⁹ *Engle v. Patterson*, 167 Ala. 117, 52 South. 397.

of the court only.⁴⁰ The following records and documents are themselves the best evidence of their contents: *Probate* of a will or letters of *administration*;⁴¹ pleadings;⁴² *discontinuance* of suit;⁴³ the levy of an *execution*;⁴⁴ mode of *serving process*;⁴⁵ the *filing* of papers with the clerk of the court;⁴⁶ the binding over of a prisoner for trial;⁴⁷ a sale of land by *order of court*;⁴⁸ *discharge* in bankruptcy;⁴⁹ *decree* of divorce;⁵⁰ *issue* joined in a former suit;⁵¹ *par-don*;⁵² *tax title* under sale of execution.⁵³ But proof of loss of certified copy of judgment rendered in another state does not admit parol evidence of it, the original still being in existence.⁵⁴ Unless proper foundation is laid for secondary evidence, the original must be produced in order to show the contents of *writs*,⁵⁵ *executions*,⁵⁶ *processes* and the returns thereof,⁵⁷ *warrants*,⁵⁸ *awards*,⁵⁹ the *examina-*

⁴⁰ *Gamble v. Martin* (Tex. Civ. App.), 129 S. W. 386.

⁴¹ *Graham v. Whitely*, 26 N. J. L. 254; *Cogswell v. Burtis*, 1 Hoff. Ch. (N. Y.) 198; *Allen v. Dundas*, 3 Term Rep. 125, 100 Eng. Reprint, 490; *Ryves v. Wellington*, 9 Beav. 579, 50 Eng. Reprint, 467; *Hood v. Barrington*, L. R. 6 Eq. 218; *Jones v. Goodrich*, 5 Moore P. C. 16; *Elden v. Keddel*, 8 East, 187, 103 Eng. Reprint, 314; *Davis v. Williams*, 13 East, 232, 104 Eng. Reprint, 358.

⁴² *Beach v. Baldwin*, 9 Conn. 476; *Betty v. Petrie*, 138 Ky. 426, 128 S. W. 320.

⁴³ *Sheldon v. Frink*, 12 Pick. (Mass.) 568.

⁴⁴ *McKee v. McKee*, 16 Md. 516; *West v. St. John*, 63 Iowa, 287, 19 N. W. 238.

⁴⁵ *Reilly v. Cavanaugh*, 29 Ind. 435.

⁴⁶ *Peterson v. Taylor*, 15 Ga. 483, 60 Am. Dec. 705.

⁴⁷ *Smith v. Smith*, 43 N. H. 536.

⁴⁸ *Phillips v. Costley*, 40 Ala. 486.

⁴⁹ *Regan v. Regan*, 72 N. C. 195.

⁵⁰ *Tice v. Reeves*, 30 N. J. L. 314.

⁵¹ *State v. Thompson*, 19 Iowa, 299; *Dygart v. Coppernoll*, 13 Johns. (N. Y.) 210.

⁵² *Spalding v. Saxton*, 6 Watts (Pa.), 338; *Parson v. Commonwealth*, 33 Ky. Law Rep. 1051, 112 S. W. 617.

⁵³ *Sharp v. Speir*, 4 Hill (N. Y.), 76; *Whitney v. Thomas*, 23 N. Y. 281; *McKee v. McKee*, 16 Md. 516; *Wynne v. Aubuchon*, 23 Mo. 30; *Shiver v. Bentley*, 78 Ga. 537, 3 S. E. 770.

⁵⁴ *Kentzler v. Kentzler*, 3 Wash. 166, 28 Am. St. Rep. 21, and note, 28 Pac. 370.

⁵⁵ *Brush v. Taggart*, 7 Johns. (N. Y.) 19; *Hindle v. Healy*, 204 Mass. 48, 90 N. E. 511.

⁵⁶ *Perry v. Whipple*, 38 Vt. 278; *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106.

⁵⁷ *Pendexter v. Carleton*, 16 N. H. 482; *Gluscock v. Nave*, 15 Ind. 457. See note to *Driggers v. United States*, 129 Am. St. Rep. 848, on admissibility of returns of officers.

⁵⁸ *Ross v. Pleasants*, 3 Pa. 408.

⁵⁹ *Scarborough v. Reynolds*, 12 Ala. 252.

tion of a prisoner before a magistrate when required to be written down,⁶⁰ and the *authority* in writing to draw a draft.⁶¹ When it is a matter of record, parol evidence is not admissible to prove the *enlistment*,⁶² or the *desertion* of a soldier,⁶³ the fact that a person has been in the *penitentiary*,⁶⁴ the *vacation* of a public street,⁶⁵ or the established grade of a street.⁶⁶ The laws of South Dakota declaring all section lines to be highways (with some unimportant exceptions), render it unnecessary for a party to offer any proof other than the fact that the point in question was on the section line which is open to proof by oral testimony.⁶⁷ In the absence of any *ordinance*, a highway commissioner was properly permitted to give evidence of his official duties.⁶⁸ Where a *highway* was to be considered finally dedicated when a certificate to that effect should be recorded, the record of a certified copy is the best evidence upon this point, and, without evidence of the destruction or loss or inaccessibility or effacement or mutilation of the record or of books in which it should have been made, secondary evidence could not be let in, and no presumption of regularity could operate, where the case is not one which has to do with the records, the antiquity of which of itself suggests any difficulty in producing the best or primary evidence.⁶⁹ The documents themselves are the best evidence of the conformity of a plat to the statute,⁷⁰ the *contents of books* and records in public of-

⁶⁰ *State v. Grove*, 1 Mart. (1 N. C. 63) 43; *O'Connell v. State*, 10 Tex. App. 567; *Wright v. State*, 50 Miss. 332.

⁶¹ *Tinsley v. Penniman*, 83 Tex. 54, 18 S. W. 718.

⁶² *Atwood v. Winterport*, 60 Me. 250.

⁶³ *Terrell v. Colebrook*, 35 Conn. 188.

⁶⁴ *State v. Lewis*, 80 Mo. 110.

⁶⁵ *Lathrop v. Central Iowa Ry. Co.*, 69 Iowa, 105, 28 N. W. 465.

⁶⁶ *Pittsfield v. Barnstead*, 38 N. H. 115; *Farrar v. Fessenden*, 39 N. H. 268; *Livingston v. Hudson*, 85 Ga. 835, 12 S. E. 17.

⁶⁷ *Lowe v. East Sioux Falls Quarry Co.*, 25 S. D. 393, 126 N. W. 609; *Lidel v. South Dakota Cent. Ry. Co.*, 25 S. D. 462, 127 N. W. 653.

⁶⁸ *Perry v. Sheldon*, 30 R. I. 426, 75 Atl. 690.

⁶⁹ *Bacon v. Boston & M. R. R.*, 83 Vt. 421, 76 Atl. 128.

⁷⁰ *Bemis v. Becker*, 1 Kan. 226.

fices,⁷¹ or the *sale of public land* and final improvements on homesteads.⁷² A certificate of a public officer, that his books show certain facts, is not the best evidence of the contents of the books, and, in the absence of a statute authorizing such proof, is not competent evidence of entries therein.⁷³ The records themselves are the best evidence of the proceedings of private and municipal *corporations* of which records are kept,⁷⁴ as also are the records of proceedings of a county board,⁷⁵ or of a *school board*.⁷⁶ Where certain facts appear of record or in written instruments, it is error for the court to admit oral testimony of the contents of such records or instruments without first showing their loss or disappearance and the inability to produce the same.⁷⁷ But the records of county commissioners are not the best evidence of the appointment of a sheriff, where under the law the appointing power is to issue a "commission" or "certificate of appointment."⁷⁸ The original documents showing the contents of articles of *corporate organization*,⁷⁹ or city *ordinances* establishing fire limits, are required as the best evidence thereof in the absence of statutory substitution.⁸⁰

⁷¹ *Angell v. Rosenbury*, 12 Mich. 241; *Bartlett v. Patton*, 33 W. Va. 71, 5 L. R. A. 523, 10 S. E. 21.

⁷² *Crawford County Bank v. Baker*, 95 Ark. 438, 130 S. W. 556; *Chicago v. McGraw*, 75 Ill. 566.

⁷³ *Sampson v. Northwestern Nat. Life Ins. Co.*, 85 Neb. 319, 123 N. W. 302.

⁷⁴ *Perryman v. Greenville*, 51 Ala. 507; *Methodist Chapel v. Herrick*, 25 Me. 354; *Coffin v. Collins*, 17 Me. 440; *Smith v. Natchez Steamboat Co.*, 2 Miss. 479; *Haven v. New Hampshire Asylum*, 13 N. H. 532, 38 Am. Dec. 512; *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619; *Pittsburg Ry. Co. v. Clarke*, 29 Pa. 146; *Slack v. Norwich*, 32 Vt. 518; *Childrey v. Huntington*, 34 W. Va. 457, 11 L. R. A. 313, 12 S. E. 536; *Owings v. Speed*,

5 Wheat. (U. S.) 420, 5 L. Ed. 124; *Bradley v. McKee*, 5 Cranch C. C. 298, Fed. Cas. No. 1784.

⁷⁵ *Yavapai County v. O'Neil*, 3 Ariz. 363, 29 Pac. 430; *State v. Central Ry. Co.*, 17 Nev. 259, 30 Pac. 887.

⁷⁶ *Kane v. School District*, 48 Mo. App. 408; *Whitehead v. School District*, 145 Pa. 418, 22 Atl. 991; *Board of County Commissioners of Denver v. Lunney*, 46 Colo. 403, 104 Pac. 945.

⁷⁷ *Keane v. Pittsburg Lead Minn. Co.*, 17 Idaho, 179, 105 Pac. 60.

⁷⁸ *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198; *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048.

⁷⁹ *Warner v. Daniels*, 1 Wood. & M. 90, Fed. Cas. No. 17,181.

⁸⁰ *Miller v. Sergeant*, 10 Ind. App. 22, 37 N. E. 418; *Viernow v. Car.*

Where the books of the city treasurer, together with the minutes of the council, showed the amount of money received and placed in the general fund, together with the items of expense and other obligations, the oral statement of a witness was not admissible when the primary evidence, the books and other records relating to said facts were available.⁸¹ The best evidence of the heading of a *hotel register*⁸² is the register itself.

§ 201 (200). **Same—Private writings.**—It will be observed that most of the illustrations given in the last section relate to matters more or less public in their nature, matters as to which the law generally requires some record to be kept. But the rule is by no means limited in its application to writings of this character. The paper in question may be of a private character, as a contract, memorandum or letter. If it becomes necessary to prove the contents of the document, it must be produced or its absence accounted for. When a contract is reduced to writing, the writing is the best evidence of its terms and must be produced, or its absence satisfactorily accounted for, in all cases where proof of the terms of the contract is offered.⁸³ As we have shown, where certain facts appear

thage, 139 Mo. App. 276, 123 S. W. 67.

⁸¹ City of Cleburne v. Gutta Percha etc. Co. (Tex. Civ. App.), 127 S. W. 1072.

⁸² Grauley v. Jermyn, 163 Pa. 501, 30 Atl. 203. The following Canadian cases are illustrative of forms of primary evidence: Leonard v. Young, 4 All. 111; Doe v. Jack, 1 All. 476; White v. Fleming, 20 N. S. R. 335; Farley v. Graham, 9 V. C. R. 438.

⁸³ First Nat. Bank v. Hedgecock, 87 Neb. 220, 127 N. W. 171. See, also, the following late cases: Mathews v. Livingston (Conn.), 85 Atl. 529; Walton v. Mitchell, 11 Ga. App. 159, 74 S. E. 1006; Kulvie v. Bunsen Coal Co., 161 Ill. App. 617;

Romona etc. Stone Co. v. Weaver (Ind. App.), 97 N. E. 441; Powers v. Iowa Cent. R. Co. (Iowa), 136 N. W. 1049; Title etc. Surety Co. v. Commonwealth, 146 Ky. 702, 143 S. W. 401; Brock v. Satchell, 130 La. 853, 58 South. 686; Beauregard v. Smith (Mass.), 100 N. E. 627; Livesey v. Besson, 82 N. J. L. 333, 82 Atl. 509; Lampe v. Platt, 76 Misc. Rep. 439, 134 N. Y. Supp. 1087; Armour Fertilizer Works v. McLawhorn, 158 N. C. 274, 73 S. E. 883; Coombs v. Cook (Okla.), 129 Pac. 698; Joynes v. Pennsylvania R. Co., 234 Pa. 321, 83 Atl. 318; Trainor v. Lee (R. I.), 83 Atl. 847; Marrett v. Herrington (Tex. Civ. App.), 145 S. W. 254; Pacific etc. Tel. Co. v. Huetter, 68 Wash. 442,

of record or in written instruments, it is error for the court to admit oral testimony of the contents of such records or instruments without first showing their loss or disappearance and the inability to produce the same.⁸⁴ So the contents of a writing cannot be proved by the testimony of one who heard it read.⁸⁵ Many of the illustrations given in the next section are those in which one of the *parties* to the contract or other writing was also a party in the action. For the most obvious and cogent reasons, those who have voluntarily reduced their agreement to writing for the express purpose of avoiding mistakes or uncertainty ought not to be allowed to prove that agreement by inferior evidence. But the rule has a much wider application. It is said by a leading text-writer on the subject that "oral evidence cannot be substituted for any writing the existence of which is disputed and which is material either to the issue between the parties or to the credit of witnesses and is not merely the memorandum of some other fact."⁸⁶

§ 201a (200). Same—Illustrations.—The following illustrations will facilitate inquiry into the subject of the

123 Pac. 607; Dixon etc. Fuel Co. v. Myers Grain Co. (W. Va.), 77 S. E. 362; Magoon v. Eastman (Vt.), 84 Atl. 869; Aetna Ins. Co. v. Bank of Brunson, 194 Fed. 385.

⁸⁴ Keane v. Pittsburg Lead Min. Co., *supra*. This case is useful in that it contains the record of two questions improperly allowed in the trial court. The witness was asked as to his understanding when plaintiff was to be paid for his stock. It was immaterial what the understanding was as the contract determined it. He was also asked, "As a matter of fact didn't you write Mr. McClarren frequently on the subject of the title to Mr. Keane's stock?" This called for the witness' statement as to what he wrote, and was improperly allowed. The writing was the best evidence. This illustration is given advisedly to

show that although the law which regulates the admission of the evidence referred to is elementary, it took the court of appeal to see that justice was done.

⁸⁵ Propst v. Mathis, 115 N. C. 526, 20 S. E. 710; Mutual Life Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294; In re Guinasso's Estate, 13 Cal. App. 518, 110 Pac. 335. In the last-named case it was sought to establish a destroyed will under Code of Civil Procedure, section 1339, which provides that where a will has been destroyed by public calamity in the testator's lifetime without his knowledge, at least two credible witnesses are necessary to prove it. One witness proved it but the other only knew of it through hearing it read by that one, and it was held insufficient.

⁸⁶ 1 Greenl. Ev., § 88.

application of the rule to private writings in specific instances. It has been held applicable to *deeds*.⁸⁷ Secondary evidence is not admissible until the nonproduction of the primary evidence has been sufficiently accounted for, and this rule applies to a bond for titles relied upon in an action for the recovery of land.⁸⁸ The rule as to proof of written instruments and records does not include oral testimony of the existence of such instruments and records, preliminary to their introduction or proof of loss.⁸⁹ Secondary evidence of the contents of a written instrument is inadmissible in the absence of proper diligence to secure the original.⁹⁰ When the terms of a written instrument are material in one of the aspects presented by the pleadings, though immaterial in other aspects, secondary evidence of its contents cannot be admitted until a sufficient predicate has been laid.⁹¹ It is error to admit a record copy of a deed when the deed itself is in possession or under control of him who seeks to admit the record thereof.⁹² Sufficient foundation, by way of preliminary proceedings, must be made before the introduction of secondary evidence of the contents of a deed.⁹³ The ownership of land can be proved either by the deeds themselves or, if the deeds cannot be obtained, by the records thereof under certain circumstances. If the title is not directly in issue, the rule as to the best evidence does not apply;

⁸⁷ *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Ebersole v. Rankin*, 102 Mo. 488, 15 S. W. 422; *Bell v. Kendrick*, 25 Fla. 778, 6 South. 868; *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189; *Phillips v. O'Neal*, 87 Ga. 727, 13 S. E. 819; *McConnell v. Slap-
pey*, 134 Ga. 95, 67 S. E. 440; *May-
field v. Southern R. Co.*, 85 S. C. 165, 67 S. E. 132; *Collar v. Collar*, 86 Mich. 507, 13 L. R. A. 621, 49 N. W. 551; *Keane v. Pittsburg Lead Min. Co.*, 17 Idaho, 179, 105 Pac. 60; *Bacon v. Boston & M. R. Co.*, 83 Vt. 421, 76 Atl. 128.

⁸⁸ *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282, and note, 6 S. E. 27.

⁸⁹ *Village of Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609.

⁹⁰ *Low v. Tandy*, 70 Tex. 745, 8 S. W. 620.

⁹¹ *Trammel v. Hudmon (Hudmon v. Trammell)*, 86 Ala. 472, 6 South. 4.

⁹² *West v. Cameron*, 39 Kan. 736, 18 Pac. 894.

⁹³ *Berdel v. Egan*, 125 Ill. 298, 17 N. E. 709.

proof may be made of the declarations of the owner or by acts of ownership or control. When it appears that the knowledge of a witness as to the title is derived from some written instrument relating to the title, his testimony will not be received unless such instrument is produced or its absence satisfactorily accounted for.⁹⁴ Parol testimony is not admissible as to what records show concerning the ownership of land.⁹⁵ Proof of a verbal sale of land or its "possession" is incompetent,⁹⁶ whether absolute or in trust.⁹⁷ "Parol declarations or admissions, since they cannot confer or divest title, are not admissible as evidence of title, either to sustain the burden of title or to rebut *prima facie* evidence, but only to show the nature and extent of the possession and the character and quality of the claim of title under which the property was held, or other material facts resting *in pais*." ⁹⁸ The rule has been held applicable to *wills*,⁹⁹ *leases*,¹⁰⁰ *notes and mortgages*,¹ and to the filing of a *chattel mortgage*.² The best evidence of the *assignment of bonds* where the assignor was dead and the signature not identifiable was held to be the possession by the claimant, the fact that he purchased the bonds from a broker, the death of the previous owner without his having challenged the ownership, the absence of any attempt on the part of the representatives to question it, and that such owner had delivered the bonds to another broker for sale.³ It was not error for the trial court to sustain a motion to strike out evidence of the contents, character, and nature

⁹⁴ 12 Ency. of Ev. 544.

⁹⁵ *Cornwell v. Cornwell*, 93 Ill. 414; *Pumphrey v. Goggey*, 150 Ill. App. 473.

⁹⁶ *Arthur v. Humble*, 140 Ky. 56, 130 S. W. 958.

⁹⁷ *Flanders v. Booge*, 146 Iowa, 675, 125 N. W. 661.

⁹⁸ *People v. Holmes*, 166 N. Y. 540, 60 N. E. 249; *Gilmartin v. Buchanan*, 134 App. Div. 587, 119 N. Y. Supp. 489.

⁹⁹ *Morrill v. Otis*, 12 N. H. 466; *In re Jones' Estate*, 130 Iowa, 177, 106 N. W. 610.

¹⁰⁰ *Dikes v. Miller*, 24 Tex. 417; *Burks v. Bragg*, 89 Ala. 204, 7 South. 156; *Wallace v. Wallace*, 62 Iowa, 651, 17 N. W. 905.

¹ *Solomon v. Creech*, 82 Ga. 445, 9 S. E. 165.

² *Curtis v. Wilcox*, 91 Mich. 229, 51 N. W. 992.

³ *Bosse v. Weik*, 144 Mo. App. 468, 129 S. W. 417.

of a written contract, where the contract itself was not produced. The writing itself was the best evidence of its contents and the rights conferred thereunder,⁴ but, until there is evidence of a written contract, oral testimony of the transaction is admissible.⁵ It is generally applied to *letters*,⁶ and *telegrams*.⁷ Statements not made from personal knowledge of the witness but from information from memoranda in a telephone office as to the time when one of the parties to an action made and disconnected his *telephone call*, the memorandum neither being produced nor accounted for, are inadmissible. The memorandum is the best evidence of its contents.⁸ So with the *written or printed rules of a railway company*,⁹ the rules themselves are the best evidence, and an employee cannot testify to them without producing them.¹⁰ *Books of account* must be

⁴ Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 18 Idaho, 1, 107 Pac. 989. (A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by the company issuing the prospectus, standing alone, is not sufficient upon which to found a cause of action. Where the action is based on a written contract entered into in pursuance of the statements contained in such prospectus, the presumption is that the entire contract was embodied in the writing.) See, also, First Nat. Bank v. Hedgecock, 87 Neb. 220, 127 N. W. 171; Clow v. Brown, 134 Ind. 287, 33 N. E. 1126; Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

⁵ Southern R. Co. v. Lewis, 165 Ala. 451, 51 South. 863.

⁶ Brown v. Jewett, 18 N. H. 230; King v. Worthington, 73 Ill. 161; Watkins v. Paine, 57 Ga. 50; Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469; Watson v. Roode, 30 Neb. 264, 46 N. W. 491; Mugge v. Adams, 76 Tex. 448, 13 S. W. 330;

Moore v. Dickinson, 39 S. C. 441, 17 S. E. 998; Rumbough v. Southern Improvement Co., 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536; Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Young v. Inman, 146 Iowa, 492, 125 N. W. 177; Keane v. Pittsburgh Lead Min. Co., 17 Idaho, 179, 105 Pac. 60; Merriman v. Blalack, 57 Tex. Civ. App. 270, 122 S. W. 403.

⁷ Durkee v. Vermont Central Ry. Co., 29 Vt. 127; Anheuser-Busch Assn. v. Hutmacher, 127 Ill. 652, 4 L. R. A. 575, 21 N. E. 626; Nichols v. Howe, 43 Minn. 181, 45 N. W. 14. See note on "Admissibility in Evidence of Telegram Received in Reply to Telegrams," to Edwards v. Erwin, 16 Ann. Cas. 394.

⁸ Edwards v. Adams (Tex. Civ. App.), 122 S. W. 898.

⁹ Price v. Richmond & D. Ry. Co., 38 S. C. 199, 17 S. E. 732; Louisville & N. Ry. Co. v. Orr, 94 Ala. 602, 10 South. 167.

¹⁰ Bennett v. Chicago City R. Co., 243 Ill. 420, 90 N. E. 735.

produced.¹¹ Where books are offered in evidence and are available to the parties, oral proof may be given of entries in them;¹² and when they are voluminous and are produced for inspection, the court may, for the purpose of cross-examination, permit a competent witness who has examined them to testify as to the result of his examination.¹³ The entries in the diary of an engineer of works, regarding his conclusions as to certain matters under a contract which were referable to him, were held to be the best evidence where the engineer had since become mentally incompetent. The law regards such entries as those of a deceased person.¹⁴ So it is held that *receipts* are not the best evidence that the articles for which they were supposed to represent payment were used in the construction of a particular building.¹⁵ An insurance policy is the best evidence of its contents.¹⁶ When the statute requires the application for insurance to be made part of the policy, unless it is so incorporated it is not competent evidence, and cannot be considered in determining whether or not the insured made true answers to the questions asked.¹⁷ And so with the original report of examination by a physician.¹⁸ A *certificate of death* signed by a physician is not the best evidence of the death of the one named in it. While the statute requires the physician to give the death certificate,

¹¹ *Phillips v. Trowbridge Co.*, 86 Ga. 699, 13 S. E. 19; *Mendel v. Boyd*, 71 Neb. 657, 99 N. W. 493; *Brayton v. Sherman*, 119 N. Y. 623, 23 N. E. 471 (original books of entry are best evidence, instead of the ledger: *Bennett v. Bennett*, 37 W. Va. 396, 38 Am. St. Rep. 47, 16 S. E. 638; *Roden v. Brown*, 103 Ala. 324, 15 South. 598; *State v. Nevada C. R. Co.*, 28 Nev. 186, 113 Am. St. Rep. 834, 81 Pac. 99; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656).

¹² *Pierce v. Norton*, 82 Conn. 441, 74 Atl. 686.

¹³ *Elmira Roofing Co. v. Gould*, 71 Conn. 629, 42 Atl. 1002.

¹⁴ *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767.

¹⁵ *Neher v. Viviani*, 15 N. M. 460, 110 Pac. 695. As to *receipts* generally, see *Evans v. St. Louis etc. R. Co.*, 149 Mo. App. 166, 129 S. W. 1050; *Jackson v. Lewis*, 29 S. C. 193, 7 S. E. 252.

¹⁶ *Holmes v. Rivers*, 145 Iowa, 702, 124 N. W. 801; *Waller & Edmonds v. Cockfield*, 111 La. 595, 35 South. 778.

¹⁷ *Southern etc. Ins. Co. v. Herlihy* (Ky.), 128 S. W. 91.

¹⁸ *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 7 Ann. Cas. 607, 84 Pac. 867.

there is nothing in the statute making the certificate evidence in judicial proceedings, and it stands entirely on a different plane from the return of an officer made pursuant to law under his official oath. The law requires the best evidence, and the best evidence is the testimony of the physician, if living.¹⁹ Original *plans* are the best evidence and require production.²⁰ A depositor in a bank may testify of his own knowledge as to the amount deposited, that being a fact irrespective of the book entries.²¹ While occupancy under a lease may be shown by parol; the terms of the *lease* must be shown by the written contract, if there be one.²² Evidence of *possession* alone is sufficient to maintain trespass.²³ Parol evidence cannot be given that a certain *letter*, not produced, was a letter of credit;²⁴ nor that a former *bill* of less amount than a later one had been presented;²⁵ nor as to the terms of a *wager* reduced to writing;²⁶ nor that complaints had been made by a *letter*, not produced;²⁷ nor as to the contents of an article in a *newspaper*;²⁸ nor of *books of accounts*;²⁹ nor of the contents of an *invoice* of goods;³⁰ nor as to the *transfer of stock* on corporate books;³¹ nor of an *innkeeper's notice* required by statute to be in writing, by testimony of the

¹⁹ Louisville Ry. Co. v. Raymond, 135 Ky. 738, 27 L. R. A., N. S., 176, 123 S. W. 281.

²⁰ Bryant v. Stilwell, 24 Pa. 314.

²¹ Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502; Davis v. Alston, 61 Ga. 225; Steed v. Knowles, 97 Ala. 573, 12 South. 75; State v. Reed, 45 La. Ann. 162, 12 South. 189.

²² Rex v. Merthyr Tidvil, 1 Barn. & Adol. 29, 109 Eng. Reprint, 698; Augustin v. Challis, 1 Ex. 279, 17 L. J. Ex. 73; Brewer v. Palmer, 3 Esp. 213; Penn v. Griffith, 6 Bing. 533, 130 Eng. Reprint, 1386; Thunder v. Warren, 8 Ir. L. R. 181.

²³ Wetzel v. Satterwhite (Tex. Civ. App.), 125 S. W. 93.

²⁴ Rawson v. Curtiss, 19 Ill. 456.

²⁵ Stratford v. Ames, 8 Allen (Mass.), 577.

²⁶ Frazee v. State, 58 Ind. 8.

²⁷ Beall v. Poole, 27 Md. 645.

²⁸ Bond v. Central Bank, 2 Ga. 92.

²⁹ State v. Rosenfeld, 35 Mo. 472; Hall v. Lyons, 29 W. Va. 410, 1 S. E. 582; Thompson v. Fry, 7 Blackf. (Ind.) 608; Sayre v. Woodyard, 66 W. Va. 288, 66 S. E. 320; Shelby v. New York Steam Co., 121 N. Y. Supp. 619; Houston etc. R. Co. v. Washington (Tex. Civ. App.), 127 S. W. 1126.

³⁰ Coder v. Stotts, 51 Kan. 382, 32 Pac. 1102.

³¹ Skowhegan Bank v. Cutler, 49 Me. 315.

wife of the innkeeper as to verbal notice;³² nor of the terms of a consignment of goods where the *carrier's record* is available.³³ It frequently happens that oral evidence is the best evidence. Where a plaintiff knew the quantity of grain delivered by him, he was not restricted to the contents of defendant's books in proving the delivery of the grain. Where he testified positively that he knew the amount of grain that he delivered at defendant's elevator, that he delivered it personally, and saw it weighed, and detailed the exact number of bushels of each kind of grain so delivered, which testimony corresponded exactly with the allegations of the complaint, such evidence was both competent and amply sufficient to support the verdict.³⁴ And where a witness testified, speaking of his own knowledge and recollection and without need of refreshing his memory, that a certain water valve was not leaking at a given time, his written report thereof was held inadmissible.³⁵ A person having knowledge of the sale of a chattel, and the amount paid or agreed to be paid for it, is a competent witness to the fact, although he may have recorded in his books of account a memorandum of the sale. Indeed, books of account have themselves always been regarded as a species of secondary evidence, admissible in favor of the party keeping them because of the necessities of the case, not because they were the best evidence of the transactions recorded in them.³⁶ The fact that such entries have been made has never been held to preclude the testimony of the person having knowledge of the facts, and able to testify to them from memory.³⁷ There is no need to produce a *bill of lading* in order to show a sale or delivery of certain goods proved to have been sold.³⁸ So the rule applies with equal force to copies where no adequate reason is shown

³² *McBride v. Goodhue*, 134 Ga. 608, 68 S. E. 321.

³³ *St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.*, 167 Ala. 442, 52 South. 904.

³⁴ *Cochrane v. National Elevator Co.*, 20 N. D. 169, 127 N. W. 725.

³⁵ *Pace v. Louisville etc. Co.*, 166 Ala. 519, 52 South. 52.

³⁶ *Greenleaf on Ev.*, 14th ed., § 117.

³⁷ *Hull v. Seattle etc. Co.*, 60 Wash. 162, 110 Pac. 804.

³⁸ *Weinstein v. Yielding*, 167 Ala. 347, 52 South. 591.

for not producing the original evidence. For instance, it is error to permit a carbon copy to be used without producing or accounting for the original;³⁹ or copies of account-books or deeds.⁴⁰ In criminal prosecution, parol evidence cannot be given that a person is a *pensioner* of the government.⁴¹ The best evidence in such case is the record kept under the statutes.

§ 202 (201). **The rule does not exclude evidence unless objection is made.**—The exception dealt with in this section, at this place for convenience, is one not at all affecting the question of the inherent value of the evidence tendered and applies practically to every department of practice. If the opponent is deceived and does not know he is deceived, or if he is lax and permits secondary evidence to be given when he might have insisted upon the primary evidence or none at all, belongs scarcely to the realm of evidence. As it does undoubtedly exist, we treat it, and find it laid down, that the rule excluding secondary evidence, when that which is primary is attainable, is not so rigid as to be enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary, when it might have been excluded if proper objection had been taken. The courts pronounce themselves very clearly on the subject. In dealing with a guaranty in respect of which parol evidence was admitted the Maryland supreme court said: "A guaranty of this kind belongs to the class of instruments in reference to which the rule of evidence excluding parol testimony is rigidly enforced. If the appellant had excepted in the court below to the introduction of the evidence of the transactions which preceded and led up to the written guaranty sued on, it would have been excluded, except in so far as it was necessary

³⁹ Rosenberg v. People's Surety Co.,
140 App. Div. 436, 125 N. Y. Supp.
257.

⁴⁰ Isbell v. Whalen, 25 S. D. 445,

127 N. W. 476; McMillan v. Savannah
Guano Co., 133 Ga. 760, 66 S. E. 943.

⁴¹ United States v. Scott, 25 Fed.

470.

to prove the respective amounts due; . . . and the construction of the terms of the guaranty would then have been a question for the court, sitting as a court, and not as a jury, as it is well settled that the construction of all written documents is a question of law, for the court. When, however, the evidence had been permitted to go into the case without exception, the court was bound, under the rulings of this court,⁴² to deal with it as properly in the case, whether legally admissible or not, and give it the same effect as if it had in fact been legally admissible. The evidence being thus in the case, the meaning of the guaranty was to be gathered from the written paper and the parol evidence taken together, and its construction then became a proper question to go to the court, sitting as a jury."⁴³ The rule is well settled that when evidence is let in generally, without objection, and no attempt is made in the trial court to limit or confine its effect, it is in for all purposes, and it must be considered and allowed its full force.⁴⁴ In-

⁴² *Lamb v. Taylor*, 67 Md. 85, 8 Atl. 760; *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 58, 14 Atl. 673.

⁴³ *Slingluff v. Andrew Volk etc.* Co., 89 Md. 557, 43 Atl. 759; *Roberts v. Bonaparte*, 73 Md. 191, 10 L. R. A. 689, 20 Atl. 918.

⁴⁴ *Ryan v. Young*, 147 Ala. 660, 41 South. 954; *Birmingham R. etc. Co. v. Wildman*, 119 Ala. 547, 24 South. 548; *Mushet v. Fox*, 6 Cal. App. 77, 91 Pac. 534; *Hattersley v. Burrows*, 4 Colo. App. 538, 36 Pac. 889; *Montgomery v. State*, 55 Fla. 97, 45 South. 879; *Leonard v. Mixon*, 96 Ga. 239, 51 Am. St. Rep. 134, 23 S. E. 80; *Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707; *McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120; *Iowa Business Men's Bldg. etc. Assn. v. Fitch*, 142 Iowa, 329, 120 N. W. 694; *Jaggard v. Plunkett*, 81 Kan. 565, 25 L. R. A., N. S., 935, 106 Pac. 280; *Packwood v. White*, 7 La. Ann. 31; *Chesapeake*

Brewing Co. v. Goldberg, 107 Md. 485, 15 Ann. Cas. 879, 69 Atl. 37; *Farmers' Bank v. Duvall*, 7 Gill & J. (Md.) 78; *O'Brien v. City of Woburn*, 184 Mass. 598, 69 N. E. 350; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Western Land Securities Co. v. Daniels-Jones Co.*, 113 Minn. 317, 129 N. W. 587; *Goodall v. Norton*, 88 Minn. 1, 92 N. W. 445; *Orr & Linsley Shoe Co. v. Hance*, 44 Mo. App. 461; *Metz v. Chicago etc. R. Co.*, 88 Neb. 459, 129 N. W. 994; *Langworthy v. Coleman*, 18 Nev. 440, 5 Pac. 65; *Sherwood v. Sissa*, 5 Nev. 349; *Condit v. Blackwell*, 19 N. J. Eq. 193, 196; *Denn v. Banta*, 1 N. J. L. 266; *Witmark v. New York El. R. Co.*, 149 N. Y. 393, 44 N. E. 78; *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Lehigh Valley Coal Co. v. Ward*, 149 Pa. 119, 24 Atl. 183; *Weckerly v. Geyer*, 11 Serg. & R. (Pa.) 35; *Crebbin v. Farmers' Nat. Bank* (Tex. Civ. App.),

competent evidence, if material, is sufficient to establish a fact in issue, when received without objection, but if not material, it does not affect the issue. In a very old Arkansas case,⁴⁵ the following sound statement is found: "Along with the testimony that was competent and relevant to the issue, the bill of exceptions presents some that was purely hearsay, and, as such, totally inadmissible, not only that it supposed better evidence, but on account of its intrinsic weakness and incompetency to satisfy the mind as to the existence of the specific fact of part payment within the bar that was in this case sought to be established. And although, as this legal and illegal testimony has been indiscriminately produced before the court without objection, it all has to be regarded in considering the question before us, otherwise the same case that was apparently presented to the court below by the motion for a new trial would not be reviewed by us, still that does not confer upon this hearsay evidence any new attribute in point of weight. Its nature and quality in this respect remaining the same, so far as its intrinsic weakness and incompetency to satisfy the mind are concerned."⁴⁶ If a *prima facie* case or de-

50 S. W. 402; Marston v. Deane, 7 Car. & P. 13; Reed v. Deere, 7 Barn. & C. 261, 108 Eng. Reprint, 720; Stevens v. Pinney, 8 Taunt. 327, 2 Moore, 349, 129 Eng. Reprint, 409; Fry v. Chapman, 5 Dowl. C. P. 265; Election Case, 37 Can. S. Ct. 495.

⁴⁵ State Bank v. Wooddy, 10 Ark. 638.

⁴⁶ See, also, Hutchings v. Castle, 48 Cal. 152; Childers v. Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Lehman v. Frank, 19 App. Div. 442, 46 N. Y. Supp. 761; Sharp v. Baker, 22 Tex. 306. The admission of such evidence, without objection, does not add any weight to it, if intrinsically it had none, and should have been excluded, upon objection. Evidence does not have weight, because it is admitted;

but it is admitted because it deserves to have weight. The case of Damon v. Carroll, 163 Mass. 404, 40 N. E. 185, might be cited in support of the proposition, but the court threw some little doubt upon it in an opinion which is by no means clear. The court likened the rejection of hearsay to the rejection of testimony incompetent formerly by reason of interest, and cited Bentham as authority for treating hearsay as secondary evidence, without however, formally adopting him. In a later Texas case—Daniel v. Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421—the court delivered itself of this doubting observation: "This evidence may have been objectionable as hearsay, but it was admitted without objection, and is

fense can be made without the use of a document relating thereto, it is no sufficient answer that there is such writing, unless the other party produces it in evidence.⁴⁷ But it is the common practice, when a witness is testifying as to a fact or contract, for the opposite counsel to interpose and ask the *preliminary question* whether such agreement is in writing, and if it so appears, the writing must be produced or its absence legally accounted for. It is the province of the presiding judge to pass upon all preliminary questions relating to the admissibility of secondary evidence and to determine the facts necessary to the decision of such questions. If the judge admits secondary evidence, it is presumed that he has found as facts all such preliminary matters; and such finding is conclusive, unless the exceptions are preserved according to the practice of the jurisdiction.⁴⁸ Stephen thus states the rule: "Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would, in effect, decide the matter in issue."⁴⁹ Care must be taken that confusion does not arise as to the part that secondary evidence, unobjected to, plays. It may supply the place of primary evidence, but it cannot vary or contradict it.⁵⁰ A very clear exposition of the distinction is

uncontradicted; and, as its place might have been supplied by other testimony had objection been urged and sustained at the proper time, the court should have treated it as competent for the purpose for which it was offered." This case does not appear to have been followed on this point, whereas *Sharp v. Baker*, *supra*, has found support in *De Garca v. Galvan*, 55 Tex. 53, and in *Stewart v. State*, 9 Tex. App. 321, and *Burke v. State*, 15 Tex. App. 156.

⁴⁷ See cases cited above.

⁴⁸ *Whiteher v. McLaughlin*, 115 Mass. 167; *Mason v. Libbey*, 90 N. Y. 653, where the instrument has been

destroyed. See, also, the late cases: *Gelder v. Welsh*, 169 Mich. 490, 135 N. W. 280; *Morison v. Weik*, 19 Cal. App. 139, 124 Pac. 869; *Peters etc. Furniture Co. v. Queen City etc. Ins. Co. (Or.)*, 126 Pac. 1005. See § 214, *post*; and also § 174, *ante*.

⁴⁹ Reynolds' Steph. Ev., art. 71, p. 111.

⁵⁰ *Jamison v. May*, 13 Ark. 600. There is a New York decision to the contrary (*White v. Balta*, 7 Misc. Rep. 311, 27 N. Y. Supp. 902), but it has never been cited as authority. From a very old Maine case (*Goddard v. Cutts*, 11 Me. 440) we extract this terse statement of law on an attempt

to be found in a California case.⁵¹ In that case testimony as to an oral agreement was without objection received, varying the terms of its contemporaneous written contract, and the court of appeal said that though no objection was made, yet the incompetency of parol evidence to vary a writing might be considered as a matter of law. Upon this a rehearing was sought. In support of the petition the proposition was urged that in the absence of objection, secondary evidence was sufficient to support the findings of a court based thereon. Here there was an apt illustration of the confusion we have referred to. The court pointed the distinction in these words: "The rule declared by this court is entirely distinct from that applied in those cases. Whether or not a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence."⁵² Where a contract is reduced to writing, whether required by law to be written or not, the writing supersedes all other negotiations and stipulations concerning the matter made at the time or prior thereto.⁵³ If the terms as agreed upon have not all been reduced to writing, these can be supplied only by an appropriate proceeding or under proper allegations. By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said that parol or secondary evidence, unobjected to, might supply the terms, or purport, of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding, but parol evidence would neither

to vary a contract by parol evidence: "This is manifestly a condition subsequent, not to be found in the note, but attempted to be attached thereto by parol evidence. This testimony was received without objection; but when called upon to determine whether the verdict is or is not against the weight of evidence, it must be weighed according to the rules established by law. This testi-

mony, such as it is, is contradicted by two witnesses. If false, it ought not to affect the note; and if true, it was not competent to change its terms, or interpose new conditions."

⁵¹ *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499.

⁵² 1 Greenl. on Ev., 16th ed., § 305a.

⁵³ Civ. Code, § 1625.

be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced. These rules are in no way inconsistent, and the rule as to secondary evidence is not applicable here."⁵⁴

§ 203 (202). Qualifications of the rule—Independent and collateral facts.—We have so far dealt with the necessity for production of the written document, but it often happens that parol testimony as to a fact may be primary evidence although there is written evidence of the same fact. It is difficult to lay down any rule which will accurately define in what cases it is not necessary to produce a writing as the best evidence. There is much conflict in the cases upon this subject, arising more, perhaps, out of the application of the rule to differing cases than as to the rule itself. All the cases recognize the principle that, where the contents of the instrument are required, it must be produced, or its absence excused.⁵⁵ If the essential fact

⁵⁴ Code Civ. Proc., § 1856; *German Fruit Co. v. Armsby*, 153 Cal. 585, 96 Pac. 319.

⁵⁵ *Gilbert v. Duncan*, 29 N. J. L. 133. *Savage, C. J.*, in *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667, said: "I have always understood the rule to be, that parol evidence of the contents of papers may be given when they do not form the foundation of the cause, but merely relate to some collateral fact." The judgment of *Parker, C. J.*, in *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137, proceeds also on the ground that the contents of a paper collateral to the issue may be proved by parol.

Greenleaf, also, in his work upon Evidence, paragraph 89, adopts the rule as enunciated by Chief Justices *Savage* and *Parsons*, citing as authority the case just referred to. The author of the note in 2 *Phillips' Ev., Cow. & Hill's Notes*, 398, after an elaborate examination of these cases, and others cited by him as maintaining the opposite doctrine, says: "We know of no ground, either upon principle or authority, upon which the doctrine can be maintained. Where, however, the contents are immaterial, and the question is one of mere identity, as in the present case, no reason is perceived why the

to be proved is not the contents of a written instrument, but an *independent fact* to which the writing is merely *collateral* or of which it is merely an incident, there is no reason for the application of the rule under discussion. In such cases the contents of the document are no part of the issue, and there is no agreement that the writing shall be the sole repository of the fact. When the parol evidence is as near to the fact testified as to the writing itself, then each is primary, and the act or oral statement may be proved. This is frequently illustrated in the parol proof of such facts as that indebtedness has been paid, although the debt may be in the form of notes or even judgments. Parol proof of the *payment* may be made even though a receipt is given contemporaneously. On the same principle the time of marriages and births may be shown by persons having knowledge of the facts without resort to the record evidence which the statutes may require. The existence of documents without reference to their contents may be proved in this way, as also their identity, so long as there is no attempt to introduce evidence of their contents. The rule does not exclude oral evidence of an independent fact on the ground that the same fact is included in a contract which is collateral to the issue being tried.⁵⁶

production of the instrument should be required before the witness is permitted to allege its existence."

⁵⁶ First Nat. Bank v. Hedgecock, 87 Neb. 220, 127 N. W. 171; Atlanta & B. Air Line Ry. v. Wood, 160 Ala. 657, 49 South. 426; Councill v. Mayhew, 172 Ala. 295, 55 South. 314; St. Louis etc. R. Co. v. Caldwell, 93 Ark. 286, 124 S. W. 1034; Stovell v. Alert Gold Min. Co., 38 Colo. 80, 87 Pac. 1071; Joyce v. Joyce, 80 Conn. 88, 67 Atl. 374; Camp v. State, 58 Fla. 12, 50 South. 537; Mason v. State, 1 Ga. App. 534, 58 S. E. 139; State v. Rozeboom, 145 Iowa, 620, 124

N. W. 783; Holt v. Weld, 140 Mass. 578, 5 N. E. 506; Hartman v. Dobar, 80 N. J. 250, 76 Atl. 347; Carrington v. Allen, 87 N. C. 354; Rabon v. Atlantic etc. R. Co., 149 N. C. 59, 62 S. E. 743; McFadden v. Kingsbury, 11 Wend. (N. Y.) 667; Empire Implement Mfg. Co. v. Hunch, 219 Pa. 135, 67 Atl. 995; Hagins v. Aetna Life Ins. Co., 72 S. C. 216, 51 S. E. 683; Smith v. Southern Ry. Co., 89 S. C. 415, 71 S. E. 989; Keeton v. State, 59 Tex. Cr. 316, 128 S. W. 404; In re Miller, 36 Utah, 228, 102 Pac. 996. Among the latest cases see Southern Bitulithic Co. v. Hughston

§ 203a (202). **Same—Illustrations.**—Where a general summarized statement had been referred to in evidence, it was not error to permit a witness to say that certain facts were not taken into consideration in making the summary. In the words of the court, “the testimony was not as to what items were contained in the statement, as stated in appellant’s proposition, but as to what items were considered in making up the statement, an entirely different matter, and one which was not shown by the statement itself.”⁵⁷ Extracts from account-books have been admitted where they were supported by the testimony of a witness who could prove their contents of his own knowledge irrespective of the books.⁵⁸ In an action for assault the plaintiff, in detailing his financial condition in support of damages for loss of time, was properly permitted to give oral evidence of certain contracts he had entered into.⁵⁹ It may be shown by parol that an *account* was paid, although there is a receipt;⁶⁰ the actual receipt of *rents* and profits though books were kept;⁶¹ that new *notes* were *taken* in payment of a debt;⁶² the identification of a note apart from its contents;⁶³ that certain personalty was *listed* for *taxation*.⁶⁴ So it may be shown that a judgment has been

(Ala.), 58 South. 450; Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869; Knight v. Landis, 11 Ga. App. 536, 75 S. E. 834; Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; De Noyelles v. Delaware Ins. Co., 78 Misc. Rep. 649, 138 N. Y. Supp. 855; Share v. Coats (S. D.), 137 N. W. 402; Philadelphia Underwriters’ Agency v. Brown (Tex. Civ. App.), 151 S. W. 899; Canadian Bank v. Sesnon, 68 Wash. 434, 123 Pac. 602; Star Grocer Co. v. Bradford, 70 W. Va. 496, 74 S. E. 509.

⁵⁷ Sheldon Canal Co. v. Miller, 40 Tex. Civ. App. 460, 90 S. W. 206.

⁵⁸ Carlisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172.

⁵⁹ Hartman v. Dobar, 80 N. J. L. 250, 76 Atl. 347. In Den v. Hamilton,

12 N. J. L. 109, it was held that the fact that a person took actual possession of the premises in controversy may be proved by parol, though he went into possession under an agreement in writing.

⁶⁰ Berry v. Berry, 17 N. J. L. 440; Kingsbury v. Moses, 45 N. H. 222; Page v. Einstein, 7 Jones (52 N. C.), 147; Wolf v. Foster, 13 Kan. 116; Meade v. Keane, Fed. Cas. No. 9373, 3 Cranch C. C. 51.

⁶¹ Wilcox v. Bates, 58 Wis. 128, 15 N. W. 774.

⁶² Daniel v. Johnson, 29 Ga. 207.

⁶³ Lingenfelter v. Simon, 49 Ind. 82.

⁶⁴ Hewitt v. State, 121 Ind. 245, 23 N. E. 83.

paid;⁶⁵ and a tax;⁶⁶ that a third person owes a debt, when notes evidencing the same are not produced;⁶⁷ that a *claim* was *settled* before suit was begun;⁶⁸ the *consideration* of a guaranty.⁶⁹ When a circular *letter* had been received and referred to a fact collateral and incidental to the issues, oral evidence of it was allowed.⁷⁰ So that a *telegram* had been *received*;⁷¹ the transactions at an *auction*;⁷² the *value* of goods, although the witness has a bill showing their cost;⁷³ that a *sale* was *made* and of the time of the sale, although the contract was in writing;⁷⁴ as to an *execution sale*, its validity not being in question;⁷⁵ that the witness *held a mortgage* on certain property,⁷⁶ as well as the *amount* of the same;⁷⁷ that a *verbal sale* was made, although a written bill of sale is subsequently accepted;⁷⁸ that a *purchase* at a *sheriff's* sale was for the benefit of a third person;⁷⁹ that there was a fraudulent combination at a sale of land;⁸⁰ that a *deed* was *executed* and delivered after an execution sale;⁸¹ the time of *birth*, though there is a written family record of births,⁸² and though a registry

⁶⁵ *Planters' Bank v. Borland*, 5 Ala. 531.

⁶⁶ *Davis v. Hare*, 32 Ark. 386.

⁶⁷ *Duffie v. Phillips*, 31 Ala. 571.

⁶⁸ *Arnold v. Arnold*, 20 Iowa, 273.

⁶⁹ *Nichols v. Bell*, 1 Jones (46 N. C.), 32.

⁷⁰ *Mobile etc. Co. v. Hawkins*, 163 Ala. 565, 51 South. 37.

⁷¹ *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564.

⁷² *Austin v. Boyd*, 23 Mo. App. 317.

⁷³ *Savannah Ry. Co. v. Hoffmayer*, 75 Ga. 410.

⁷⁴ *Thompson v. Mapp*, 6 Ga. 260; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736; *Gallagher v. London Assur. Corp.*, 149 Pa. 25, 24 Atl. 115.

⁷⁵ *Stanley v. Sutherland*, 54 Ind. 339.

⁷⁶ *File v. Springel*, 132 Ind. 312, 31 N. E. 1054.

⁷⁷ *Hyde v. Shank*, 93 Mich. 535, 53 N. W. 787.

⁷⁸ *Sanders v. Stokes*, 30 Ala. 432.

⁷⁹ *Hoagland v. Hoagland*, 2 N. J. Eq. 501.

⁸⁰ *Miltenerberger v. Morrison*, 39 Mo. 71.

⁸¹ *Uhl v. Moorhous*, 137 Ind. 445, 37 N. E. 366; *Armstrong v. McCoy*, 8 Ohio, 128, 31 Am. Dec. 435.

⁸² *Central Ry. Co. v. Coggin*, 73 Ga. 689; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *Beeler v. Young*, 3 Bibb (Ky.), 520; *Morrison v. Emsley*, 53 Mich. 564, 19 N. W. 187; *Carskad-den v. Poorman*, 10 Watts (Pa.), 82, 36 Am. Dec. 145; *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *Evans v. Morgan*, 2 Cromp. & J. 453, 2 Tyr. 396; *Reg. v. Mainwaring, Dears. & B. C. C.* 132, 26 L. J. M. C. 10, 2 Jur., N. S., 1236, 5 W. R. 119, 7 Cox C. C. 192; *Morris v. Miller*, 4 Burr. 2057, 98 Eng. Reprint, 73.

is required by law;⁸³ *tenancy* and occupancy, though under a written lease;⁸⁴ *ownership*;⁸⁵ the fact of the *leasing* of a railway;⁸⁶ that certain land was sold for a given sum;⁸⁷ that a person was *omitted in a will*;⁸⁸ that a *road* is a *highway* though never laid out.⁸⁹ It is proper to allow a *surveyor* to testify how the measurements of the ground surveyed held out with reference to the figures on the *plat*, and as to how the location of a certain fence compared with the same *plat*.⁹⁰ It may be shown by *parol* that certain lands are used by a railroad for *depot grounds*,⁹¹ what the terms of a *verbal contract* are, though a written memorandum thereof was made and read at the time;⁹² so of a *verbal demand*, though accompanied by a written one;⁹³ or of the fact that A is a *hotel-keeper*, although he has a *license*.⁹⁴ When a given *train is due* is not the contents of a writing, but an independent fact to which the writing (the printed time-table) was merely collateral, or of which it was merely an incident. Furthermore, said the court: "Neither the plaintiff nor the deceased was a party to the writing, nor did the plaintiff assert any right founded upon or growing out of it, nor had either any connection with the instrument, in the sense that the writing was regarded or understood to be the sole repository of the fact. The question was not what was the contents of this printed paper; but when should the cars have arrived at that point?"⁹⁵

⁸³ *Commonwealth v. Norcross*, 9 Mass. 492; *Nixon v. Brown*, 4 Blackf. (Ind.) 157; *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742, and important note.

⁸⁴ *Rayner v. Lee*, 20 Mich. 384; *Central R. Co. v. Whitehead*, 74 Ga. 441; *Hammon v. Sexton*, 69 Ind. 37; *Twyman v. Knowles*, 13 Com. B. 222, 17 Jur. 238, 22 L. J. C. P. 143.

⁸⁵ *Wolfe v. Underwood*, 97 Ala. 375, 12 South. 234.

⁸⁶ *Central Ry. Co. v. Whitehand*, 74 Ga. 441.

⁸⁷ *Robinson v. Tipton*, 31 Ala. 595.

⁸⁸ *Bulger v. Ross*, 98 Ala. 267, 12 South. 803.

⁸⁹ *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333.

⁹⁰ *Perry v. Sheldon*, 30 R. I. 426, 75 Atl. 690.

⁹¹ *Fowler v. Farmers' Loan Co.*, 21 Wis. 77.

⁹² *Lathrop v. Bramhall*, 64 N. Y. 365.

⁹³ *Smith v. Young*, 1 Camp. 439.

⁹⁴ *Owings v. Wyant*, 3 Har. & McII. (Md.) 393.

⁹⁵ *Meyers v. San Pedro etc. R. Co.*, 36 Utah, 307, 21 Ann. Cas. 1229, 104 Pac. 736. In action for injuries

Parol evidence is also admissible that a passenger bought a *ticket* over several roads having coupons attached;⁹⁶ of the *issues* determined in a former *suit* where the record is not conclusive,⁹⁷ or where the declaration was lost,⁹⁸ or where it was a suit in an inferior court, if the subject of the inquiries was merely incidental and collateral to the issues in the cause. Though the record was the best evidence secondary evidence was admissible.⁹⁹ Parol evidence may be given that a *suit* has been *tried*;¹⁰⁰ that an *arbitrator* has been substituted by agreement for one appointed by the court;¹ that an *agent* has been *appointed*, though the appointment is in writing;² of the *attendance* of *witnesses* and jurors at court;³ that two *records* relate to the *same cause* of action;⁴ the *time* of issuing a *writ*;⁵ that copies of an *ordinance* produced had been *posted*, the fact of publication and not the contents being in issue.⁶ The inclusion or exclusion of a creditor from a schedule in bankruptcy is admissible in an action for services rendered, the fact being entirely incidental to the main issue.⁷ Parol evidence is admissible that town *officers* were duly

caused by collision between railroad cars of different companies running on the same track, where a question arises as to which road is in fault, the running time of the trains may be shown by other proof than the time-table of the companies: *Chicago etc. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239.

⁹⁶ *Central Ry. Co. v. Wolff*, 74 Ga. 664.

⁹⁷ *Justice v. Justice*, 3 Ired. (N. C.) 58; *Lander v. Arno*, 65 Me. 26; *Hickerson v. Mexico*, 58 Mo. 61; *Rake v. Pope*, 7 Ala. 161; *State v. De Witt*, 2 Hill (S. C.), 282, 27 Am. Dec. 371.

⁹⁸ *Butler v. Slam*, 50 Pa. 456.

⁹⁹ *Garden v. Houston*, 163 Ala. 300, 50 South. 1030; *Pollack v. Gunter*, 162 Ala. 317, 50 South. 155.

¹⁰⁰ *Johnston v. Hamburger*, 13 Wis. 195.

¹ *Douglass v. Brandon*, 6 Baxt. (Tenn.) 58.

² *Whitfield v. Brand*, 16 Mees. & W. 282, 16 L. J. Ex. 103.

³ *Baker v. Brill*, 15 Johns. (N. Y.) 260; *Massey v. Westcott*, 40 Ill. 160.

⁴ *Rake v. Pope*, 7 Ala. 161; *Porter v. State*, 17 Ind. 415; *Federal Hill etc. Co. v. Mariner*, 15 Md. 224; *Commonwealth v. Sutherland*, 109 Mass. 342; *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 375; *Davisson v. Gardner*, 10 N. J. L. 289; *Butler v. Slam*, 50 Pa. 456; *Perkins v. Walker*, 19 Vt. 144.

⁵ *Den v. Hamilton*, 12 N. J. L. 109.

⁶ *Taft v. Size*, 10 Ill. 432.

⁷ *Fink v. Glauber*, 121 N. Y. Supp. 297.

sworn, the record being silent on the subject;⁸ the *identity* or genuineness of a *writing*;⁹ as copies or originals;¹⁰ the contents of a writing to show its identity with or diversity from another writing.¹¹ When a contract has been executed in duplicate, and one of the duplicates was lost and copies are introduced in evidence showing disputed interlineations, parol evidence may be given to explain the alterations.¹² Parol evidence can be given of the oral tender of a check in full settlement as it constitutes original evidence of the fact.¹³ In an action to recover the value of an automobile destroyed in a collision, the fact of joint ownership can be proved orally although there was a written contract between the owners.¹⁴ In an action for injuries caused by falling into an open pit in an approach to a railway station, the defendant was allowed, over objection, to introduce in evidence copy of a deed. This was done to show the width of the right of way, and objection was made on the ground that no foundation was laid for the introduction of the record by first showing why the original deed could not be produced. The deed related to a collateral matter, and did not form the basis of the cause of action, and therefore its introduction did not fall within the rule that secondary evidence should be excluded unless proof is made that the primary evidence was not obtainable.¹⁵ When a witness called upon the defendant, and, in

⁸ Pease v. Smith, 24 Pick. (Mass.) 122.

⁹ Ross v. Bruce, 1 Day (Conn.), 100; McGinnis v. State, 24 Ind. 500; McClean v. Hartzog, 6 Serg. & R. (Pa.) 154; Commonwealth v. Messenger, 1 Binn. (Pa.) 273, 2 Am. Dec. 441; Scott v. Jones, 4 Taunt. 865, 128 Eng. Reprint, 572; Read v. Gamble, 10 Ad. & E. 597, 113 Eng. Reprint, 227; Bucher v. Jarratt, 3 Bos. & P. 145, 127 Eng. Reprint 78; How v. Hall, 14 East, 275, 104 Eng. Reprint, 606; Darby v. Onseley, 1 Hurl. & N. 1, 25 L. J. Ex. 227, 2 Jur., N. S., 497.

¹⁰ Burnett Cigar Co. v. Art Wall Paper Co., 164 Ala. 547, 51 South. 263.

¹¹ West v. State, 22 N. J. L. 212; Myer's Estate, 111 Iowa, 584, 82 N. W. 961.

¹² Burnett Cigar Co. v. Art Wall Paper Co., 164 Ala. 547, 51 South. 263.

¹³ Cristler v. Williams (Tex. Civ. App.), 130 S. W. 608.

¹⁴ Hull v. Seattle etc. Ry. Co., 60 Wash. 162, 110 Pac. 804.

¹⁵ St. Louis etc. R. Co. v. Caldwell, 93 Ark. 286, 124 S. W. 1034.

testifying to the conversation, stated he had referred to an agreement or understanding with a third person, that part of the testimony being only explanatory of the purpose of the witness in calling upon the defendant and obtaining information from him as to certain land the subject matter of the action, was clearly admissible for such purpose.¹⁶

§ 204 (203). **Same—Corporate acts.**—We have already given some instances where references to written instruments have been allowed as mere inducements to more material parts of the testimony, and where witnesses have properly been allowed to speak of the *execution* of deeds or other *papers* without producing the documents referred to.¹⁷ But, of course, if the testimony involves the construction or contents of the document, the general rule applies.¹⁸ From the illustrations given, it is clear that where such facts as ownership of land or chattels, or tenancy, or the contents of documents as opposed to their description arise, the best evidence rule must apply in full vigor if those facts form the subject of main and not merely collateral or incidental issues. Questions as to the effect of the omission of a corporation to record its corporate acts frequently arise in determining the admissibility of parol evidence to prove such acts. The records of a corporation are *prima facie* evidence of its organization and subsequent proceedings. When such records exist, they are the best evidence, and the rules of evidence require their production. But all the acts of a corporation need not be established by positive record evidence.¹⁹ Where the records of a corporation are omitted entirely, or where they are so carelessly or imperfectly kept as not to show the adoption

¹⁶ *Henderson v. Louisiana etc. Lumber Co.* (Tex. Civ. App.), 128 S. W. 671.

¹⁷ *Gallagher v. London Assur. Corp.*, 149 Pa. 25, 24 Atl. 115; *Baltes Land, Stone & Oil Co. v. Sutton*, 32 Ind. App. 14, 69 N. E. 179. See § 200 et seq., *ante*.

¹⁸ *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443; *Primrose v. Brownrig*, 56 Ga. 369; *Thompson v. Richards*, 14 Mich. 172.

¹⁹ *United States v. Fillebrown*, 7 Pet. (U. S.) 28, 8 L. Ed. 596.

of resolutions or other acts of the corporation, parol evidence may be admitted to show that such resolutions were adopted, or that such acts were done, by the governing body, unless the law or the charter expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.²⁰ Mr. Justice Story, discussing this subject said: "Here, then, secondary evidence and presumptive proof were admitted in a suit against the corporation to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record. If the corporation had shown that no such vote had been on record, would the presumption have been completely repelled? Would the omission of the corporation to record its own doings have

²⁰ *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 4 Morr. Min. Rep. 71; *Powesheik Co. v. Stanley*, 9 Iowa, 511; *White v. State*, 69 Ind. 273; *Vicksburg etc. R. Co. v. Ouachita*, 11 La. Ann. 649; *Moor v. Newfield*, 4 Greenl. (Me.) 44; *Trott v. Warren*, 11 Me. 227; *Cram v. Bangor House Proprietary*, 12 Me. 354; *State v. Goll*, 32 N. J. L. 285; *Darlington v. Commonwealth*, 41 Pa. 68. In *Prothro v. Minden Seminary*, 2 La. Ann. 939, it was held that parol evidence was admissible to prove a resolution of the board of directors of the corporation, authorizing its president to execute a mortgage in the name of the corporation, where the witness testified that the resolution was written by him as secretary on a slip of paper, and never transcribed on the minute-book, the paper had been lost and that an unsuccessful search had been made for it. The court in that case said that to refuse the plaintiff the benefit of the oral proof of the lost writing would in reality be permitting a corporation to take advantage of the carelessness of its own officers and

servants. And when there is no record of the act of a corporation, such act may be proved by presumptive evidence, as in the case of a private person: *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; *United States v. Fillebrown*, 7 Pet. (U. S.) 28, 8 L. Ed. 596; *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 4 Morr. Minn. Rep. 71; *City of Lexington v. Headley*, 5 Bush (Ky.), 508; *Burgess v. Pue*, 2 Gill (Md.), 254; *Dunn v. St. Andrews Church*, 14 Johns. (N. Y.) 118. In the case last cited, the plaintiff had performed services, as clerk of the church, for the corporation, for which he had received some payments. The records of the corporation contained entries of payment at several times to the plaintiff, but no resolution was entered on the records of the corporation appointing him clerk of the church. The court held that it was not necessary to show by the records that such a vote had been had, and that there was sufficient evidence of an implied promise by the corporation to make the compensation.

prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such admission would not be fatal to the plaintiff in suits against the corporation (as in our opinion it would not be), it establishes the fact that acts of the corporation not recorded may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs in support of its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence."²¹ Where the law or the charter requires the clerk of a public corporation to keep a record of all the proceedings of the governing body of such corporation, that record, or a duly authenticated copy of it, is the only proper evidence of the acts of the body, and its absence cannot be supplied by parol evidence.²² But incidental and collateral facts connected with the transactions of corporations may be proved by parol without violation of the best evidence rule, as the following further illustrations will show.

§ 204a (203). Same—Illustrations.—The acts of the board of directors of a corporation, ordered to be entered of record, but which the secretary, by neglect or mistake, does not enter, may be proved by parol testimony. If the corporation, for reasons deemed sufficient by it, postpones the formal entry of record of the acts of its board of directors, they may be proved by parol testimony.²³ Parol

²¹ *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

²² *City of Logansport v. Crockett*, 64 Ind. 319; *City of Louisville v. McKegney*, 7 Bush (Ky.), 651; *Har-*

ris v. Whitcomb, 4 Gray (Mass.), 433; *Morrison v. City of Lawrence*, 98 Mass. 219.

²³ *Bay View Homestead Assn. v. Williams*, 50 Cal. 353, and notes to *Higgins v. Reed*, 74 Am. Dec. 309,

proof has been received of the *election* of directors;²⁴ of the fact that *stock* had been *distributed* and a large number of bills issued;²⁵ that *subscriptions* to stock in a large amount were *solicited* and obtained by an agent;²⁶ that *no vote* of a given character had even been *taken* by the corporation;²⁷ of the *acts* done in *organizing* a corporation, but not of the contents of its articles;²⁸ of *filing articles* of incorporation, that being no part of the articles;²⁹ of the publication of an *ordinance*;³⁰ of the intention of a corporation to *dedicate a road* to the public,³¹ or to make certain improvements.³² By *failing to keep a record* of its proceedings a corporation may be estopped from objecting to parol evidence of its acts.³³ When the records of a corporation are excluded because the corporation was not legally organized, oral evidence is admissible to show *who are acting officers*,³⁴ and that the association was acting as a *de facto* corporation.³⁵ Where it appeared that either no written evidence of *organization* ever existed, or that if it did, the writing had been lost, and could not be found, parol evidence of a meeting called for organization pur-

and Sawyer v. Manchester etc. Ry. Co., 13 Am. St. Rep. 550.

²⁴ Partridge v. Badger, 25 Barb. (N. Y.) 146.

²⁵ Banks v. Darden, 18 Ga. 318.

²⁶ Low v. Connecticut Ry. Co., 45 N. H. 370.

²⁷ Smith v. Richards, 29 Conn. 232.

²⁸ Miller v. Wild Cat Co., 52 Ind. 51.

²⁹ Johnson v. Crawfordsville Ry. Co., 11 Ind. 280.

³⁰ Teft v. Size, 10 Ill. 432; Des Moines v. Casady, 21 Iowa, 570.

³¹ People v. Eel River & E. Ry. Co., 98 Cal. 665, 33 Pac. 728.

³² New York N. H. & H. R. Co. v. Offield, 78 Conn. 1, 60 Atl. 740.

³³ Scott v. First Methodist Church, 50 Mich. 528, 15 N. W. 891; Pickett v. Abney, 84 Tex. 645, 19 S. W. 859.

³⁴ People v. Leonard, 106 Cal. 302, 39 Pac. 617.

³⁵ Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Tipton Fire Co. v. Barnheisel, 92 Ind. 88; Swartwout v. Michigan etc. Co., 24 Mich. 389; Fields v. United States, 27 App. D. C. 433; United States v. Amedy, 11 Wheat. (U. S.) 392, 6 L. Ed. 502. In the case last mentioned, Mr. Justice Story said: "The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. Under such circumstances we think nothing more was necessary for the government to prove than that the company was *de facto* organized and acting as an insurance company and corporation."

poses and the proceedings thereat was admissible;³⁶ and so with proceedings of directors which do not appear on the minutes.³⁷ Parol evidence of the *filing* of a *declaration* of an amendment to a charter is admissible.³⁸ As a general rule, the proper method of proving the nonexistence of a record is by testimony of him who would have been the lawful custodian of such record if it were in existence. In Texas it was held that under this rule the testimony of an outside person to the effect that he had examined the files in the office of the secretary of state, and failed to find any record of a charter incorporating an association by the name of the Odd Fellows' Building and Savings Association, was not admissible. It was competent to show by the witness that he had never heard of a corporation, partnership, or business concern of any kind doing business under the name stated, but proof as to what was shown by the records in the office of the secretary of state should be made by the testimony of that officer.³⁹ But parol evidence is not admissible to show that a corporation has gone into liquidation, or that a foreign corporation has been licensed to do business in the state, or that one corporation has been merged into another.⁴⁰ In criminal cases, where one of the material allegations of the information is that the concern with which the accused was dealing is a corporation, oral evidence of its existence is not sufficient. The proof of so material a fact (for if there was no corporation, there was no crime) should rest in a higher class of testimony. than in civil cases.⁴¹

³⁶ Weber v. Fickey, 52 Md. 500.

³⁷ Hughes Mfg. Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871.

³⁸ Memphis etc. Co. v. Rives, 21 Ark. 302.

³⁹ Cobb v. Bryan, 37 Tex. Civ. App. 339, 83 S. W. 887; Edwards v. Barwise, 69 Tex. 84, 6 S. W. 677.

⁴⁰ Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 South. 224.

⁴¹ State v. Merchant, 48 Wash. 69, 92 Pac. 890. In State v. Pittam, 32 Wash. 137, 72 Pac. 1042, the oral evidence was held sufficient, but it went in without objection and no motion to strike the testimony was made. See State v. Knowles, 185 Mo. 141, 83 S. W. 1083, as to embezzlement of funds of a benevolent organization under Revised Statutes of 1899, section 1918. In Arkansas it is specially

§ 205 (204). **Appointment and acts of public officers.**—The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule, has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases. That he has acted notoriously as a public officer has been deemed *prima facie* evidence of his character, without producing his commission or appointment.⁴² Although persons become officers by election or appointment, the record of such election or appointment is not the only evidence that they are such officers, nor does the usual presumption that the written evidence is withheld from some improper motive apply in such cases. Moreover, the public convenience requires that parol evidence should be allowed to prove that public officers are such officers. The presumption of authority from acting in an official capacity always exists.⁴³ It is sufficient *prima facie* evidence from so acting that he is an officer *de facto*.⁴⁴ But when the complaint alleges the ap-

provided that in criminal cases corporate existence may be shown by general reputation (Kirby's Dig., § 3084), and therefore evidence of a *de facto* corporation is sufficient: *Mears v. State*, 84 Ark. 136, 104 S. W. 1095.

⁴² *Jacob v. United States*, 13 Fed. Cas. No. 7157, 1 Brock. 520. In the trial of *The Gordons* (1 Leach C. C. 515, 1 East P. C. 352), this principle of evidence was sustained by all the judges, even in a case of murder. It is also laid down in *Berryman v. Wise*, 4 Term Rep. (Durn. & E.) 366, 100 Eng. Reprint, 1067; *Bevan v. Williams*, 3 Term Rep. 635, 100 Eng. Reprint, 775, 3 Camp. 432; and in *Phil. Ev.*, 180.

⁴³ See § 43 et seq., *ante*.

⁴⁴ *Moody v. Keener*, 7 Port. (Ala.) 218; *James v. State*, 41 Ark. 451; *Allen v. State*, 21 Ga. 217, 68 Am. Dec. 457; *Rehkopf v. Miller*, 59 Ill.

App. 662; *Hall v. Bishop*, 78 Ind. 370; *Brown v. Connelly*, 5 Blackf. (Ind.) 390; *Londagan v. Hammer*, 30 Iowa, 508; *Morrison v. Pence*, 82 Kan. 420, 108 Pac. 831; *Noland v. Moore*, 2 Litt. (Ky.) 365; *New Portland v. Kingfield*, 55 Me. 172; *Barry v. Smith*, 191 Mass. 78, 6 Ann. Cas. 817, 5 L. R. A., N. S., 1028, 77 N. E. 1099; *Webber v. Davis*, 5 Allen (Mass.), 393; *Scott v. Detroit Young Men's Soc.*, 1 Doug. (Mich.) 119; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *State v. Twining*, 73 N. J. L. 3, 62 Atl. 402; *Peck v. Essex County*, 20 N. J. L. 457; *State v. Meder*, 22 Nev. 264, 38 Pac. 668; *Woolsey v. Rondout*, 4 Abb. (N. Y.) 639, 2 Keyes, 603; *Tatom v. White*, 95 N. C. 453; *Eldred v. Sexton*, 5 Ohio, 215; *Chapman Tp. v. Herrold*, 58 Pa. 106; *Mauldin v. Greenville*, 64 S. C. 444, 42 S. E. 202; *Biencourt v.*

pointment of the officer, as this lies at the foundation of the complaint, it must be proved, and secondary evidence is admissible only upon proof of the loss or absence of the record;⁴⁵ and so where the appointment or nonappointment of such officer is the pivotal question on which the case turns or the proof is regulated by a statute.⁴⁶

§ 205a (204). Same — Illustrations. — Proof that one has *acted* notoriously as a public officer is *prima facie* evidence of his official character.⁴⁷ The same rule prevails both in civil and in criminal actions and whether the officer is or is not a party to the record.⁴⁸ Courts have permitted

Parker, 27 Tex. 558; State v. Taylor, 70 Vt. 1, 67 Am. St. Rep. 648, 42 L. R. A. 673, 39 Atl. 447; State v. Clark, 64 W. Va. 625, 63 S. E. 402; Bank of United States v. Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81; Dunlop v. Munroe, 8 Fed. Cas. No. 4167, 1 Cranch C. C. 536.

⁴⁵ Thayer v. Stearns, 1 Pick. (Mass.) 109; Griffin v. Rising, 2 Cush. (Mass.) 75; Henderson County v. Dixon, 23 Ky. Law Rep. 1204, 63 S. W. 756.

⁴⁶ Bonner v. Commonwealth, 30 Ky. Law Rep. 992, 99 S. W. 1150 (indorsement by commonwealth attorney on execution); O'Donnel v. Dushman, 39 N. J. L. 677 (determination of an election board); Benninghoof v. Finney, 22 Ind. 101 (appointment of special constable to be noted in statutory form); Curtis v. Fay, 37 Barb. (N. Y.) 64; Beale v. Commonwealth, 11 Serg. & R. (Pa.) 299 (deputy sheriff's appointment where sheriff sought to be made liable); Bovee v. McLean, 24 Wis. 225 (special method of proof of commissioner's appointment under act of Congress); De Soto v. Brown, 44 Mo. App. 148 (acting police judge under city ordinance); Fain v. Garthright, 5 Ga. 6

(proof that one was *not* a justice of the peace at a certain time).

⁴⁷ James v. State, 41 Ark. 451; Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574; North v. People, 139 Ill. 81, 28 N. E. 966; State v. Row, 81 Iowa, 138, 46 N. W. 872; Burke v. Cutler, 78 Iowa, 299, 43 N. W. 204; Cabot v. Given, 45 Me. 144; McCoy v. Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; Wilcox v. Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Burke v. Elliott, 4 Ired. (N. C.) 355, 42 Am. Dec. 142; Cannell v. Curtis, 2 Bing. N. C. 228, 2 Scott, 379, 1 Hodges, 342, 5 L. J. C. P. 43; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Rex v. Gordon, 1 Leach C. C. 515, 1 East P. C. 352. See § 109 et seq. *ante*, as to judicial notice of existence and duties of officers.

⁴⁸ Rex v. Gordon, 1 Leach C. C. 515, 1 East P. C. 352; Berryman v. Wise, 4 Term Rep. 366, 100 Eng. Reprint, 1067; McGahey v. Alston 2 Mees. & W. 206, 2 Gale, 238, 6 L. J. Ex. 29; Radford v. McIntosh, 3 Term Rep. 632, 100 Eng. Reprint, 773; Doe ex dem. James v. Brawn, 5 Barn. & Ald. 243, 106 Eng. Reprint, 1181; Rex v. Jones, 2 Camp. 131.

proof by parol that a person taking an acknowledgment was at the time a *justice*;⁴⁹ or deputy clerk;⁵⁰ that A was a *magistrate*, in an action on a recognizance taken before him;⁵¹ that B was *president of a corporation*;⁵² and that one was *admitted to practice as a land attorney*.⁵³

§ 205b (204). **Writings practically incapable of production.**—The law generally requires the production of the highest evidence of which a thing is capable; and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from being universal. For example, it does not require that a supposed writer shall be called to prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved. The general rule is most frequently applied to writings, where proof is offered of their contents. The writing itself must be produced.⁵⁴ It is a well-recognized exception to the general rule that secondary evidence may be given of writings which *cannot be produced* in court. For example, of inscriptions which are traced upon mural monuments, walls and stones, as well as surveyors' marks on trees. As an illustration, parol evidence was allowed to be given of the handwriting of one who had written a libel on the wall of the jail;⁵⁵ but the evidence must show that the writing cannot without great difficulty be removed or produced in court.⁵⁶ Evidence has been admitted of the inscription on a tombstone

⁴⁹ State v. McNally, 34 Me. 210, 56 Am. Dec. 650; Rhoades v. Selin, Fed. Cas. No. 11,740, 4 Wash. C. C. 715; Bank of United States v. Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81; Shults v. Moore, Fed. Cas. No. 12,824, 1 McLean (U. S.), 520.

⁵⁰ Taton v. White, 95 N. C. 453.

⁵¹ Webber v. Davis, 5 Allen (Mass.), 393.

⁵² Brown v. La Crosse City Gas Co., 21 Wis. 51.

⁵³ Bourke v. Whiting, 19 Colo. 1, 34 Pac. 172.

⁵⁴ Commonwealth v. Morrell, 99 Mass. 542.

⁵⁵ Mortimer v. McCallan, 6 Mees. & W. 67.

⁵⁶ Jones v. Tarleton, 9 Mees. & W. 675, 11 L. J. Ex. 267, 6 Jur. 348.

giving the date of death.⁵⁷ There is a class of writings of so *transient* a nature that the court may readily assume they cannot be produced in court, and as to which secondary evidence may be allowed, such as inscriptions and addresses on traveling trunks. If the production of the thing on which the inscription is found is indispensable, it would be impossible to proceed in many cases. If a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the courtroom into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written.⁵⁸ While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy—itself a serious evil—without giving any additional safeguard to the interests of justice.⁵⁹ An inscription on a banner or flag carried about by the leaders of a riot may be proved orally⁶⁰ and in certain cases the contents of a notice.⁶¹ Where tags had been taken off certain boxes and mislaid, and evidence of their inscriptions given and objected to, Chapman, C. J., said: "In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag with the written direction upon it might have been more satisfactory to the jury than an

⁵⁷ *Smith v. Patterson*, 95 Mo. 525, 8 S. W. 567.

⁵⁸ *Kansas etc. R. Co. v. Miller*, 2 Colo. 442. An English decision on the production of the address on a parcel will be found in *Burrell v. North*, 2 Car. & K. 679.

⁵⁹ *Mr. Justice Swayne in Cliquot*

v. United States, 3 Wall. (U. S.) 114, 18 L. Ed. 116.

⁶⁰ *The King v. Hunt*, 3 Barn. & Ald. 566, 106 Eng. Reprint, 768; *Sheridan & Kerwin's Case*, 31 How. St. Tr. 672.

⁶¹ *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180 (notice to an indorser of a promissory note).

oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters. But even if it ought to have been produced in the absence of evidence of its loss, the proof of loss was adduced to the judge, and his decision as to the credibility of the evidence of loss was conclusive, and not subject to exception."⁶² So parol evidence may be given of the marks or brands on stolen goods without producing them.⁶³ There was no error in permitting a witness to testify that a paper shown the witness was the instrument that he took an assignment of, although objection was made that the instrument was mutilated, and torn into three pieces. The instrument was not then offered in evidence, but the witness was asked simply to identify it.⁶⁴ Parol evidence has been admitted of *notices* which have been *posted*.⁶⁵ It has been held that the contents of *resolutions* read at a *public meeting* may be proved by parol as they are of the nature of speeches;⁶⁶ and when *documents*, although existing, have become *illegible*, they may be proved by secondary evidence.⁶⁷

§ 205c (204). Same—Public records—Statutes—Books of corporations.—It is on the same general principle and on grounds of public convenience that the existence and contents of judicial and other *public records* required by law to be kept may be proved by an examined copy.

⁶² *Commonwealth v. Morrell*, *supra*, and a long line of Massachusetts cases on the subject of identity from *Commonwealth v. Hills*, 10 Cush. (Mass.) 530, to *Commonwealth v. Brown*, 124 Mass. 318. On the question of identity as aided by a writing, see an interesting decision, *Hailes v. State*, 10 Tex. App. 490; and as aided by measurement, see *Weaver v. State*, 46 Tex. Cr. 607, 81 S. W. 39.

⁶³ *Piano v. State*, 161 Ala. 88, 49 South. 803.

⁶⁴ *Baltes Land etc. Co. v. Sutton*, 32 Ind. App. 14, 69 N. E. 179.

⁶⁵ *Polly v. McCall*, 37 Ala. 20; *Kelly v. Taylor*, 23 Cal. 11, 5 Morr. Min. Rep. 598; *Teft v. Size*, 10 Ill. 432; *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845; *State v. Credle*, 91 N. C. 640.

⁶⁶ *The King v. Hunt*, 3 Barn. & Ald. 566, 106 Eng. Reprint, 768; *Sheridan v. Kerwin's Case*, 31 How. St. Tr. 672.

⁶⁷ *Dunning v. Rankin*, 19 Cal. 640, 9 Morr. Min. Rep. 455; *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Little v. Downing*, 37 N. H. 355.

Copies of records and papers, duly authenticated by the officers in whose custody they are by law required to be kept, or by the officer whose duty it is, by law, to authenticate them, are admissible in evidence, where, by law, the originals would be.⁶⁸ Some courts have gone so far as to reject even the records themselves, and to require an exemplified copy. Thus it has been said: "Neither the records themselves nor minutes should ever be received, when copies can be obtained, unless there is some strong reason for dispensing with the usual and appropriate evidence."⁶⁹ It is also in recognition of the same principle that state and federal statutes make many special provisions for the proof of public records by properly *authenticated copies*. The risk of loss from removal of records, the public convenience and the absence of any motive in public officers to make false copies, are all considerations that lead to these exceptions to the general rule.⁷⁰ In England, in a few instances it was held that the original books of private companies might be proved by copies, when the removal of the originals would cause great inconvenience.⁷¹ In this country the rule has not generally been applied to private business or in favor of private corporations, but many *statutes* have been enacted in the different states permitting proof by copies of the books of *banks, insurance companies* and the like.⁷² In a few instances proof by parol has been

⁶⁸ 1 Greenl. Ev., § 507; *United States v. Percheman*, 7 Pet. (U. S.) 51, 8 L. Ed. 604; *Oakes v. Hill*, 14 Pick. (Mass.) 442-448. See, also, 1 Greenl. Ev., § 485.

⁶⁹ *Lowry v. Cady*, 4 Vt. 504, 24 Am. Dec. 628.

⁷⁰ *As to judicial record*: *Fouke v. Ray*, 1 Wis. 104; *Dupont v. Downing*, 6 Iowa, 172; *Winans v. Dunham*, 5 Wend. (N. Y.) 47; as to *official documents*: In re *McClellan's Estate*, 20 S. D. 498, 107 N. W. 681; *Coons v. Renick*, 11 Tex. 134, 60 Am. Dec. 230; *Smithers v. Lowrence*, 35 Tex.

Civ. App. 25, 79 S. W. 1088. Among the latest cases are: *O'Connor v. United States*, 11 Ga. App. 246, 75 S. E. 110; *Traylor v. Epps*, 11 Ga. App. 497, 75 S. E. 828; *Producers' Oil Co. v. Bean* (Tex. Civ. App.), 147 S. W. 1166; *Brasfield v. Young* (Tex. Civ. App.), 153 S. W. 180.

⁷¹ *Mortimer v. McCallan*, 6 Mees. & W. 58, 67; *Boyle v. Wiseman*, 10 Ex. 647.

⁷² See statutes of jurisdiction. Rule relaxed as to banks in *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027; *Crawford v. Branch Bank*, 8 Ala. 79.

admitted of the *nonexistence* of particular entries—for example, that a given name was not in the city directory.⁷³ It is competent to prove the failure of a party to return any property for taxation by the oral evidence of a witness who swears that he has examined the tax-books, and that no such returns appear of record.⁷⁴ That a record of marriage does not contain the entry of a particular marriage may be proved by the oral testimony of the officer who had examined it for that purpose.⁷⁵ But parol evidence is not, unless the proper foundation be first laid, admissible to prove either affirmatively what books of account or private writings do contain, or negatively what they do not contain.⁷⁶ And where the plaintiff offered to prove, by parol, that no sales were made by the government of the United States, within a reservation claimed to have been made for the benefit of a canal, this evidence was properly excluded. The government records furnish the proper evidence of what lands were sold, and what reservations were made for canal or other purposes.⁷⁷ The best evidence of the existence or nonexistence of entries in public records is the records themselves. When, because of the voluminous character of the records to be examined, or for other sufficient reasons, oral evidence is admissible to show the absence of a record or an entry, it should ordinarily be given by the legal custodian and then only after showing a diligent search. As a rule, the oral evidence of another than the custodian is not the best evidence or competent when the testimony of the legal keeper can be had.⁷⁸

§ 206 (205). Multiplicity of documents — General results.—We have already incidentally referred to another

⁷³ *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538, followed in *People v. Laird*, 118 Cal. 291, 50 Pac. 431; *State v. Hahn*, 38 La. Ann. 169.

⁷⁴ *Vizard v. Moody*, 117 Ga. 67, 43 S. E. 426. See, also, *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, for an exhaustive discussion on the subject.

⁷⁵ *McPhelemy v. McPhelemy*, 78 Conn. 180, 61 Atl. 477.

⁷⁶ *Aspinwall v. Chisholm*, 109 Ga. 437, 34 S. E. 568.

⁷⁷ *City of Chicago v. McGraw*, 75 Ill. 566.

⁷⁸ *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

relaxation of the rule based on the necessity of the case, which may be thus stated:⁷⁹ Where the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents, and who is skilled in such matters, provided the result is capable of being ascertained by calculation.⁸⁰ This has been permitted when another course would cause great loss of time and tend to confuse the jury; and competent witnesses have been allowed to *summarize* the accounts and to state conclusions as to balances, and the like.⁸¹ Of course the court may require the production of the originals if this is deemed necessary. Where it appears that the witness has examined the accounts he will be permitted to give oral testimony as to *balances*,⁸² *solvency* and *insolvency* as shown by the books,⁸³ and the result of his examination.⁸⁴ But in other cases such evidence has been rejected.⁸⁵ The *manner of drawing bills* of exchange, if a settled mode of business, may be shown by parol; but not if the mode of business has va-

⁷⁹ See § 204 et seq., *ante*.

⁸⁰ *Burton v. Driggs*, 20 Wall. (U. S.) 125, 136, 22 L. Ed. 299; *Holbrook v. Jackson*, 7 Cush. (Mass.) 136; *Boston etc. Corp. v. Dana*, 1 Gray (Mass.), 83; *State v. Brady*, 100 Iowa, 191, 62 Am. St. Rep. 560, 36 L. R. A. 693, 69 N. W. 290; *Bourquin v. Missouri etc. R. Co.* (Kan.), 127 Pac. 770; *Reynolds' Steph. Ev.*, art. 71.

⁸¹ *Ritter v. State*, 70 Ark. 472, 69 S. W. 262; *San Pedro L. Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Elmira Roofing Co. v. Gould*, 71 Conn. 629, 42 Atl. 1002; *Chicago St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001; *State v. Clements*, 82 Minn. 448, 85 N. W. 234; *Von Sachs*

v. Kretz, 72 N. Y. 548; *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App. 105, 82 S. W. 1099; *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299.

⁸² *Roberts v. Doxon*, Peake Ad. Cas. 83; *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528. See, also, *Dupuy v. Truman*, 2 Younge & C. 341. Clearly this is the rule in respect to experts: *Culver v. Marks*, 122 Ind. 554, 17 Am. St. Rep. 377, 7 L. R. A. 489, 23 N. E. 1086.

⁸³ *Meyer v. Sefton*, 2 Stark. 274, 19 R. R. 720.

⁸⁴ *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299.

⁸⁵ *Ritchie v. Kinney*, 46 Mo. 298; *McCombs v. North Carolina R. R. Co.*, 67 N. C. 193; *Fox v. Baltimore Co.*, 34 W. Va. 466, 12 S. E. 757.

ried;⁸⁶ nor is it competent for a witness to state the *general contents* of letters when the object is to show the feeling toward the witness by a party to the action.⁸⁷

§ 207 (206). **Parol proof of admissions or self-harming evidence concerning writings—English rule.**—To a qualified extent leading English authorities may be consulted with profit, more especially where there is a conflict on the same subject between the American decisions. Since the celebrated case of *Slatterie v. Pooley*, it has been regarded as the settled doctrine in England that the admissions of a party are evidence against himself, although they relate to the contents of formal written instruments in issue in the case. Stephen without qualification lays down the rule that the admission of one whose testimony is relevant is primary evidence, though relating to the contents of written instruments. “Primary evidence means the document itself produced for the inspection of the court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under articles 15–20.”⁸⁸ In delivering the opinion of the court in the leading case referred to, which settled the law in England after innumerable conflicting decisions had made of it the very masterpiece of confusion worse confounded, Baron Parke said: “We entertain no doubt that the defendant’s own declarations were admissible in evidence to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs. If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable.

⁸⁶ *Spencer v. Billing*, 3 Camp. 310,
1 Rose, 362.

⁸⁷ *Topham v. McGregor*, 1 Car. &
K. 320.

⁸⁸ *Reynolds’ Steph. Dig.*, art. 64.

The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible.”⁸⁹ In the English courts parol admissions have been received to prove a debt, although the *debt* was based on a written agreement;⁹⁰ to prove the *contents of a deed*;⁹¹ or the terms of a written *lease*;⁹² in embezzlement cases, the prisoner’s election to office and the terms of his official bond;⁹³ and the acts and conduct of the overseers of the poor in one parish have been held competent as constituting an admission of the contents of a certain certificate which was required to settle a pauper in such parish.⁹⁴ Taylor, however, in his work on Evidence questions the correctness of the reasoning on which the English doctrine rests, and calls attention to the fact that the courts of Ireland, where the subject has undergone much discussion, have disapproved the English rule.⁹⁵ Best gives the same account of the conflict, but winds up an excellent support of the English

⁸⁹ In Canada the English doctrine is not uniformly followed: *Maloney v. Purdon*, 3 Kerr, 515; *Forcier v. Belanger*, Q. R. 16 K. B. 289; *Aubrey v. Smith*, 7 U. C. R. 213. See Best on Ev., 11th ed., 515 et seq.

⁹⁰ *Newhall v. Holt*, 6 Mees. & W. 662, 9 L. J. Ex. 293, 4 Jur. 610.

⁹¹ *Slatterie v. Pooley*, 6 Mees. &

W. 664, 10 L. J. Ex. 8, 4 Jur. 1028; *King v. Cole*, 2 Ex. 632.

⁹² *Howard v. Smith*, 3 Man. & G. 254, 10 L. J. C. P. 245, 3 Scott (N. R.), 574.

⁹³ *Reg. v. Welch*, 1 Denio C. C. 199.

⁹⁴ *Reg. v. Basingstoke*, 14 Q. B. 611, 117 Eng. Reprint, 237.

⁹⁵ *Taylor on Ev.*, 10th ed., § 411 et seq.

opinion by saying: "The *value* of self-harming evidence, like that of every sort of evidence, is for the jury; its *admissibility* is a question of law,—the test of which is, to see if the evidence tendered is in its nature original and proximate; and it will scarcely be contended that self-harming statements of all kinds do not fulfil both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written; but that is a maxim which has been much misunderstood. The contents of a document could most unquestionably be proved by a chain of circumstantial evidence composed of *acts*, every link in which might be established by parol or verbal testimony."⁹⁶

§ 208 (207). **Same—Rule in the United States.**—It is quite easy to understand that there should be a conflict on this question in this country. If there are conflicts on indigenous propositions, *a fortiori* the number should be increased when, with the adoption of English decisions in our earliest days, we took them over with all their blemishes, and the early inoculation was not prophylactic. In the United States there is what is colloquially called an irreconcilable conflict in the decisions on this subject. While some of the cases unqualifiedly approve the English rule, others emphatically dissent. We prefer to say that there is an overwhelming weight of authority in favor of the English rule, and that the minority of the decisions does not exhibit any good reason for shaking our confidence in it, supported as it is by the United States supreme court with no uncertain reasoning. In the leading case sustaining the English doctrine the plaintiff was allowed to prove the admissions of the defendant to the effect that he had prosecuted to final judgment a former action against the defendant. The court used the following language: "The admissions of a party are not open to the same objection which belongs to parol evidence from other sources.

⁹⁶ Best on Ev., 11th ed., 512.

A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus, the statements of a party that certain land had been conveyed might be admitted though the conveyance must be by recorded deed. The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties, as what a party admits against himself may be reasonably taken as true. The weight and value of the statements and admissions will vary according to the circumstances and must be determined by the jury."⁹⁷ The admissions of a party have been received to prove the contents of letters and of a deed;⁹⁸ the existence of a *partnership* based on a written contract;⁹⁹ the terms of a *lease* in writing;¹⁰⁰ the *footings* of an *account*;¹ and the contents of a *telegram*.² On the other hand, there have been numerous decisions which have maintained the view that there is no principle in the law of evidence authorizing the substitution of the declarations of a party even as against himself for record or written evidence. They point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication, and the difficulty of detection and the danger of following record titles to be lost by testimony so uncertain in character. They lay down the rule that admissions rank only with oral testimony, and that, unless made in open court, they are competent only where parol evidence would be admissible to establish the same facts.³

⁹⁷ *Smith v. Palmer*, 6 Cush. (Mass.) 513.

⁹⁸ *Loomis v. Wadhams*, 8 Gray (Mass.), 557; *Morey v. Hozt*, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127.

⁹⁹ *Edwards v. Tracy*, 62 Pa. 374.

¹⁰⁰ *Taylor v. Peck*, 21 Gratt. (Va.) 11.

¹ *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767.

² *Williams v. Blickell*, 37 Miss. 682, 75 Am. Dec. 88.

³ *Halliburton v. Fletcher*, 22 Ark. 453; *Bivens v. McElroy*, 11 Ark. 23, 3 Am. Dec. 258; *Flournoy v. Newton*, 8 Ga. 306; *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (a qualified admission only); *Jameson v. Conway*, 10 Ill. 227; *Mason v. Park*, 4 Ill. 532; *Rees v. Lawless*, 4 Litt. (Ky.) 218; *Clark v. Slidell*, 5 Rob. (La.) 330;

For ourselves we cannot see any serious objections to the practice of admitting the oral or even the written self-harming admissions of a party in respect to the contents of written instruments under such circumstances, and the weight of authority, both in England and America, unquestionably sustains the view that such proof may be received without accounting for the absence of the written instrument.⁴ In one of the United States supreme court

Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865; Bank of North America v. Crandall, 87 Mo. 208; Cumberland Mut. F. Ins. Co. v. Giltinan, 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424 (a very apologetic decision); Well and Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Roberts v. Roberts, 82 N. C. 29; Threadgill v. White, 11 Ired. (N. C.) 591. Evidence of this character has been held inadmissible to prove *corporate organization*: Well and Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; the fact that *attachment* proceedings are pending: Jenner v. Joliffe, 6 Johns. (N. Y.) 9; the fact that a party had been *subpoenaed* as a witness: Hasbrouck v. Baker, 10 Johns. (N. Y.) 248; the existence of a *bond*: Fox v. Reil, 3 Johns. (N. Y.) 477; the legal effect of a *deed*: Morrill v. Robinson, 71 Me. 24; and the contents of a *mortgage*: — Sherman v. People, 13 Hun (N. Y.), 575.

⁴ See cases already cited in this section; also Gayle v. Commissioners, 155 Ala. 204, 46 South. 261; Bickley v. Bickley, 136 Ala. 548, 34 South. 946; Barnett v. Wilson, 132 Ala. 375, 31 South. 521; Paysant v. Ware, 1 Ala. 160; Denver etc. R. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67; Morey v. Hoyt, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127; Combs v. Union Trust Co., 146 Ind. 688, 46 N. E. 16; Work v. McCoy, 87 Iowa, 217,

54 N. W. 140; Blackington v. Rockland, 66 Me. 332; Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Clarke v. Warwick C. M. & Co., 174 Mass. 434, 54 N. E. 887; Loomis v. Wadhams, 8 Gray (Mass.), 557; New York Cent. Ins. Co. v. Watson, 23 Mich. 486; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; State v. Litchman-Goodman & Co., 131 Mo. App. 65, 109 S. W. 819; Langdon v. New York, 59 Hun, 434, 13 N. Y. Supp. 864; Edgar v. Richardson, 33 Ohio St. 581, 31 Am. Rep. 571; Edwards v. Tracy, 62 Pa. 374; Conrad v. Farrow, 5 Watts (Pa.), 536; Hodges v. Tarrant, 31 S. C. 608, 9 S. E. 1048; Hoefling v. Hambleton, 84 Tex. 517, 19 S. W. 689; Campbell v. State, 59 Tex. Cr. 496, 129 S. W. 139; Curtis v. Ingham, 2 Vt. 287; Taylor v. Peck, 21 Gratt. (Va.) 11; Eads v. State, 17 Wyo. 490, 101 Pac. 946; Dunbar v. United States, 156 U. S. 185, 186, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325; Paige v. Loring, 18 Fed. Cas. No. 10,672, 1 Holmes, 275; Earle v. Pickin, 5 Car. & P. 542; Reg. v. Basingstoke, 14 Q. B. 611, 68 Eng. Com. L. 611, 117 Eng. Reprint, 237; Slatterie v. Pooley, 6 Mees. & W. 664, 10 L. J. Ex. 8, 4 Jur. 1038; Rogers v. Card, 7 U. C. C. P. 89. See note on "Admissibility in Evidence of Verbal Admission as to Contents of Writing," to Purinton v. Purinton, 8 Ann. Cas. 207.

decisions, the facts were, that the witness was stating that the defendant had telegraphed certain things to him. An objection being raised, he produced a typewritten telegram, and said that he received it from the defendant. It was further objected that it was not the original, the one prepared and signed by the defendant; whereupon the witness testified that it was delivered to him by the telegraph company, and that he afterward talked with the defendant about it, who confirmed it, and admitted that he had sent it. Thereupon the court permitted the telegram to be read in evidence. Mr. Justice Brewer said: "Whatever may be the rule in other cases, an admission by defendant that the writing which is offered is the message which he sent, is sufficient to justify its introduction in evidence. An admission as to a writing is like an admission of any other fact, and when a competent witness testifies that a certain writing, which he produces, was received by him, and that the defendant admitted that he sent it to him, he has laid the foundation for the introduction of the writing, and this though it be not in the handwriting of the defendant."⁵ It is not possible to imagine language more simple, reasoning more irresistible, common sense more crystallized, and therefore law more sound. And this is not the single utterance of the same court. The same learned judge said in another case: "Parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal."⁶ When a payment had been made and an entry thereof written in the payee's book and oral evidence of the payment objected to on that ground, Mr. Justice Thompson said: "The entry of the advance made by the defendant himself, under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that subject, than proof of the actual payment. The entry in the cash-book did not change

⁵ *Dunbar v. United States*, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325.

⁶ *Durland v. United States*, 161 U. S. 306, 40 L. Ed. 709, 16 Sup. Ct. Rep. 508; *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357.

the nature of the contract arising from the loan, or operate as an extinguishment of it, as a bond or other sealed instrument would have done. If the original entry had been produced, the handwriting of the defendant must have been proved, a much more uncertain inquiry than the fact of actual payment. It cannot be laid down as a universal rule that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the receipt of the money, it certainly could not be pretended that the production of this letter would be indispensable and exclude all parol evidence of the advance. And yet it would be written evidence.”⁷ The rule that parol evidence shall not be received to alter or contradict written terms is so familiar and the reasons which support it so elementary that it is often invoked in cases to which it is not applicable, and it is sometimes suggested, and acted upon in the moving progress of a trial before a jury, to conditions of offered testimony to which on first impression it appears to be applicable, and is therefore without due consideration then enforced. It has doubtless been observed by those called to consider such matters, that the first impression of good lawyers and of good judges seems to accept it as a universal rule that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. But such is not the rule. When a chattel mortgage of sheep had been given and renewed, and the mortgagee sought to recover from a third party who had received the proceeds of the wool shorn, the fact sought to be established in the action was an agreement of the plaintiff mortgagee to allow the mortgagors to use the wool covered by the first mortgage to obtain means to meet the necessary expense of the management of the herds of sheep mortgaged to it. This the defendant offered to prove by the testimony of one of the acting parties, who, in stating the time and circumstances and terms of the agreement, referred, as a part of the *res*

⁷ Keene v. Meade, 3 Pet. (U. S.) 1, 7 L. Ed. 581.

gestae of that transaction, to a pencil memorandum made by the other acting party thereto, and read by the witness, which had for its purpose, as the witness claimed, the directions to the clerk who was to draft the renewal mortgage as to its terms. The plaintiff had introduced the clerk as a witness, and he had testified that no such memorandum ever existed. A renewal mortgage was given differing in terms from the original and from what the penciled directions would have disclosed. Oral testimony of the penciled memorandum was excluded. The pencil memorandum in question was not offered by the defendant, nor did the defendant offer to prove its contents to support or establish its defense; but it offered to prove a parol agreement that the wool might be used to meet expenses, and should not be included in the new mortgage, and that a pencil memorandum of instructions was written to that effect. Circuit Judge McCormick held that the trial court erred in rejecting the testimony as to the contents of the penciled memorandum.⁸ He said that the defendant did not claim under either of the mortgages. Therefore the renewal mortgage and the pencil memorandum to which the testimony related could only be considered as extrinsic evidence to support or contradict the other testimony offered to show that the mortgagors could so use the wool shown. It was manifest that the language of the renewal mortgage was not identical with the language of the first mortgage in relation to that subject. And while, if the action was on the second mortgage, its sound construction by the court might exclude any parol proof tending to modify its terms, when used—as it could only be used in that case—as extrinsic evidence to sustain or oppose the contention of the defendant, the inferences of fact to be deduced from the difference in its language and the language of the original mortgage were for the consideration of the jury.⁹ And further, whether any such pencil mem-

⁸ *Pecos Valley Bank v. Evans-Snyder-Buel Co.*, 107 Fed. 654, 46 C. C. A. 534.

⁹ *Barreda v. Silsbee*, 62 U. S. 146, 16 L. Ed. 86.

orandum was ever written, and what, if written, it contained, presented a question of fact depending on the credibility of the witnesses; and that question of fact was for the consideration of the jury, and not for the determination of the court.¹⁰

§ 209 (208). Same—Copies not the best evidence—Duplicates.—The contents of documents must, in general, be proved by primary evidence, and therefore it is the rule that written instruments cannot be proved by copies. They are mere secondary evidence, and are inadmissible under the general rule unless a basis is laid for the reception of secondary evidence under some of the rules hereafter stated.¹¹ The rule has been applied to almost every

¹⁰ *Dunbar v. United States*, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325.

¹¹ *C. W. Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272, 50 South. 906; *Hallett v. Eslava*, 3 Stew. & P. (Ala.) 105; *Barnes v. Shattuck*, 13 Ariz. 338, 114 Pac. 952; *Hartford F. Ins. Co. v. Enoch*, 79 Ark. 47, 77 S. W. 899; *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Ord v. McKee*, 5 Cal. 515; *Smith v. Holebrook*, 2 Root (Conn.), 45; *Cannon v. Kinney*, 3 Harr. (Del.) 317; *Gardner v. State*, 55 Fla. 25, 45 South. 1028; *McMillan v. Guano Co.*, 133 Ga. 760, 66 S. E. 943; *Solomon v. Creech*, 82 Ga. 445, 9 S. E. 165; *Robinson v. Bealle*, 20 Ga. 275; *Chicago etc. Coal Co. v. Moran*, 210 Ill. 9, 71 N. E. 38, 110 Ill. App. 664; *Matteson v. Noyes*, 25 Ill. 591; *Gimbel v. Hufford*, 46 Ind. 125; *Ruthven v. Clarke*, 109 Iowa, 25, 79 N. W. 454; *Halstead v. Cuppy*, 67 Iowa, 600, 25 N. W. 820; *Haas v. Chubb*, 67 Kan. 787, 74 Pac. 230; *Central Branch Union Pac. R. Co. v. Walters*, 24 Kan. 504; *Beall v. Braclay*, 10 B.

Mon. (Ky.) 261; *Wallace v. Bradshaw*, 6 Dana (Ky.), 382; *Landry v. Klopman*, 13 La. Ann. 345; *Knight v. Knight*, 12 La. Ann. 396; *Elwell v. Cunningham*, 74 Me. 127; *Bird v. Bird*, 40 Me. 392; *Maurice v. Worden*, 54 Md. 233, 39 Am. Dec. 384; *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray (Mass.), 376; *Torrey v. Fuller*, 1 Mass. 524; *Wells v. Toogood*, 165 Mich. 677, 131 N. W. 124; *Woods v. Burke*, 67 Mich. 674, 39 N. W. 798; *Freeland v. McCaleb*, 2 How. (Miss.) 756; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *Carr v. Carr*, 36 Mo. 408; *Washoe Copper Co. v. Junila*, 43 Mont. 178, 115 Pac. 917; *Stapleton v. Pease*, 2 Mont. 550; *Fitch v. Martin*, 74 Neb. 538, 104 N. W. 1072; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Putman v. Goodall*, 31 N. H. 419; *Wallace v. Goodall*, 18 N. H. 439; *Bozorth v. Davidson*, 3 N. J. L. 617; *Lieberman v. Railroad Co.*, 115 N. Y. Supp. 1034; *Marcy v. Shults*, 29 N. Y. 346; *Egerton v. Wilmington etc. R. Co.*, 115 N. C. 645, 20 S. E. 184; *Barton-Parker Mfg. Co. v. Mercantile Co.*, 18 Okl. 137, 89 Pac. 1128; *Porter v. Wilson*,

class of document, deeds,¹² negotiable instruments and commercial paper generally,¹³ chattel securities,¹⁴ and contracts of all kinds.¹⁵ Thus if the original can be obtained, letter-press copies are not admissible,¹⁶ nor photographs

13 Pa. 641; *Cottom v. Wiley*, 39 Pa. Sup. Ct. 507; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56; *Allen v. Clearman* (Tex. Civ. App.), 128 S. W. 1140; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146; *Lunsford v. Smith*, 12 Gratt. (Va.) 554; *Rohloff v. Aid Assn.*, 130 Wis. 61, 109 N. W. 989; *Miller v. Crawford County*, 106 Wis. 210, 82 N. W. 175; *Anglo-American Packing etc. Co. v. Cannon*, 31 Fed. 313; *Nodin v. Murray*, 3 Camp. 228, 13 Rev. Rep. 796.

¹² *Branch v. Smith*, 114 Ala. 463, 21 South. 423; *Poorman v. Miller*, 44 Cal. 269; *Ord v. McKee*, 5 Cal. 515; *Cunningham v. Tracy*, 1 Conn. 252; *McMillan v. Savannah Guano Co.*, 133 Ga. 760, 66 S. E. 943; *Brooking v. Dearmond*, 27 Ga. 58; *Hanson v. Armstrong*, 22 Ill. 442; *Roberts v. Haskell*, 20 Ill. 59; *Courtright v. Deeds*, 37 Iowa, 503; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60; *Tesson v. Gusman*, 26 La. Ann. 248; *Elwell v. Cunningham*, 74 Me. 127; *Andrews v. Hooper*, 13 Mass. 472; *Woods v. Burke*, 67 Mich. 674, 35 N. W. 798; *West v. West*, 75 Mo. 204; *Hartmann v. Hoffman*, 65 App. Div. 443, 72 N. Y. Supp. 982; *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249; *Lancaster v. Lee*, 71 S. C. 280, 51 S. E. 139; *Malcolmson v. McKee*, 1 Brev. (S. C.) 168; *Saunders v. Harris*, 5 Humph. (Tenn.) 345; *Smith v. Burgher* (Tex. Civ. App.), 136 S. W. 75; *Clawson v. Wilkins* (Tex. Civ. App.), 93 S. W. 1086; *Crafts v. Daugherty*, 69 Tex. 477, 6 S. W. 850;

Hayball v. Shephard, 25 U. C. Q. B. 536; *McDonald v. Murray*, 5 Ont. 559.

¹³ *Patriotic Bank v. Coote*, Fed. Cas. No. 10,807, 3 Cranch C. C. 169.

¹⁴ *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331; *Rauh v. Scholl*, 12 Wash. 135, 40 Pac. 726.

¹⁵ *Chicago etc. Coal Co. v. Moran*, 110 Ill. App. 664; *Manson v. Blair*, 15 Ind. 242; *Commonwealth v. Parlin etc. Co.*, 118 Ky. 168, 80 S. W. 791; *Bogart v. Brown*, 5 Pick. (Mass.) 18; *Porter v. Wilson*, 13 Pa. 641; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737.

¹⁶ *Home Protection of North Alabama v. Whidden*, 103 Ala. 203, 15 South. 567; *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381; *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403; *Seaboard etc. R. Co. v. Rentz*, 60 Fla. 449, 54 South. 20; *Watkins v. Paine*, 57 Ga. 50; *International Text Book Co. v. Mackhorn*, 158 Ill. App. 543; *King v. Worthington*, 73 Ill. 161; *Heilman Milling Co. v. Hotaling*, 21 Ky. Law Rep. 950, 53 S. W. 655; *State v. Sterling*, 41 La. Ann. 679, 6 South. 583; *Marsh v. Hand*, 35 Md. 123; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Commonwealth v. Jeffries*, 7 Allen (Mass.), 548, 83 Am. Dec. 712; *Nowlen v. Lyon*, 73 Mich. 434, 41 N. W. 496; *State v. Lentz*, 184 Mo. 223, 83 S. W. 970; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Westinghouse Co. v. Tilden*, 56 Neb. 129, 76 N. W. 416; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *March v. Wycoff*, 111 N. Y. Supp. 669; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep.

of writings.¹⁷ The rule has also been applied to blue-prints.¹⁸ Where a document is executed in *duplicate* or triplicate or any greater number of originals, each one is primary evidence of the contents of the document, and the other need not be produced. In such cases each is deemed

652; *Churchill v. Lee*, 77 N. C. 341, 346; *Patton v. Ash*, 7 Serg. & R. (Pa.) 116; *Chambers v. Modern Woodmen of America*, 18 S. D. 173, 99 N. W. 1107; *State v. Standard Oil Co.*, 120 Tenn. 86, 110 S. W. 565; *Booker-Jones Oil Co. v. National Refining Co.* (Tex. Civ. App.), 131 S. W. 623; *Thompson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. 454; *Whitney Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007; *Loverin v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000; *Menasha Wooden Ware Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299; *Varley Duplex Magnet Co. v. Ostheimer*, 159 Fed. 655, 86 C. C. A. 523; *Anglo-American Packing Co. v. Cannon*, 31 Fed. 313; *Chapin v. Siger*, Fed. Cas. No. 2600, 3 McLean, 378; *Nodin v. Murray*, 3 Camp. 228, 13 Rev. Rep. 796. It has been held that a copy of a letter-press copy of a lost instrument can be produced as evidence without producing the press copy itself: *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469. Letter-press copies of records of weather bureau, the originals being sent to Washington, treated as original: *Chicago & E. I. R. Co. v. Zapp*, 209 Ill. 339, 70 N. E. 623. See, also, *Anniston City Land Co. v. Edmondson*, 141 Ala. 366, 37 South. 424 (tax and assessment roll); *Glazer v. Old Dominion Steamship Co.*, 113 N. Y. Supp. 979; *Dreiske v. Jones etc. Co.*, 133 Ill. App. 572; *Modern Dairy etc. Co. v. Blanke etc. Supply Co.* (Tex. Civ.

App.), 116 S. W. 153 (copy documents annexed to depositions). In several states recorded and certified copies are given statutory efficacy: *Preston v. Hirsch*, 5 Cal. App. 485, 90 Pac. 965; *Chicago etc. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A., N. S., 272, 76 N. E. 489; *Butt v. Mastin*, 143 Ala. 321, 39 South. 217. In *B. Roth Tool Co. v. Champ Spring Co.*, 146 Mo. App. 1, 123 S. W. 513, a schedule or synopsis of book entries showing receipts and expenditures of a party to the action verified and testified to by the witness was admitted as an original (the books being in court), as this was the only practicable way of dealing with the matter. As to copies of documents made by mechanical means, as originals, see note to *International Harvester Co. v. Elfstrom*, in 12 L. R. A., N. S., 343.

¹⁷ In *re Foster*, 34 Mich. 21; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Crane v. Dexter Horton & Co.*, 5 Wash. 479, 32 Pac. 223; *Stitzel v. Miller*, 250 Ill. 72, Ann. Cas. 1912B, 412, 34 L. R. A., N. S., 1004, 95 N. E. 53; *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Leathers v. Salvor Wrecking Co.*, Fed. Cas. No. 8164, 2 Woods, 680.

¹⁸ *Fuchs etc. Mfg. Co. v. Kittredge*, 242 Ill. 88, 89 N. E. 723, in which, however, the blue-print was treated as an original drawing, as the print itself was used in the transaction.

an original.¹⁹ As to *carbon copies* there is already a conflict of opinion, and we think unnecessarily so, in that a carbon copy does not appear to be any different kind of copy than that taken in the copying-press. Thus in some jurisdictions it is said that the copies of the letters signed and forwarded and those kept by the addressers cannot be considered duplicate originals. There can be no logical difference between such copies and the letter-press copies, which have always been held to be copies which are not admissible in evidence without accounting for the nonproduction of the originals. If a writer, desiring to preserve a copy of a letter, writes at the same time two copies exactly alike, one of which he proposes to send and the other to keep, it is a matter of indifference which copy he sends, but the one sent becomes the original and the other a copy, no matter by what force of evidence it is shown to be an absolutely accurate copy.²⁰ Exactly the opposite was

¹⁹ *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 South. 263; *Westbrook v. Fulton*, 79 Ala. 510; *Hopkins v. State*, 52 Fla. 39, 42 South. 52; *Purvis v. Savannah Bank etc. Co.*, 6 Ga. App. 275, 65 S. E. 35; *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211; *Gardner v. Eberhart*, 82 Ill. 316; *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146; *State v. Gurnee*, 14 Kan. 111; *Totten v. Bucy*, 57 Md. 446; *Cleveland etc. Co. v. Perkins*, 17 Mich. 296; *Kessler v. Claves*, 147 Mo. App. 88, 125 S. W. 799; *Catron v. German Ins. Co.*, 67 Mo. App. 544; *State v. Albertalli*, 78 N. J. L. 90, 72 Atl. 128; *Sarasohn v. Kamaiky*, 193 N. Y. 203, 86 N. E. 20; *Crossman v. Crossman*, 95 N. Y. 145; *Hubbard v. Russell*, 24 Barb. (N. Y.) 404; *Lewis v. Payne*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Reeves & Co. v. Martin*, 20 Okl. 558, 94 Pac. 1058; *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678; *Zipp*

v. Colechester Rubber Co., 12 S. D. 218, 80 N. W. 367; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664; *Chesapeake etc. R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161; *Niagara F. Ins. Co. v. Whittaker*, 21 Wis. 329; *Anglo-American Packing Co. v. Cannon*, 31 Fed. 313; *Doe v. Pulman*, 3 Q. B. 622, 6 Jur. 1122, 43 Eng. Com. L. 895, 114 Eng. Reprint, 645. But a letter-press copy is not a duplicate: *Foote v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Seibert v. Ragsdale*, 103 Ky. 206, 44 S. W. 653; *State v. Halstead*, 73 Iowa, 376, 35 N. W. 457. See § 225, *post*.

²⁰ *McDonald v. Hanks*, 52 Tex. Civ. App. 140, 113 S. W. 604; *State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995; but in *Wright v. Chicago etc. Co.*, 118 Mo. App. 392, 94 S. W. 555, it was said that a carbon copy was practically an original. In that case, however, it was not a letter, but a weight-ticket, and was a copy from

ruled in Pennsylvania and Virginia. "The testimony showed that it was an exact carbon copy made on a typewriter at the same time as the original, signed by the same officers, executed in the same manner, and in every respect was an exact duplicate. The one was served, the other remained in the possession of the owner of the land. Appellant contends that, as both were contemporary writings, the counterparts of each other, one of which was delivered and the other preserved, they may both be considered as originals, and the one which was preserved may be received in evidence without notice to produce the one which was delivered. This contention is based on the rule of our cases, and must be sustained.²¹ The duplicate notice should have been admitted in evidence and the refusal so to do was error."²² We think the safer course is to treat such carbon copies as ordinary copies subject to the rule of notice to produce. A carbon copy is no more or better signed or executed than a letter-press copy—as a fact, the signature is not always reproduced on the carbon as it is in the press-copy letter, which is usually copied after signature. But where a document is executed in *counterpart*, each party signing only the part by which he is bound, each counterpart is the best evidence against the party signing it and his privies.²³ As to the other party, it is only secondary evidence;²⁴ and all duplicates must

another state verified in a deposition. See, also, *Leschen v. Brazelle*, 164 Mo. App. 415, 144 S. W. 893. See note on "Admissibility of Carbon Copy of Writing Without Accounting for Non-production of Original," to *International Harvester Co. v. Elfstrom*, 11 Ann. Cas. 108.

²¹ *Eisenhart v. Slaymaker*, 14 Serg. & R. (Pa.) 153; *Gaskell v. Morris*, 7 Watts & S. (Pa.) 32; *Morrow v. Commonwealth*, 48 Pa. 305.

²² *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678; *Chesapeake etc. Ry. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161; *Virginia-Carolina etc.*

Co. v. Knight, 106 Va. 674, 56 S. E. 725. If the decision rested on the absence of necessity to give notice to produce a notice, we could appreciate better the reason for the conclusion.

²³ *Roe v. Davis*, 7 East, 362; *Loring v. Whittemore*, 13 Gray (Mass.), 228; *Nicoll v. Burke*, 8 Abb. N. C. (N. Y.) 213; *Cleveland & T. Ry. Co. v. Perkins*, 17 Mich. 296; *Colling v. Treweek*, 6 Barn. & C. 398, 108 Eng. Reprint, 497; *Brown v. Woodman*, 6 Car. & P. 206.

²⁴ *Munn v. Godbold*, 3 Bing. 292, 11 Moore, 49, 2 Car. & P. 97; *Kyser v. Kansas City etc. R. Co.*, 56 Iowa,

be accounted for before secondary evidence is admissible.²⁵ Obviously the rule as to best evidence may apply to a copy as well as to an original when it becomes necessary to prove the contents of the copy. Thus if a bill is rendered and is to be proved, that paper is the one to be proved, whether it is an original or a copy.²⁶ This rule has been applied to physician's *bill rendered*;²⁷ and to copy of letters attached to a contract.²⁸ Where the libel alleged was the publishing of a song, the loss of the particular copy published had to be established before copies were admitted.²⁹ There is an apparent divergence of opinion as to receiving in evidence a copy of a copy of the original writing, and this pseudo-conflict is perpetuated by the failure to discriminate between the copy of what purports to be a copy of an original, unverified as to the original, and one which, though copied from a copy, is verified as a copy of the original. The statement shows how unnecessarily the question has been raised, for in the latter case it is not a copy of a copy at all, though made from the copy, because once it can be supported as a copy of the original it is out of the category of copy of a copy only. The rule that a copy of a copy is not admissible evidence is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and

207, 9 N. W. 133; *Anglo-American Packing Co. v. Cannon*, 31 Fed. 313.

²⁵ *Peaks v. Cobb*, 192 Mass. 196, 77 N. E. 881; *Holden's Steam Mill Co. v. Westervelt*, 67 Me. 446; *Dyer v. Fredericks*, 63 Me. 170; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Wright v. Bogan*, 2 N. C. 177, note; *Norris v. Billingsley*, 48 Fla. 102, 37 South. 564; *Bryson v. Boyce*, 41 Tex. Civ. App. 415, 92 S. W. 820; *Spring Garden Ins. Co. v. Whayland*, 103 Md. 699, 64 Atl. 925. See, also, *Manchester etc. R. Co. v. Fisk*, 33 N. H. 297, as to printed cards and notices;

Gardner v. Eberhart, 82 Ill. 316, as to circulars with the name of each addressee prefixed; and *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146, as to duplicate executed some time after original.

²⁶ *Vinal v. Burrill*, 16 Pick. (Mass.) 401.

²⁷ *Missouri P. R. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169.

²⁸ *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848.

²⁹ *Johnson v. Morgan*, 7 Ad. & E. 23.

capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original, for then it is also a second remove from the record.³⁰ But it is an entirely different proposition founded on different principles where secondary evidence in such shape is offered on the ground that the original is lost, or the record destroyed, or the copy higher evidence than the record itself, or, as Mr. Justice Story says, where the copy of the copy is the highest proof in existence.³¹ In such and similar cases the copy has been received in evidence.³²

§ 210 (209). The general rule as applied to telegrams—Mode of proof.—We have reserved the discussion of the best evidence regarding telegraphic and telephonic—or rather electric—communications because there are elements in their consideration a little more complex than in the case of epistolary transmission. Telegrams are, of course, ad-

³⁰ *Winn v. Patterson*, 9 Pet. (U. S.) 663, 9 L. Ed. 266. This is supported by great weight of authority: *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715; *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358; *Hagey v. Schroeder*, 30 Ind. App. 151, 65 N. E. 598; *Jobes v. Lows*, 63 Kan. 886, 66 Pac. 627; *Chambers v. Haney*, 45 La. Ann. 447, 12 South. 621; *Cypress Co. v. Peyret*, 113 La. 867, 37 South. 858; *Coleman v. Cousin*, 128 La. 1094, 55 South. 686. Where it was sought to introduce an alleged copy of an insurance policy made from a register, Washington, Circuit Justice, said: "To introduce a copy of an instrument, or to give evidence of its contents, the party should lay a foundation, by some evidence tending to prove that there was a genuine instrument in existence. The register of policies of insurance, kept by the insurance

company, is nothing more than a private memorandum, which ought to have been produced, after proving the existence of an original": *United States v. The Paul Shearman*, *supra*.

³¹ *Winn v. Patterson*, *supra*.

³² *Fowler v. Hoffman*, 31 Mich. 215; *White v. Herrman*, 62 Ill. 73; *Tennis Coal Co. v. Napier*, 142 Ky. 719, 135 S. W. 295 (copy of original survey admitted where two certified copies of patent differed); *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469 (the case of *Vinal v. Burrill*, 16 Pick. (Mass.) 401, is not in conflict with the later decisions—it was not a case of copies of copies, but of copies of original accounts made up from the books and no notice to produce given); *Cameron v. Peck*, 37 Conn. 555; *Hamer v. State* (Tex. Cr. App.), 131 S. W. 813.

missible in evidence in the same manner as are other writings.³³ And where they are relied upon to establish contracts, they must be proved in the same manner as other writings.³⁴ The modern authorities establish the rule that telegrams are admissible in evidence, but not without proof that they are genuine.³⁵ Their authenticity may be shown by proof of the handwriting of some person employed in the telegraph office at the time the telegram was received at the office or of that of the sender,³⁶ or by any other suitable means.³⁷ It is not necessary to show that the party whose name is signed to the telegram in fact signed it and procured its transmission.³⁸ The authenticity may be proved by proof of the handwriting where the original telegram is used.³⁹ In other cases it is sufficient if it be shown that the telegram is in the handwriting of the person in charge of the telegraph office at which it was received, though its authenticity may be also shown in other ways.⁴⁰ The original must, however, have been authorized or sent by the alleged sender or by his direction, but it is not necessary to prove that some person saw the sender send the message. Circumstantial evidence is, of course, sufficient.⁴¹ The

³³ *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474.

³⁴ *Durkee v. Vermont Central R. Co.*, 29 Vt. 127. As to contracts by telegraph and the admissibility of telegrams as evidence, see exhaustive note to *Cobb v. Glenn Boom etc. Co.*, 110 Am. St. Rep. 743.

³⁵ *Lewis v. Havens*, 40 Conn. 363; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Cobb v. Glenn Boom & L. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, and note pp. 764-771, 49 S. E. 1005; *Richie v. Bass*, 15 La. Ann. 668; *Burt v. Winona etc. Ry. Co.* 31 Minn. 472, 18 N. W. 285, 289; *Yeiser v. Cathers*, 5 Neb. (Unof.) 204, 97 N. W. 840; *Reynolds v. Hinrichs*, 16 S. D. 602, 94 N. W. 694; *Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265.

³⁶ *Richie v. Bass*, 15 La. Ann. 668; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

³⁷ *Dunbar v. United States*, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325.

³⁸ *Lewis v. Havens*, 40 Conn. 363.

³⁹ *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

⁴⁰ *Richie v. Bass*, 15 La. Ann. 668.

⁴¹ *Adams v. Mille Lacs Lumber Co.*, 32 Minn. 216, 19 N. W. 735; *Flint v. Kennedy*, 33 Fed. 820. A telegram from the wife of one defendant in an action for conspiracy, not written nor sent to either defendant, is not admissible as evidence against them: *Benford v. Sanner*, 40

same rule prevails in regard to telegrams as in regard to other writings, that secondary evidence of their contents cannot be received until it has been shown that the original cannot be produced.⁴² Thus if the original is *beyond the jurisdiction* of the court, the copy of the message received at the destination may be introduced as secondary evidence.⁴³ The same rule holds where it is shown to be

Pa. 9, 80 Am. Dec. 545. But a telegram addressed to J. W. Fenimore & Co. and delivered to J. W. Fenimore, Jr., is admissible in evidence against the latter on a showing that there was no firm of the first name in the city: *Rogers v. Fenimore* (Del.), 41 Atl. 886.

⁴² *McCormick v. Joseph*, 83 Ala. 401, 3 South. 796; *Whilden v. Merchants' Bank*, 64 Ala. 1, 38 Am. Rep. 1, and note; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *Western Union Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349; *Cairo & St. L. Ry. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Matteson v. Noyes*, 25 Ill. 591; *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223; *Barons v. Brown*, 25 Kan. 410; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *Mond v. Hurd*, 31 Mont. 314, 3 Ann. Cas. 566, 78 Pac. 579; *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434; *Mims v. Western Union Tel. Co.*, 82 S. C. 247, 64 S. E. 236; *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.), 100 S. W. 974; *Abernathy v. Hewlett*, 2 Tex. App. Civ. Cas., § 805; *Western Union Tel. Co. v. Kapp*, 35 Tex. Civ. App. 663, 80 S. W. 840; *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Cobb v. Glenn Boom etc. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005; *Anglo-American Packing etc. Co. v. Cannon*, 31 Fed. 313.

⁴³ *Barons v. Brown*, 25 Kan. 410; *Whilden v. Merchants' etc. Bank*, 64 Ala. 1, 38 Am. Rep. 1, and note. There is some difficulty in determining whether the message delivered to a telegraphic office or that which is delivered to the person to whom it may be addressed at the point of destination is to be regarded as the original. Perhaps, under some circumstances, the one or the other may be considered the original. It is not now necessary to enter on that inquiry. If the message as it was delivered to, and may be preserved in, the office of the telegraph company at Philadelphia, is to be regarded as the original, it is without the jurisdiction of the court, as was its custodian. It is a settled rule of evidence in this country, that if writings, necessary as evidence in a court of one state, are in the custody of persons residing in another, secondary evidence of their contents will be received: *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299; *Beattie v. Hilliard*, 55 N. H. 428; *Binney v. Russell*, 109 Mass. 55; *Shorter v. Sheppard*, 33 Ala. 648; 1 Whart. Ev., § 130; *Elwell v. Mersick*, 50 Conn. 272; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 26 S. W. 216. See note on "Telegram Left for Transmission or Message Delivered as Primary or Best Evidence," to *Collins v. Western Union Tel. Co.*, 8 Ann. Cas. 270.

the *custom* of the company *to destroy* messages received by it after a given period; secondary evidence may then be received as to the contents of the telegram.⁴⁴ The destruction of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents.⁴⁵ But, although the general rule applies to telegrams as well as to other writings, there has been some difficulty in determining *what are original* telegrams within the meaning of the rule that the best evidence must be produced. By the decided weight of authority the question whether the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission; in other words, upon the question for whom the telegraph company is agent. If there is but a single communication, the dispatch as delivered at the place of destination is the best evidence.⁴⁶ In such case the telegraph company is

⁴⁴ *Flint v. Kennedy*, 33 Fed. 820; *Riordan v. Guggerty*, 74 Iowa, 688, 39 N. W. 107; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Ward v. Tennessee etc. Ry. Co. (Tenn.)*, 57 S. W. 193; *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187. See, also, *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; *Western Union Tel. Co. v. Kemp*, 55 Ill. App. 583.

⁴⁵ *Smith v. Easton*, *supra*. This is sustained by *Howley v. Whipple*, 48 N. H. 487, and *United States v. Babcock*, Fed. Cas. No. 14,485, 3 Dill. 571. *Abbott* (Trial Ev. 290) assents to this where the object is to prove assent or admission, but says the copy delivered is the primary evidence to prove notice to the receiver: *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep.

28. In *Barons v. Brown*, 25 Kan. 410, it is *held* that where the controversy is not between the sender and the person to whom a telegram is addressed, the original message, if not lost or destroyed, must be produced.

⁴⁶ *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Anheuser-Busch Brewing Assn. v. Hutmacher*, 127 Ill. 652, 4 L. R. A. 575, 21 N. E. 626; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Saveland v. Green*, 40 Wis. 431; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105. In an Alabama case it was held unnecessary to decide this question where the telegrams in question were at the time in another state, this being held sufficient to admit secondary evidence: *Shorter v. Shepard*, 33 Ala. 648. In speaking of original message, the written message is referred to and not the electro-

the sender's agent, but if the message were sent in response to a request by letter to telegraph a reply, it appears to us that the company would be the receiver's agent and the dispatch as handed for transmission the original.⁴⁷ And generally in controversies arising between the sender and the receiver, when the company can be considered the agent of the sender of the message, the message received at the place of destination is to be deemed the original.⁴⁸ The positions may be thus summarized: That the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered at the end of the line.⁴⁹

hieroglyphic of the operator on the tape of the machine, nor any oral message given or taken direct to or from the instrument: *Banks v. Richardson*, 47 N. C. 109.

⁴⁷ This view is supported in *Thorpe v. Philbin*, 15 Daly, 155, 3 N. Y. Supp. 939, where the copy received in reply was admitted, although the one at the dispatching end was the original, because there was a later admission as to what the contents of it were.

⁴⁸ *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Bond v. Hurd*, 31 Mont. 314, 3 Ann. Cas. 566, 78 Pac. 579; *State v. Hopkins*, 50 Vt. 316; *Saveland v. Green*, 40 Wis. 431, and cases cited; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105; *Magie v. Hernan*, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909.

⁴⁹ *Anheuser-Busch Brew. Co. v. Hutmacher*, *supra*. See, also, *Saveland v. Green*, 40 Wis. 431; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Wilson v. Minneapolis etc. R. Co.*, 31

Minn. 481, 18 N. Y. Rep. 291; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *Gray, Tel.*, §§ 104, 129; *Morgan v. People*, 59 Ill. 58. In what is regarded as the leading case, *Durkee v. Vermont Cent. Ry. Co.*, *supra*, Chief Justice Redfield thus expressed the rule: "In regard to the proof offered to establish telegraphic communications, it seems to us that where such communications are relied upon to establish contracts, where their force and effect will depend upon the terms used, they must be proved in the same manner other writings, as letters and contracts, are. For a telegraphic communication is ordinarily in writing, in the vernacular, at both ends of the line, and must of necessity be so at the last end, unless the person to whom it is addressed is in the office at the time, which is sometimes the fact. In such case, if the communication were never reduced to writing, it could only be proved like other matter resting in parol, by the recollection of witnesses in whose hearing it was repeated. In regard

One who sends an order by telegraph makes the company his agent for the delivery of the same, and is bound by the message as delivered. The receiver may put in evidence the message as received.⁵⁰ This is upon the principle that any mistake of the company in the act of transmission or delivery is the mistake of the principal in the same manner as if a mistake should be made by any agent in the delivery of any verbal message. *Qui facit per alium, facit per se.* But in England a different rule prevails, the message delivered to the company being deemed the primary evidence;⁵¹ and a few cases in this country seem to hold this view.⁵² While this is true if the answer is a mere acceptance or answer to an offer, yet if the message sent in reply contains *new conditions* or offers, the company would probably be deemed the agent of the one replying, and in that case the message as received would be the original on the principle first stated.⁵³ Of course there must be

to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very dispatch delivered. In default of that, its contents may be shown by the next best proof. If the course of business is, as in the cities, to preserve copies of all messages received in books kept for that purpose, a copy might readily be obtained which would ordinarily be regarded as better proof than the mere recollection of a witness. And according to the early English and the American practice, the party is bound to produce a copy of the original (that being lost) when in his power, and known a suffi-

cient time before the trial to enable him to do so: 1 Greenleaf, Ev., § 84, and note. And perhaps if no copy of such message is preserved, but the original message ordered to be sent is preserved, that should be produced, although this were not strictly the original in the case, the letter delivered, which was the original, being lost. But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise."

⁵⁰ Saveland v. Green, 40 Wis. 431; Western Union Tel. Co. v. Shotter, 71 Ga. 760.

⁵¹ Henkel v. Pape, L. R. 6 Ex. 7.

⁵² Matteson v. Noyes, 25 Ill. 591; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88.

⁵³ Redf. Car., § 546; Durkee v. Vermont Cent. Ry. Co., 29 Vt. 127.

competent *proof* that the alleged sender did actually *send* or *authorize* the sending of the message in question.⁵⁴ We have already dealt with the presumptive authenticity of telegrams;⁵⁵ and the rule for replies to telegrams may be taken as properly resting on the foundation laid in the leading case.⁵⁶ The telegraph company is the agent of the person initiating correspondence for the purpose of receiving a reply by telegraph, where a telegraphic reply is expected by the person making use of the telegraph to conduct the correspondence.⁵⁷ Although, as we have said, such proof may consist of circumstantial evidence, yet the fact of the delivery of a telegraphic dispatch to a person at a given time and place is not proved by producing an alleged reply signed by him, received at the sending office later on the same day and addressed to the sender of the former dispatch.⁵⁸ In controversies between the *sender and the telegraph company*, for example, in an action for failure to properly transmit the message, the primary evidence of the dispatch is the message left with the company for transmission.⁵⁹ *In proving a contract* by telegram the best evidence is the telegram containing the offer as re-

⁵⁴ *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485, the primary evidence of this fact is the telegram delivered to the company.

⁵⁵ § 53, *ante*.

⁵⁶ *Durkee v. Vermont Cent. Ry. Co.*, *supra*.

⁵⁷ *Bond v. Hurd*, 31 Mont. 314, 3 Ann. Cas. 566, 78 Pac. 579; *Cobb v. Glenn etc. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005. But it has been held that a telegraph company is the common agent of the parties at either end of the wire: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

⁵⁸ *Howley v. Whipple*, 48 N. H. 487. See note to § 53, *ante*.

⁵⁹ *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223; *Redf. Car.*, § 546. In *Conyers v. Postal Cable Co.*, 92 Ga. 619, 44 Am. St. Rep. 100, 19 S. E. 253, it was held admissible in such an action to offer the message as delivered to the sender without first calling for or showing inability to obtain the original message. The same was held in *Western Union Tel. Co. v. Blance*, 94 Ga. 431, 19 S. E. 255, and also in *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 26 S. W. 216, on proof that the original is out of the jurisdiction, or that it is lost: *Western Union Tel. Co. v. Williford* (Tex. Civ. App.), 27 S. W. 700.

ceived at the point of destination and the dispatch containing the acceptance as *delivered for transmission*. This is in analogy to the making of contracts by letter where the contract is consummated when the acceptance is delivered for transmission.⁶⁰ When a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the statute of frauds, because each party authorizes his agents, the company or the company's operator, to write for him; "and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal, and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office."⁶¹ With reference to such contracts a difficult point has arisen over the negligent alteration of a message in transmission, and the liability of the parties is of course affected by the *status* of the agency of the telegraph. In a most exhaustive opinion in a Tennessee case,⁶² the court, after a thorough review of the cases involving the question of agency and the question which message is the original, came to the conclusion that the mere fact of employment of a telegraph company to transmit a message does not make the company the agent of the sender so as to bind him upon a telegram negligently altered in the transmission, and that the

⁶⁰ *Durkee v. Vermont C. Ry. Co.*, 29 Vt. 127; *Howley v. Whipple*, 48 N. H. 487; *Wilson v. Minneapolis & N. Ry. Co.*, 31 Minn. 481, 18 N. E. 291; *Saveland v. Green*, 40 Wis. 431; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Beach v. Raritan & D. B.*

Ry. Co., 37 N. Y. 457; *Cobb v. Glenn Boom L. Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005.

⁶¹ *Howley v. Whipple*, *supra*.

⁶² *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 4 L. R. A. 660, 11 S. W. 783.

sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent. The court in the above case laid considerable stress upon the proposition that the question of altered message was not involved in some of the cases cited to the proposition that the telegraph company is ordinarily the agent of the person sending the message, and adverted to the fact that in some of the cases the question discussed was which message was the original message—the one delivered to the telegraph company for transmission or the one actually delivered. The English authorities are in accord with the Tennessee decision but are not entitled to weight here by difference in the conditions. The law in this country undoubtedly is that laid down in the great Vermont case, and that being so, the Tennessee case must not be regarded as any alteration of it except in that state. The telegraph company either is or is not the agent of the person initiating a telegraphic negotiation. The weight of authority says that it is.⁶³ It has just received additional strength from a recent Wisconsin case.⁶⁴ In that case one Sherrerd sent a telegram from Milwaukee to New York to his brokers to buy “one hundred corn products at market.” The message was delivered “one thousand.” The court said there was no dispute that the telegraph company was Sherrerd’s agent and that under the circumstances the purchase by the plaintiff’s brokers of the one thousand shares of the specified stock, pursuant to the telegram delivered to plaintiff’s brokers, vested the title thereof in the plaintiff, and made him the owner. No question of ratification of the purchase could arise as between the plaintiff and his brokers. The brokers acted within the authority of their agency for the plaintiff in purchasing the stock for him, and executed the authority which the telegraph

⁶³ *Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *New York etc. Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Saveland*

v. Green, 40 Wis. 431; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

⁶⁴ *Sherrerd v. Western Union Tel. Co.*, 146 Wis. 197, 131 N. W. 341.

company had undertaken to transmit for the plaintiff. The stock purchased under plaintiff's authority, pursuant to the terms of the telegram, therefore became plaintiff's property without any further action on his part, nor was he so circumstanced that he could disaffirm the transaction as between himself and the seller. The same rules must also apply to aerograms and wireless messages whenever they may form the subject of judicial investigation. The mere absence of the wire will not affect the construction of messages which will, we assume, come under the head of electric communications.

§ 211 (210). Communications by telephone.—The subject of telephonic communications is germane to that treated in the last section only in that such communications spring from a common source. Otherwise its treatment as evidence differs materially. In the one case we have to deal with the intricacies of the law of agency, of primary and secondary evidence; in the other a simple variation in the way of proving oral communications. A man may testify as to what another said to him. The circumstances are but slightly different if the conversation is held with a fence between them. The height of the fence only calls for the establishment of identity, and so it is with the telephone. A man may send a verbal message to another and the evidence of it is material; so a message may be transmitted by telephone and if, occasionally, the telephone operator at some intermediate station conveys the message, he is only enacting the part of the carrier of the verbal message. Having regard to the connection with the subject treated in the last section it may be best to discuss here the subject of telephonic communications, although, strictly speaking, the rule as to the best evidence has little, if any, application to such communications. The rule, says the court in a well-known Kentucky case,⁶⁵ that a party must produce the best evidence within his power

⁶⁵ *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

to prove a fact should govern. But as business expands by the aid of new inventions, wider scope must be given to the rules of evidence, and that the statements of an agent, when acting within the scope of his agency, are competent against his principal, is well settled. When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to so act. The necessities of a growing business require this rule, and it is sanctioned by the known rules of evidence.⁶⁶ But there are cases holding the stricter rule that, where evidence of the substance of such conversation is sought to be introduced, it must first be shown that the *party* speaking was *recognized*, either by his voice or in some other manner, on the ground that to hold parties responsible for answers made by unidentified persons, in response to calls at the telephone from their offices or places of business concerning their affairs, would open the door for fraud and imposition, and establish a dangerous precedent, which is not sanc-

⁶⁶ These views, although dissented from by Pryor, J., have been generally supported to the extent that when the operator is used as an intermediary, he is the agent of both parties to make and receive the communications: *Oskamp v. Gadsden*, 35

Neb. 7, 37 Am. St. Rep. 428, and note, 17 L. R. A. 440, and note, 52 N. W. 718. See, also, note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 33, and to *Barrett v. Magner*, 127 Am. St. Rep. 538.

tioned by any rule of law or principle of ethics.⁶⁷ A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line.⁶⁸ It is asserted in other cases that the circumstances tending to establish the identity of the speaker are to be considered in determining the *weight* of evidence, not its admissibility.⁶⁹ These decisions proceed upon the principle that those evidentiary matters, upon which men are compelled to act in the ordinary affairs of life and in the usual transactions of business, ought to be allowed to go to the jury in cases where they become material to the issues on trial. The telephone, although a very recent invention, has come into such common use that we think the courts may properly take judicial notice of the general manner and extent to which it is made use of by the business community. "No doubt," continued the court in the well-known case we quote from,⁷⁰ "very many important business transactions are every day made by telephonic communications of precisely

⁶⁷ *Oberman Brewing Co. v. Adams*, 35 Ill. App. 540 (qualified, however, by *Rock I. etc. Co. v. Potter*, 36 Ill. App. 590); *Murphy v. Jack*, 142 N. Y. 215, 40 Am. St. Rep. 590, 36 N. E. 882, 58 N. Y. St. Rep. 458; *Shawyer v. Chamberlain*, 113 Iowa, 742, 86 Am. St. Rep. 411, 84 N. W. 661; *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807; *Deering & Co. v. Shumpik*, 67 Minn. 348, 69 N. W. 1088 (qualified by *Barrett v. Magner*, 105 Minn. 118, 127 Am. St. Rep. 531, 117 N. W. 245); *Davis v. Walter*, 70 Iowa, 465, 30 N. W. 804. In criminal cases the evidence of telephonic conversations has been admitted when testimony of identification by his voice of the party speaking was introduced: *People v. Ward*, 3 N. Y. Cr. Rep. 483; *Stepp v. State*, 31 Tex. Cr. 349; 20 S. W. 753. As to necessity and sufficiency of

identification in communication by telephone, see note to *Planter's Cotton Oil Co. v. Western Union Tel. Co.*, 6 L. R. A., N. S., 1180; note to *McCarthy v. Peach*, 1 Ann. Cas. 802, and note to *Warren Gzowski v. Frost*, 20 Ann. Cas. 705. On the admissibility of telephone conversations in evidence and the mode of proving them, see note to *Barrett v. Magner*, 127 Am. St. Rep. 538.

⁶⁸ *Young v. Seattle Transfer Co.*, 33 Wash. 225, 99 Am. St. Rep. 942, 63 L. R. A. 988, 74 Pac. 375.

⁶⁹ *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

⁷⁰ *Globe Printing Co. v. Stahl*, *supra*.

the same character as that to which the witness was allowed to testify in this case. A person is called up by one desiring to communicate with him by means of a connection of their respective wires through what is known as the central office. A conversation ensues. It may be relative to the most important matters of business. It may involve a contract for the sale of bonds and stocks, instructions from a principal to his agent touching important transactions, or the acknowledgment of a debt due and a promise to pay the same. The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community, if the courts were to hold that business men are not entitled to act upon the faith of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way." So an acknowledgment of a notary taken by telephone should not be set aside when it appears that the nature and contents of the instrument were correctly stated to a party executing it and there is no pretense of fraud;⁷¹ and where communication was had by telephone with a railroad company's office, it was presumed that an authorized agent of the company attended to the message and, it not being shown that the conversation was carried on by an intruder, the company was bound by the statements coming from its office.⁷² The authorities are, however, not agreed as to the question of the admissibility of conversations over the telephone which have been *taken by some third person* and repeated to a party to the action. The Kentucky case referred to has held such evidence competent on the ground that the third person was an agent of the party. This seems to be the trend of the authorities, although in a Georgia case such communications were rejected on the ground that they were pure hearsay.⁷³ An Illinois case

⁷¹ Banning v. Banning, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210.

⁷² Reed v. Burlington Ry. Co., 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N.

W. 451; Rock Island Ry. Co. v. Potter, 36 Ill. App. 590.

⁷³ Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Wilson v.

holds that a third party may testify to that portion of the conversation over a telephone which is spoken in his presence, although he could not hear the replies and did not know with whom the conversation was held.⁷⁴ When material to the issues, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. When two parties communicate over the telephone apparently recognizing each other, and one puts a question or makes an inquiry to which the other responds, the evidence is admissible without absolute proof of identity. The general rule is that where it is shown that the witness called up the other party at his place of business, through the central station with which both were connected, and received a response as in the usual course of business over the telephone, this is sufficient *prima facie* identification of the speaker at the other end of the line as the party called, or his authorized agent, and that, upon such proof, the ensuing conversation, if otherwise admissible, may be testified to by the witness. It is proper to add that the weight of such evidence depends largely upon the circumstances of each case and is always a question for the trial court or jury.⁷⁵ The fact that the character of a tele-

Coleman, 81 Ga. 297, 6 S. E. 693. In *German Bank v. Citizens' Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, the conversation sought to be admitted and properly excluded was what the recipient of the telephonic message told a third person concerning it.

⁷⁴ *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644.

⁷⁵ The facts in the case of *Globe Printing Co. v. Stahl*, *supra*, serve as a guide for the evidence in similar cases. It was a telephonic conversation between the plaintiff's bookkeeper and a person who answered to

phonic conversation is uncertain and easily manufactured merely affects the weight, not the admissibility.⁷⁶ When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through

the defendant's name. The book-keeper testified that he "called up by telephone to the general office of the Bell Telephone Company for defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery-stable, on Olive street; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number to the telephone call; that he (the witness) did not know whose voice it was, and does not now know; that the witness did not know the defendant's voice, and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant), and the answer was 'Yes.'" The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, "that he asked why defendant did not pay the bill for which his suit was brought and that the party answering said, 'All right; I will attend to the matter about the first of the month.'" A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified. The evi-

dence was properly admitted. The following cases support the rule which we have extracted from the recent California case, *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242, and in which the court reviews and passes upon every phase of the question: *Wolfe v. Railway Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; *Globe P. Co. v. Stahl*, 23 Mo. App. 451; *Guest v. Hannibal etc. Co.*, 77 Mo. App. 258; *Kansas C. S. Co. v. Standard W. Co.*, 123 Mo. App. 13, 99 S. W. 765; *Star B. Co. v. Cleveland F. Co.*, 128 Mo. App. 517, 109 S. W. 802; *Rock I. etc. Co. v. Potter*, 36 Ill. App. 590; *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533; *Godair v. Hamilton N. B.*, 225 Ill. 572, 116 Am. St. Rep. 172, 8 Ann. Cas. 447, 80 N. E. 407; *General H. Soc. v. New Haven Co.*, 79 Conn. 581, 118 Am. St. Rep. 173, 9 Ann. Cas. 168, 65 Atl. 1065; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L. R. A., N. S., 746, 69 Atl. 405; *Miller v. Leib*, 109 Md. 414, 72 Atl. 466; *Conkling v. Standard O. Co.*, 138 Iowa, 596, 116 N. W. 822; *Western N. T. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Barrett v. Magner*, 105 Minn. 118, 127 Am. St. Rep. 531, 117 N. W. 245; *Holzhauser v. Sheeny*, 127 Ky. 28, 104 S. W. 1034; *Gilliland v. Southern R. Co.*, 85 S. C. 26, 137 Am. St. Rep. 861, 27 L. R. A., N. S., 1106, 67 S. E. 20.

⁷⁶ *Shawyer v. Chamberlain*, 113 Iowa, 742, 86 Am. St. Rep. 411, 84 N. W. 661.

that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it.⁷⁷ It has been held that a presentment of a promissory note by telephone is sufficient. In a New York case⁷⁸ the facts were that on the day of the maturity of the note a clerk in the employ of the bank called up the maker on the telephone. The maker responded to the call at his house. The clerk then stated to the maker that the bank held the note for collection, described it, and asked the maker what he proposed doing with it. The maker replied, in substance, that he could not pay it; that he had an understanding or agreement that the note should be renewed, and if the bank would return the note it would be taken care of at the other end of the line. The clerk replied that they knew nothing about such an arrangement, and then called to the telephone the assistant cashier of the bank, who in turn talked with the maker. The maker repeated in substance what had been said to the clerk, and was informed by the cashier that the bank would, under the circumstances, have to protest the note. No other presentation was made; but the note was protested, and notice of the protest mailed to the indorser. The question was, therefore, fairly presented for determination whether the demand over the telephone was a sufficient presentation, and whether the bank was relieved of the obligation, under

⁷⁷ Wolfe v. Missouri Pac. Ry. Co.,
97 Mo. 473, 10 Am. St. Rep. 331,
3 L. R. A. 539, 11 S. W. 49.

⁷⁸ Gilpin v. Savage, 60 Misc. Rep.
605, 112 N. Y. Supp. 802.

the facts, of actually going to the maker's house and making a further presentation and demand there. The court answered it unqualifiedly in the affirmative. The maker, by not demanding an exhibition of the note, waived it. "The use of the modern invention of the telephone is recognized by the courts. Commercial transactions and conversations had over the telephone have been recognized as of the same binding force as where the parties talked face to face."⁷⁹ In a Missouri case,⁸⁰ the court, in dealing with an instruction that a conversation over the telephone did not constitute a valid contract, said: "If by this is meant that a contract cannot be made by telephone conversation, it is too late to so argue. A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between parties standing face to face and carrying on the conversation which culminates in the contract. No question is made as to the identity of the parties conversing. If this conversation was as testified to by

⁷⁹ *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, 458; *Wolfe v. Missouri Pac. R. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590; *Guest v. Hannibal & St. J. R. R. Co.*, 77 Mo. App. 258; *Thompson & W. Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933; *Murphy v. Jack*, 142 N. Y. 215, 40 Am. St. Rep. 590, 36 N. E. 882; *Deering & Co. v. Shumpik*, 67 Minn. 348, 69 N. W. 1088. The telephone is simply an instrument by which two persons may talk directly to each other. Suppose the holder of a note should call to the maker from across the street, as the maker stood in his doorway, and notify him that he had his note and ask payment. Would not such a demand be deemed

in law a proper presentment, although the street separated the person holding the note and the actual place of payment? Can it make any substantial difference because the person holding the note happens to be some blocks away, provided he is able to reach the maker over the telephone and talk directly to him in that way? The law surely requires substantial compliance in reference to proper presentment, and will not strain to find grounds for releasing an indorser, where there has been such a substantial compliance, and any omission to observe the more technical rules does not work to the prejudice of the indorser: *Gilpin v. Savage*, *supra*.

⁸⁰ *St. Louis etc. Flooring Co. v. Knost (Mo.)*, 128 S. W. 532.

plaintiff's agent, it made a valid contract between the parties."

§ 212 (211). **Proof of lost instruments.**—We have already seen that the rule as to the best evidence has various qualifications and limitations. The requirements of this rule are satisfied if the *best attainable evidence* is produced. The rule of law which demands the best evidence is qualified to mean the best evidence available to the party producing it.⁸¹ Of course this means that the best evidence must be proper evidence.⁸² If it is shown by satisfactory proof that the original instrument has been lost or destroyed, or that it is beyond the jurisdiction of the court or in the possession of the adverse party who refuses to produce it, one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible. "If a party intended to use a deed or any other instrument in evidence, he ought to produce the original if he has it in his possession, or, if the original is lost or destroyed, secondary evidence, which is the best the nature of the case allows, will then be admitted. The party, after proving any of these circumstances, to account for the absence of the original, may read a counterpart, or, if there is no counterpart, an examined copy, or, if there is no examined copy, he may give parol evidence of its contents."⁸³ This has been laid down in a very large number of cases.⁸⁴ From the vast number of decisions, we

⁸¹ *Montgomery v. Dormer*, 181 Mo. 5, 79 S. W. 913.

⁸² *Bosse v. Weik*, 144 Mo. App. 468, 129 S. W. 417.

⁸³ *Riggs v. Tayloe*, 9 Wheat. 483, 6 L. Ed. 140; *Brown v. Harkins*, 131 Fed. 63, 65 C. C. A. 301. Among the latest cases are: *People v. Murphy* (Cal. App.), 129 Pac. 603; *People v. Henkie*, 256 Ill. 585, 100 N. E. 175; *Coombs v. Cook* (Okl.), 129 Pac. 698; *Reasoner v. Yates*, 90 Neb. 757, 134 N. W. 651; *Flint Motor Car Co.*

v. Everson, 34 R. I. 65, 82 Atl. 726; *Benbow v. Harvin*, 92 S. C. 180, 75 S. E. 414; *Hamilton v. State* (Tex. Civ. App.), 152 S. W. 1117; *Lee v. Follensby* (Vt.), 85 Atl. 915.

⁸⁴ *Bracken v. State*, 111 Ala. 68, 56 Am. St. Rep. 23, 20 South. 636; *Andrews v. Jones*, 10 Ala. 460; *Arkansas etc. Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226; *Steward v. Scott*, 57 Ark. 153, 20 S. W. 1083; *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42; *Caulfield v.*

have selected illustrative cases from the most commonly used instruments, which will be found to include

Sanders, 17 Cal. 569; Mortgage Trust Co. v. Elliott, 36 Colo. 238, 84 Pac. 980; Oppenheimer v. Denver etc. R. Co., 9 Colo. 320, 12 Pac. 217; Brownell v. Palmer, 22 Conn. 107; Bank of United States v. Sill, 5 Conn. 106, 13 Am. Dec. 44; Edwards v. Rives, 35 Fla. 89, 17 South. 416; Fraternal Relief Assn. v. Edwards, 9 Ga. App. 43, 70 S. E. 265; Georgia Pac. Ry. Co. v. Strickland, 80 Ga. 776, 12 Am. St. Rep. 282, and note, 6 S. E. 27; Wolters v. Redward, 16 Haw. 25; Mills v. Glennon, 2 Idaho, 105 (95), 6 Pac. 116; Young v. People, 221 Ill. 51, 77 N. E. 536; Rudgear v. United States Leather Co., 206 Ill. 74, 69 N. E. 30; Choctaw etc. R. Co. v. McAlester, 7 Ind. Ter. 520, 104 S. W. 821; Curme v. Rauh, 100 Ind. 247; Rudolph v. Lane, 57 Ind. 115; Mahaffy v. Faris, 144 Iowa, 220, 122 N. W. 934, 24 L. R. A., N. S., 840; Brier v. Davis, 122 Iowa, 59, 96 N. W. 983; Western Union Tel. Co. v. Collins, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187; Fuller v. Keesece, 104 S. W. 700, 31 Ky. Law Rep. 1099; Interstate Inv. Co. v. Bailey, 29 Ky. Law Rep. 468, 93 S. W. 575; Kidd's Succession, 52 La. Ann. 2113, 28 South. 353; Gerry v. Herrick, 87 Me. 219, 32 Atl. 882; Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547; Koch v. Wimbrow, 111 Md. 21, 73 Atl. 896; Safe Deposit etc. Co. v. Turner, 98 Md. 22, 55 Atl. 1023; Commonwealth v. Johnson, 199 Mass. 55, 85 N. E. 188; Gage v. Campbell, 131 Mass. 566; Magie v. Herman, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909; Winona v. Huff, 11 Minn. 119; Shrimpton v. Netzorg, 104 Mich. 225, 62 N. W. 343; People v. Dennis, 4 Mich. 609, 69 Am. Dec. 338; Dewees v. Lumber etc. Co., 96 Miss. 253, 50

South. 865; Turner v. Thomas, 77 Miss. 864, 28 South. 803; Rollins v. Schawacker, 153 Mo. App. 284, 133 S. W. 409; Morley v. Weakley, 86 Mo. 451; Doll v. Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625; Finch v. Kent, 24 Mont. 268, 61 Pac. 653; Larson v. Cox, 68 Neb. 44, 93 N. W. 1011; Scammon v. Scammon, 33 N. H. 52; Johnson v. Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Clark v. Hornbeck, 17 N. J. Eq. 430; Wagner v. Romero, 3 N. M. 167 (131), 3 Pac. 50; In re Cunnion, 135 App. Div. 864, 120 N. Y. Supp. 266; Mason v. Libbey, 90 N. Y. 683; Enders v. Sternbergh, 2 Abb. Dec. 31, 1 Keyes (N. Y.), 264, 33 How. Pr. 464; Wells v. Harrell, 152 N. C. 218, 67 S. E. 584; Jennings v. Reeves, 101 N. C. 447, 7 S. E. 897; Young v. Engdahl, 18 N. D. 166, 119 N. W. 169; John v. John, Wright (Ohio), 584; Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946; Manchester Assur. Co. v. Oregon R. Co., 46 Or. 162, 114 Am. St. Rep. 863, 69 L. R. A. 475, 79 Pac. 60; Gould v. Lee, 55 Pa. 99; Shortz v. Unangst, 3 Watts & S. (Pa.) 45; Timbol v. Mana Co., 6 Phil. Isl. 254; Edgefield Mfg. Co. v. Maryland Casualty Co., 78 S. C. 73, 58 S. E. 969; Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33; Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630; State v. Pierre, 15 S. D. 559, 90 N. W. 1047; Anderson v. Maberry, 2 Heisk. (Tenn.) 653; Amis v. Marks, 3 Lea (Tenn.), 568; Poitevent v. Scarborough (Tex. Civ. App.), 117 S. W. 443; Yzaguirre v. State, 48 Tex. Cr. 514, 85 S. W. 14; State v. Marsh, 70 Vt. 288, 40 Atl. 836; Rogers v. Swanton, 54 Vt. 585; Beirne v. Rosser, 26 Gratt. (Va.) 537; Starwich v. Glass

*deeds,*⁸⁵ *writs,*⁸⁶ *pleadings,*⁸⁷ *specialties,*⁸⁸ *judgments,*⁸⁹ *other records,*⁹⁰ *agreements,*⁹¹ *bank notes,*⁹² *books of account,*⁹³ *letters,*⁹⁴ *patents,*⁹⁵ *wills,*⁹⁶ *time bills for work done,*⁹⁷ *re-*

Co., 64 Wash. 42, Ann. Cas. 1913A, 262, 116 Pac. 459; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *Edgell v. Conaway*, 24 W. Va. 747; *Kelley etc. Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971, 97 N. W. 674; *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 6 L. Ed. 166; *Ohio County, Ky., v. Baird*, 181 Fed. 49, 104 C. C. A. 63; *Gathercole v. Miall*, 10 Jur. 337, 15 L. J. Ex. 179, 15 Mees. & W. 319; *Lewis v. Hartley*, 7 Car. & P. 405; *McCullough v. Munn*, 2 Irish, 195. For cases on the general subject of this section, see notes to *Kentzler v. Kentzler*, 28 Am. St. Rep. 24, and *Roach v. Privett*, 24 Am. St. Rep. 822. See § 205, *ante*; § 218, *post*. See, also, the following Canadian case: *Ansley v. Breo*, 14 C. P. 371; *Little v. Johnson*, 1 Kerr, 496; *Lyman v. Cain*, 3 All. 259; *Doc d. Trider v. McIntosh*, 1 Han. 505; *Arnold v. Buller*, 15 U. C. R. 255; *Alexander v. Vye*, 16 Can. S. Ct. 501.

⁸⁵ *Steward v. Scott*, 57 Ark. 153, 20 S. W. 1088; *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189; *Rullman v. Barr*, 54 Kan. 643, 39 Pac. 179; *Babington Bros. v. Barber*, 124 La. 1042, 50 South. 844; *Huzzard v. Trego*, 35 Pa. 9; *Wright v. Giles* (Tex. Civ. App.), 129 S. W. 1163; *Miller v. Freeman* (Tex. Civ. App.), 127 S. W. 302.

⁸⁶ *Fowler v. More*, 4 Ark. 570.

⁸⁷ *Peirce v. Bank of Tennessee*, 1 Swan (Tenn.), 265.

⁸⁸ *Kelly v. Riggs*, 2 Root (Conn.), 126.

⁸⁹ *Stokes v. Prescott*, 4 B. Mon. (Ky.) 37; *Forsyth v. Vehmeyer*, 55

Ill. App. 223; *Brunbaugh v. Wilson*, 82 Kan. 53, 107 Pac. 792; *Easterwood v. Burnitt* (Tex. Civ. App.), 126 S. W. 934.

⁹⁰ *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501; *Gore v. Elwell*, 22 Me. 442; *Thayer v. Stearns*, 1 Pick. (Mass.) 109; *Stockbridge v. West*, *Stockbridge*, 12 Mass. 400; *Dillingham v. Snow*, 5 Mass. 547; *Ravenscroft v. Giboney*, 2 Mo. 1; *Farmers' Bank v. Gilson*, 6 Pa. 51; *Clark v. Trindle*, 52 Pa. 492; *Brown v. Griffith*, 70 Cal. 14, 11 Pac. 500; *Miller v. Goodwin* (Ky.), 124 S. W. 818; *Wells v. Harrell*, 152 N. C. 218, 67 S. E. 584; *Bowland v. McDonald etc. Tel. Co.*, 82 Kan. 84, 107 Pac. 797.

⁹¹ *Morrison v. Chapin*, 97 Mass. 72; *Tanner v. Page*, 106 Mich. 155, 63 N. W. 993; *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 South. 263.

⁹² *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44, and note.

⁹³ *Mayson v. Beazley*, 27 Miss. 106; *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430; *Stone v. San Francisco Brick Co.*, 13 Cal. App. 203, 109 Pac. 103.

⁹⁴ *Blaha v. Borgman*, 142 Wis. 43, 124 N. W. 1047.

⁹⁵ *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524; *Ross v. Goodwin*, 88 Ala. 390, 6 South. 682.

⁹⁶ *Smith v. Carter*, 3 Rand. (Va.) 167; *Reeves v. Booth*, 2 Mill's Const. (S. C.) 334, 12 Am. Dec. 679, and note; *In re Guinasso's Estate*, 13 Cal. App. 518, 110 Pac. 335; *In re Cunnion's Will*, 135 App. Div. 864, 120 N. Y. Supp. 266.

⁹⁷ *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545.

leases and receipts,⁹⁸ *orders for goods*,⁹⁹ *notices*,¹⁰⁰ *guaranties*,¹ and *claims against counties*.² It has been applied to instruments sent by *post*, and it is held that the loss, caused by defective transmission through the *mail*, is a sufficient excuse for its nonproduction to let in secondary evidence of the contents.³ So, also, when the instrument is partially destroyed or mutilated, parts being lost.⁴ It is an elementary principle of law that when the title of real estate is in issue, evidence of a lost deed and its contents can only be given on laying a proper foundation by proving its execution, validity, tenor, delivery, loss, and diligent search for it.⁵ To justify such secondary evidence, especially when exclusively oral, the following facts must be established to the satisfaction of the court: (1) The existence and execution of the original paper, as a genuine document; (2) the substance of its contents; (3) its loss, destruction, absence from the state, or other satisfactory reason for failure to produce the original, which may be shown by such diligent search for it as would raise a reasonable presumption of such loss or absence. The one of these facts is as necessary to be proved as the other, and the failure, therefore, to prove either is fatal to the right to introduce the secondary evidence.⁶ The basic element of proof must necessarily be that the document, deed or other instrument, was at one time in existence and this necessarily involves proof of its genuineness or execution. In the absence of such proof the rest must fall to

⁹⁸ *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463; *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234.

⁹⁹ *Deweese v. Bostwick Lumber etc. Co.*, 96 Miss. 253, 50 South. 865.

¹⁰⁰ *Hogan v. Morris*, 7 Ga. App. 232, 66 S. E. 550; *Naughton v. Soucy*, 245 Ill. 225, 91 N. E. 1033.

¹ *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42.

² *Ohio County v. Baird*, 181 Fed. 49, 104 C. C. A. 63.

³ *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44; *Shaw v. Pershing*, 57 Mo. 416; *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219.

⁴ *Dean v. Speakman*, 7 Blackf. (Ind.) 317; *Fallis v. Griffiths, Wright (Ohio)*, 303; *Farmers' etc. Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

⁵ *Enderlin Inv. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390.

⁶ *Potts v. Coleman*, 86 Ala. 94, 5 South. 780.

the ground. It is not sufficient to prove the loss of the document of which the copy or other evidence is about to be given; it is absolutely essential to prove that a deed or document executed or signed by some person was in existence, and that can only be done by proving the document as though it were in court. If the document were in existence, it would be proved by testimony as to its signature by either the party himself or an attesting witness, or one who knew of the execution or was familiar with the signature; in its absence there must be, first of all, proof of the execution or signature of the document, so that the superstructure of contents and loss may be safely raised upon it.⁷ Although the correct order of proof is as above stated, this order may be changed in the *discretion of the court*.⁸ Inasmuch as the matter is a pre-

⁷ C. W. Zimmerman Mfg. Co. v. Dunn, 163 Ala. 272, 50 South. 906; Laster v. Blackwell, 128 Ala. 143, 30 South. 663; Hughes v. Southern Warehouse Co., 94 Ala. 613, 10 South. 133; Hanna v. Price, 23 Ala. 826; Hall v. Crowley, 12 Cal. App. 30, 106 Pac. 426; Reynolds v. Jourdan, 6 Cal. 108; Bartholomew v. Edwards, 1 Houst. (Del.) 17; Shrowders v. Harper, 1 Harr. (Del.) 444; Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287; Garbutt Lumb. Co. v. Gress Lumb. Co., 111 Ga. 821, 35 S. E. 686; Smith v. Smith, 106 Ga. 303, 31 S. E. 762; Calhoun v. Calhoun, 81 Ga. 91, 6 S. E. 913; Fisk v. Kissane, 42 Ill. 87; Dickinson v. Breeden, 25 Ill. 186; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Murray v. Buchanan, 7 Blackf. (Ind.) 549; Stevens v. State, 50 Kan. 712, 32 Pac. 350; Combs v. Commonwealth (Ky.), 25 S. W. 590; Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; Kimball v. Morrell, 4 Me. 368; Gunther v. Bennett, 72 Md. 384, 19 Atl. 1048; Stocking v. St. Paul T. Co., 39

Minn. 410, 40 N. W. 365; Wells v. Pressy, 105 Mo. 164, 16 S. W. 670; Atwell v. Lynch, 39 Mo. 519; Lomerson v. Hoffman, 24 N. J. L. 674; Gardam v. Batterson, 198 N. Y. 175, 139 Am. St. Rep. 806, 19 Ann. Cas. 649, 91 N. E. 371; Weatherhead v. Baskerville, 11 How. 329, 13 L. Ed. 717; McPherson v. Rathbone, 7 Wend. (N. Y.) 216; Jackson v. Frier, 16 Johns. (N. Y.) 193; Wiseman v. North Pacific Ry. Co., 20 Or. 425, 23 Am. St. Rep. 135, and note, 26 Pac. 272; McKenna v. McMichael, 189 Pa. 440, 42 Atl. 14; Jack v. Woods, 29 Pa. 375; Slone v. Thomas, 12 Pa. 209; Baskin v. Seechrist, 6 Pa. 154; Stockdale v. Young, 3 Strob. (S. C.) 501; Isbell v. Whalen, 25 S. D. 445, 127 N. W. 476; Freeman v. Rice Inst. (Tex. Civ. App.), 128 S. W. 629; Goodier v. Lake, 1 Atk. 446, 26 Eng. Reprint, 284.

⁸ Fitch v. Bogue, 19 Conn. 285; Denn v. Pond, 1 N. J. L. 379; Culpepper v. Wheeler, 2 McMull. (S. C.) 66; Bonds v. Smith, 106 N. C. 553, 11 S. E. 322; Smith v. Brown, 151 Mass.

liminary one for the court to settle before the proffered testimony can be admitted, the exact order of proof is not of great moment; but, in proper chronological order, the evidence of the existence should come before that of loss, loss before search, and search before the testimony as to contents. Another reason suggests itself for this order that each successive step is the natural order of legal architecture to support the next. Without its existence is proved none are available, without its loss the search would be idle, without proper search the contents would not be admitted. There are some old cases which show a difference in this order of proof, and although we cite them, we feel that comment is unnecessary.⁹

§ 213 (212). **Same—Diligence necessary before secondary evidence is allowed.**—Having established the fact of the existence of the document, and its loss, it devolves upon the party to show what steps he has taken to find it. It is the general rule that before secondary evidence of a writing alleged to be lost can be given, there must be proof that a *diligent search* has been made in the place where it is most likely to be found, and that the search has not been successful.¹⁰ The courts have often under-

338, 24 N. E. 31; Allen v. Parish, 3 Ohio, 107, 121; Groff v. Ramsey, 19 Minn. 44, 60. See § 17, *supra*. As to secondary evidence of contents of will lost after probating or filing for record, see note to Hovey v. Elliott, 38 L. R. A. 456.

⁹ Terpening v. Holton, 9 Colo. 306, 12 Pac. 189; Bartholomew v. Edwards, 1 Houst. (Del.) 17; Shrowders v. Harper, 1 Harr. (Del.) 444; Porter v. Ferguson, 4 Fla. 102; Allen v. Parish, 3 Ohio, 107; Stockdale v. Young, 3 Strob. (S. C.) 501; Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305; Bateman v. Bateman, 21 Tex. 432; Mattocks v. Stearns, 9 Vt. 326.

¹⁰ Stuart v. Mitchum, 135 Ala. 546, 33 South. 670; Tanner v. Hall, 89

Ala. 628, 7 South. 187; Wilburn v. State, 60 Ark. 141, 29 S. W. 149; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 303; Mortgage Trust Co. v. Elliott, 36 Colo. 238, 84 Pac. 980; Everett v. Hart, 20 Colo. App. 93, 77 Pac. 254; Billin v. Henkel, 9 Colo. 394, 13 Pac. 420; Witter v. Latham. 12 Conn. 392; Armstrong v. Timmons. 3 Harr. (Del.) 342; Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287; Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771; Holbrook v. Trustees, 28 Ill. 187; Embree v. Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110; Coffing v. Carnahan, 122 Ind. 427, 23 N. E. 855; Meek v. Spencer, 8 Ind. 118; Williams v. Williams, 108 Iowa, 91, 78 N. W. 792; Rullman v. Barr, 54

taken to lay down definite rules for determining what constitutes a diligent search. These tests will be given, but it must be borne in mind, as will later appear, that much must be left to the *discretion of the court*.¹¹ The ques-

Kan. 643, 39 Pac. 179; Powell v. Wallace, 44 Kan. 656, 25 Pac. 42; Dickerson v. Talbot, 14 B. Mon. (Ky.) 60; Penny v. Pindell, 7 Bush (Ky.), 571; McQueen v. Sandel, 15 La. Ann. 140; Egan v. Horrigan, 96 Me. 46, 51 Atl. 246; Kidder v. Blaisdell, 45 Me. 461; Bartlett v. Wilbur, 53 Md. 485; Glenn v. Rogers, 3 Md. 312; McConnell v. Wildes, 153 Mass. 487, 26 N. E. 1114; Poignand v. Smith, 8 Pick. (Mass.) 272; Commonwealth v. Jeffries, 7 Allen, 548, 83 Am. Dec. 712; Burt v. Long, 106 Mich. 210, 64 N. W. 60; Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487; Windon v. Brown, 65 Minn. 394, 67 N. W. 1028; Doe v. McCaleb, 3 Miss. 756; Walton v. Forsdick (Miss.), 25 South. 668; Blondeau v. Sheridan, 81 Mo. 545; Barton v. Murrain, 27 Mo. 235, 72 Am. Dec. 259; Brooke v. Jordan, 14 Mont. 375, 36 Pac. 450; Post v. Gage County School Dist. No. 10, 19 Neb. 135, 26 N. W. 911; Koehler v. Schilling, 70 N. J. L. 585, 57 Atl. 154; Kearney v. New York, 92 N. Y. 617; Jackson v. Root, 18 Johns. (N. Y.) 60; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519; Churchill v. Lee, 77 N. C. 341; McManus v. Commow, 10 N. D. 340, 87 N. W. 8; Johnson etc. Dry Goods Co. v. Cornell, 4 Okl. 412, 46 Pac. 860; Sperry v. Wesco, 26 Or. 483, 38 Pac. 623; Wiseman v. Northern Pac. Ry. Co., 20 Or. 425, 23 Am. St. Rep. 135, and note, 26 Pac. 272; Heller v. Peters, 140 Pa. 648, 21 Atl. 416; Parke v. Bird, 3 Pa. 360; Brooks v. McMeekin, 37 S. C. 285, 15 S. E. 1019; Anderson v. Maberry, 2 Heisk. (Tenn.) 653;

Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201; Foot v. Silliman, 77 Tex. 268, 13 S. W. 1032; Thrall v. Todd, 34 Vt. 97; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Corbett v. Nutt, 18 Gratt. (Va.) 624; Perrin v. State, 81 Wis. 135, 50 N. W. 516; Niland v. Murphy, 73 Wis. 326, 41 N. W. 335; Brown v. Harkins, 131 Fed. 63, 65 C. C. A. 301; Simpson & Co. v. Dall, 3 Wall. (U. S.) 460, 18 L. Ed. 265; Reg. v. Hinckley, 3 Best & S. 885, 9 Jur., N. S., 1054, 32 L. J. M. C. 158, 8 L. T., N. S., 270, 9 Jur., N. S., 1054, 11 W. R. 663; Keith v. Coates, 17 Can. L. T. 33. See the following late cases: Pileher v. Dothan Mule Co. (Ala. App.), 60 South. 547; Dahler v. All Persons, 163 Cal. 160, 124 Pac. 995; Walker v. Green (Colo. App.), 128 Pac. 855; Stewart v. Randall, 138 Ga. 796, 76 S. E. 352; Switzer v. Honn, 254 Ill. 621, 98 N. E. 998; Murphy v. Cochran (Iowa), 134 N. W. 1085; Wendell v. Heim, 87 Kan. 136, 123 Pac. 869; Gelder v. Welsh, 169 Mich. 490, 135 N. W. 280; Baldridge v. Stribling (Miss.), 57 South. 658; Byrd v. Collins (N. C.), 75 S. E. 1073; Landon v. Morehead (Okla.), 126 Pac. 1027; Kenworthy v. Slooman (Or.), 125 Pac. 273; James v. Ferguson, 92 S. C. 105, 75 S. E. 286; King v. Cox (Tenn.), 151 S. W. 58; Curt-singer v. McGown (Tex. Civ. App.), 149 S. W. 303; Birch River etc. Co. v. Glendon etc. Lumber Co. (W. Va.), 76 S. E. 972; Consolidated Rubber Tire Co. v. Goodrich, 195 Fed. 764.

¹¹ Avery v. Stewart, 134 N. C. 287, 46 S. E. 519; Liles v. Liles, 183 Mo. 326, 81 S. W. 1101; Cooley v. Col-

tion is always one of diligence in the effort to procure the original. No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."¹² From the nature of the subject there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost. As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced.¹³ The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. On the whole, the court must be satisfied that the paper is destroyed and cannot be found.¹⁴ The

lins, 186 Mass. 507, 71 N. E. 979. This is illustrated by most of the cases cited to this and the next section.

¹² Bean, J., in *Wiseman v. North Pacific R. R. Co.*, 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272; 1 Greenl. Ev., § 558; *Simpson v. Dall*, 3 Wall. (U. S.) 460, 18 L. Ed. 265; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. Rep. 527; *Kelsey v. Hanmer*, 18 Conn. 311.

¹³ *Sturges v. Hart*, 45 Ill. 103; *Rex v. Stourbridge*, 8 Barn. & C. 96, 108 Eng. Reprint, 978; *Minshall v. Lloyd*, 2 Mees. & W. 450, 1 Jur. 336, 6 L. J. Ex. 115; *McGahy v. Alston*, 2 Mees.

& W. 206, 2 Gale, 238, 6 L. J. Ex. 29; *Fernley v. Worthington*, 1 Man. & G. 491, 133 Eng. Reprint, 425; *Singer Mfg. Co. v. Riley*, 80 Ala. 314; *Jernigan v. State*, 81 Ala. 58, 1 South. 72; *McCollister v. Yard*, 30 Iowa, 621, 57 N. W. 447; *Susquehanna Mut. Fire Ins. Co. v. Mordorf*, 152 Pa. 22, 25 Atl. 234; *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

¹⁴ It is true, the party need not search every possible place where it might be, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found.

party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that it is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found.¹⁵ While an honest and diligent search is sufficient, there is no reasonably certain proof of the loss until it appears by their own testimony that it is not in the hands of any of those where it might reasonably be supposed to be.¹⁶ The testimony of the *last custodian* of the paper or record should be produced,¹⁷ and, if dead, his representative or successor should be called.¹⁸ Declarations are not sufficient.¹⁹ If the paper is so traced that the possession may be in the hands of either of two persons, both should be sworn before secondary evidence will be allowed.²⁰ But it is not necessary to call the last custo-

Nor must he produce every man upon the stand, into whose hands rumor alone may have traced it, for if the inquiry is only suggested by hearsay, it may be answered by hearsay. If, on the other hand, legal testimony shows it to have been in a particular place, or if the natural and legitimate presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there. We are aware that some causes may be found which seem to tolerate a looser practice; but so far from establishing a general rule, they serve to admonish us of the danger of departing from well-established legal rules, with the hope of meeting justice in a particular case: *Mariner v. Saunders*, 5 Gilm. (10 Ill.) 113.

¹⁵ *Rankin v. Crow*, 19 Ill. 626.

¹⁶ *Doyle v. Wiley*, 15 Ill. 576; *Patterson v. Keystone Min. Co.*, 30 Cal. 360; *Kenniff v. Canfield*, 140 Cal. 34, 73 Pac. 803; *Hemphill v. McClimans*, 24 Pa. 367; *Harper v. Hancock*, 6 Ired. (N. C.) 124; *Hammond v. Lud- den*, 47 Me. 447.

¹⁷ *Judson v. Eslava, Minor* (Ala.), 71, 12 Am. Dec. 32, and note; *Lundberg v. Mackenheuser*, 4 Ill. App. 603; *Mullanphy Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Brock v. Cottingham*, 23 Kan. 383; *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771; *Darrow v. Pierce*, 91 Mich. 63, 51 N. W. 813; *Trimble v. Edwards*, 84 Tex. 497, 19 S. W. 772.

¹⁸ *Floyd v. Mintsey*, 5 Rich. (S. C.) 361; *Stanley v. Anderson*, 107 Mich. 384, 65 N. W. 247; *Gray v. Thomas*, 83 Tex. 246, 18 S. W. 721; *Baldwin v. Goldfrank*, 9 Tex. Civ. App. 269, 26 S. W. 155; *Blalock v. Miland*, 87 Ga. 573, 13 S. E. 551; *Trumble v. Edwards*, 84 Tex. 497, 19 S. W. 772.

¹⁹ *Vandergriff v. Piercy*, 59 Tex. 371.

²⁰ *Patterson v. Keystone Min. Co.*, 30 Cal. 360; *Cruise v. Clancy*, 6 Ir. Eq. R. 552; *Richards v. Lewis*, 11 Com. B. 1035; *Hall v. Ball*, 3 Man. & G. 242, 133 Eng. Reprint, 1133; *Reg. v. Hinekey*, 32 L. J. (M. C.) 158, 3 Best & S. 885, 122 Eng. Reprint, 331.

dian with whom a document was left when the office had been searched by another person under the former's direction and the latter has testified.²¹ A reference to some of the adjudicated cases will best illustrate the *degree of diligence* required. Thus *no foundation* is laid for secondary evidence by testimony that the witness had not the papers with him;²² that the attorney and client each supposed the other would bring the letters and neither made a special search;²³ that a letter which could not be found was received either by the witness or a director of the bank, though both had searched;²⁴ that a party has sent a paper to a public officer for record;²⁵ that a public officer did not have the time at his disposal for a search;²⁶ that a search for a letter received by a firm, since dissolved, which did not include an inquiry of the principal member of the firm, was made;²⁷ that the witness had looked for the paper at home and could not find it;²⁸ that it was lost or destroyed,²⁹ though if there is no cross-examination, it may be implied that search had been made;³⁰ that he had made search and could not find it;³¹ that he had lost the paper or delivered it to his attorney;³² that the receiver of letters did not know where they were;³³ that the witness supposed the paper to be in a safe, though he had not seen it for several years;³⁴ that the witness had given a paper

²¹ Waggoner v. Alvord, 81 Tex. 365, 16 S. W. 1083; Buchanan v. Wise, 34 Neb. 695, 52 N. W. 163.

²² Large v. Van Doren, 14 N. J. Eq. 208.

²³ Simpson & Co. v. Dall, 3 Wall. (U. S.) 460, 18 L. Ed. 265.

²⁴ Taunton Bank v. Richardson, 5 Pick. (Mass.) 436.

²⁵ Hawkins v. Rice, 40 Iowa, 435; McCollister v. Yard, 90 Iowa, 621, 57 N. W. 447; Fitch v. Randall, 163 Mass. 381, 40 N. E. 182.

²⁶ Brown v. United States, 1 Ct. of Cl. 377.

²⁷ Hill v. Aultman, 68 Iowa, 630, 27 N. W. 788.

²⁸ Crowe v. Capwell, 47 Iowa, 426.

²⁹ Anglo-American Packing & Provision Co. v. Cannon, 31 Fed. 313; Echols v. Hubbard, 90 Ala. 309, 7 South. 817; Angell v. Loomis, 97 Mich. 5.

³⁰ Smith v. Brown, 151 Mass. 338, 24 N. E. 31.

³¹ Bartlett v. Wilbur, 53 Md. 485.

³² Clement v. Buckle, 9 Gill (Md.), 326.

³³ Howe Machine Co. v. Stiles, 53 Iowa, 424, 5 N. W. 577.

³⁴ Post v. School District, 19 Neb. 135, 26 N. W. 911; Burks v. Bragg, 89 Ala. 204, 70 South. 156.

containing a dying declaration to a grand jury, and that he could find it neither among his own papers nor among those of the grand jury.³⁵ That the witness, an attorney, had made diligent search and inquiry for a writ prepared by him but could not find it, and that when he last saw it it was in the hands of the officer, was held insufficient;³⁶ nor is the affidavit of the attorney alone sufficient, as it does not exclude the idea that the client might produce the paper.³⁷ Statements made by counsel based on information from the client are inadmissible.³⁸

§ 214 (213, 214). Same — Further illustrations. — In cases where there is a *presumption that papers* are in a *certain custody* or in a certain office, search must be made there to rebut the presumption.³⁹ In some of the cases above cited secondary evidence was rejected because the details of the search were not given. The testimony as to the loss should be clear and distinct by the party interested himself, or one cognizant of the facts, setting out the supposed mode of loss and the thoroughness of the search, and it should exclude all presumption that the party may have the writing in his own possession or know where it is.⁴⁰ It may be stated generally that the court should be put in possession of the facts *showing the diligence used*.⁴¹ The bald statement that diligent search has been made is

³⁵ Boulden v. State, 102 Ala. 78, 15 South. 341.

³⁶ Phillips v. Purington, 15 Me. 425.

³⁷ Kauffman v. Shellworth, 64 Tex. 179.

³⁸ Smith v. Coker, 110 Ga. 650, 36 S. E. 105.

³⁹ Wylie v. Smitherman, 8 Ired. (N. C.) 236; Davenport v. Harris, 27 Ga. 68; Adams v. Fitzgerald, 14 Ga. 36; Stow v. People, 25 Ill. 81.

⁴⁰ Palmer v. Logan, 4 Ill. (3 Scam.) 56; Stevens v. Reed, 37 N. H. 49. An affidavit by the attorney of the party is insufficient: Hill v. Taylor, 77 Tex. 295, 14 S. W. 366.

⁴¹ Preslar v. Stallworth, 37 Ala. 402; Owen v. Paul, 16 Ala. 130; Wilburn v. State, 60 Ark. 141, 29 S. W. 149; Billin v. Henkel, 9 Colo. 394, 13 Pac. 420; Booth v. Cook, 20 Ill. 129; Rankin v. Crow, 19 Ill. 626; Shepard v. Pratt, 16 Kan. 209; Hanson v. Kelley, 38 Me. 456; Doe v. King, 4 Miss. 125; Gould v. Trowbridge, 32 Mo. 291; Fox v. Lambson, 8 N. J. L. 275; Harven v. Hunter, 8 Ired. (N. C.) 464; Burr v. Kase, 168 Pa. 81, 31 Atl. 954; Bray v. Aikin, 60 Tex. 688.

insufficient; the mode and places searched must be particularized and all doubt dispelled as to *bona fides* and ability, according to education, of the searcher in his endeavor to find it.⁴² It will be seen by a comparison of the illustrations given that it would be impossible to prescribe any single rule which would determine in all cases the sufficiency of the proof of the loss. In every case the testimony should show that the party has in good faith *exhausted all the sources of information* and means of discovery which the nature of the case would naturally suggest and which were accessible to him.⁴³ But the degree of diligence to be used must largely *depend upon the circumstances* of the case. The inquiry is of a preliminary nature addressed to the court in each case; and the decision is largely in the *discretion* of the court, and not subject to review unless the decision is based upon an error of law or upon evidence, which, as a matter of law, is insufficient to sustain it.⁴⁴ Lord Denman expressed this

⁴² Mitchell v. Mitchell, 3 Stew. & P. (Ala.) 81; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Kelsey v. Hanmer, 18 Conn. 311; Booth v. Cook, 20 Ill. 129; Shepard v. Pratt, 16 Kan. 209; Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Pickard v. Bailey, 26 N. H. 152; Leland v. Cameron, 31 N. Y. 115.

⁴³ Ellis v. Smith, 10 Ga. 253; Folsom v. Scott, 6 Cal. 460; Wiseman v. Northern Pac. Ry. Co., 20 Or. 425, 23 Am. St. Rep. 135, and note, 26 Pac. 272; Roberts v. Dixon, 50 Kan. 436, 31 Pac. 1083.

⁴⁴ Jernigan v. State, 81 Ala. 58, 1 South. 72; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Wilburn v. State, 60 Ark. 141, 29 S. W. 149; Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; Elwell v. Mersick, 50 Conn. 272; Waller v. School District, 22 Conn. 326; Witter v. Latham, 12 Conn. 392; Schrowders v. Harper, 1

Harr. (Del.) 444; Turner v. Elliott, 127 Ga. 338, 56 S. E. 434; Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Phillips v. Lindsey, 65 Ga. 139; Poulet v. Johnson, 25 Ga. 403; Vaughn v. Biggers, 6 Ga. 188; Fisk v. Kissane, 42 Ill. 87; Mariner v. Saunders, 10 Ill. 113; Howe v. Fleming, 123 Ind. 262, 24 N. E. 238; Stratton v. Hawks, 43 Kan. 538, 23 Pac. 591; Interstate Co. v. Bailey, 29 Ky. Law Rep. 468, 93 S. W. 578; Winston v. Prevost, 6 La. Ann. 164; Inhabitants of Milford v. Veazie (Me.), 14 Atl. 730; Bain v. Walsh, 85 Me. 108, 26 Atl. 1001; unless there is an apparent abuse of discretion: Simpson v. Norton, 45 Me. 281; Glenn v. Rogers, 3 Md. 312; Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Adams v. Leland, 7 Pick. (Mass.) 62; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; Pickard v. Bailey, 26 N. H. 152; Bachelder v. Nutting, 16 N. H. 261;

view: "The question in every case is, whether there has been evidence enough to satisfy the court before which the trial is had, that to use the words of Bailey, J., in *Rex v. Denio* 'a *bona fide* and diligent search was made for the instrument where it was likely to be found.' But this is a question much fitter for the court which tries than for us. They have to determine whether evidence is satisfactory, whether the search has been made *bona fide*, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted if such questions are to be brought before us as

Longstreth v. Korb, 64 N. J. L. 112, 44 Atl. 934; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. Rep. 527; *Stafford v. Stafford*, 1 N. J. Eq. 525; *Kearney v. New York*, 92 N. Y. 617; *Mason v. Libbey*, 90 N. Y. 683, and cases cited; *Jackson v. Frier*, 16 Johns. (N. Y.) 193; *Woodworth v. Barker*, 1 Hill (N. Y.), 172; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241; *Wells v. Martin*, 1 Ohio St. 386; *Gorgas v. Hertz*, 150 Pa. 538, 24 Atl. 756; unless manifestly insufficient: *Elrod v. Cochran*, 59 S. C. 467, 38 S. E. 122; *Congdon v. Morgan*, 14 S. C. 587; *Tyree v. Magness*, 1 Sneed (Tenn.), 276; *Durgin v. Danville*, 47 Vt. 95; *Ben v. Peete*, 2 Rand. (Va.) 539; *Doe v. Aiken*, 31 Fed. 393; *Minor v. Tillotson*, 7 Pet. (U. S.) 99, 8 L. Ed. 621; *Boyle v. Arledge*, Fed. Cas. No. 1758, 1 Hemp. (U. S.) 620; *Tiffany v. McCumber*, 13 U. C. Q. B. 159. In Georgia, while it has been held that the sufficiency of the evidence of the loss or destruction is within the discretion of the court (*Cox v. McDonald*, 118 Ga. 414, 45 S. E. 401), yet in *Bower v. Cohen*, *supra*, the court said:

"While the court has a discretion as to the weight of evidence showing loss or destruction, we do not think that mere proof that inquiry from one person, only, whose name appears in the chain of title subsequent to the execution of the deed sought to be introduced, will be a sufficient foundation for the introduction of secondary evidence. And especially is this true, when the evidence does not disclose that any inquiry was made of the immediate predecessor in title of the party seeking to introduce the copy deeds." In *Freeman v. Wm. M. Rice Institute* (Tex. Civ. App.), 128 S. W. 629, it is held that while the sufficiency of the proof upon this issue is a question within the sound discretion of the trial judge, such discretion cannot be arbitrarily exercised, and when all the evidence in the case tends to establish the loss of the original deed and reasonable diligence on the part of the party offering the secondary or circumstantial evidence of its execution to procure the original, such evidence should be admitted: *McDonald v. Hanks*, 52 Tex. Civ. App. 140, 113 S. W. 604; *Smith v. Cavit*, 20 Tex. Civ. App. 558, 50 S. W. 167.

matters of law?"⁴⁵ The rule undoubtedly is that the loss or destruction of the document need not be proved beyond the possibility of mistake. It is enough if the testimony satisfies the court of the fact with *reasonable certainty*.⁴⁶ Mr. Justice Campbell says: "We agree that the rule of law which requires the best evidence within the power or control of the party to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been willfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant."⁴⁷ The question always is, whether sufficient search has been made to justify the admission of secondary evidence. The rules of evidence are adopted for practical purposes in the administration of justice; and although it is laid down in the books, as a general rule, that the best evidence the nature of the case will admit of must be given, yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent

⁴⁵ Reg. v. Kenilworth, 7 Q. B. 642, 115 Eng. Reprint, 631. (Citing Rex v. Denio, 7 B. & C. 620, 108 Eng. Reprint, 854.)

⁴⁶ Agee v. Messer-Moore Ins. etc. Co., 165 Ala. 291, 51 South. 829; Owen v. Paul, 16 Ala. 130; Elwell v. Mersick, 50 Conn. 272; Harper v. Scott, 12 Ga. 125; Wolters v. Redward, 16 Haw. 25; McCormick etc. Co. v. Gray, 114 Ind. 340, 16 N. E. 787; Burke v. Tregre, 28 La. Ann. 437; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436; Burt v. Long, 106 Mich. 210, 64 N. W. 60; Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Clark v. Hornbeck, 17 N. J. Eq. 430; Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. Supp. 607; Kane v. Metro-

politan El. R. Co., 15 Daly, 294, 6 N. Y. Supp. 526; Gillis v. Wilmington etc. R. Co., 108 N. C. 441, 13 S. E. 11, 1019; Wells v. Martin, 1 Ohio St. 386; Bright v. Allan, 203 Pa. 386, 53 Atl. 248; Norris v. Clinkscapes, 47 S. C. 488, 25 S. E. 797; Simonson v. Aney, 26 S. D. 121, 128 N. W. 319; Tyree v. Magness, 1 Sneed (Tenn.), 276; Rushing v. Lanier, 51 Tex. Civ. App. 278, 111 S. W. 1089; Cheatham v. Riddle, 8 Tex. 162; Corbett v. Nutt, 18 Gratt. (Va.) 624; United States v. Sutter, 21 How. 170, 16 L. Ed. 119; United States v. Sutter, 21 How. (U. S.) 170, 16 L. Ed. 119; Bartlett v. Smith, 11 Mees. & W. 483.

⁴⁷ United States v. Sutter, *supra*.

to which the rule is to be pushed is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original.⁴⁸ Once the loss by destruction is established, of course the necessity for evidence of search is obviated.⁴⁹ The loss or destruction may be proved by *circumstantial evidence*.⁵⁰ The following are illustrations of facts which have been held sufficient proof of loss or destruction, and search. The search has been held sufficient when it is shown that a paper whose custody belongs to a particular office cannot be found in that office;⁵¹ that the paper was left on the table and though diligent search was made it could not be found;⁵² that a search was made among the papers saved from a fire;⁵³ that the note was offered in evidence before the witness, a justice, and that he had made diligent search among his papers;⁵⁴ that the note in question had either been lost by being picked from the pocket of the witness or by being mislaid;⁵⁵ that an unsuccessful search was made in the clerk's office for an execution, the sheriff who once had possession of the office being dead and his house having been burned, and inquiry

⁴⁸ *Minor v. Tillotson*, 7 Pet. (U. S.) 99, 8 L. Ed. 621, cited and rule followed in *Gregg v. Forsyth*, 24 How. (U. S.) 180, 16 L. Ed. 732.

⁴⁹ *Rhode v. McLean*, 101 Ill. 467.

⁵⁰ *Witter v. Latham*, 12 Conn. 392; *Central Turnpike v. Valentine*, 10 Pick. (Mass.) 142; *Taunton Bnk v. Richardson*, 5 Pick. (Mass.) 436; *Howd v. Breckenridge*, 97 Mich. 65, 56 N. W. 221; *Clark v. Hornbeck*, 17 N. J. Eq. 430; *Wells v. Jackson Mfg. Co.*, 48 N. H. 491; *Blair v. Flack*, 141 N. Y. 53, 35 N. E. 941; *Parks v. Dunkle*, 3 Watts & S. (Pa.) 291.

⁵¹ *Johnson v. Powell*, 30 Ala. 113; *Poe v. Dorrah*, 20 Ala. 288, 56 Am. Dec. 196; *Carter v. Edwards*, 16 Ind. 238; *New York Car Oil Co. v. Richmond*, 6 Bosw. (N. Y.) 213; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501; *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. W. 148; *Brain-tree v. Battles*, 6 Vt. 395.

⁵² *Tyler v. Dyer*, 13 Me. 41.

⁵³ *Thayer v. Barney*, 12 Minn. 502; *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. E. 148; *Burt v. Long*, 106 Mich. 210, 64 N. W. 60.

⁵⁴ *Conkey v. Post*, 7 Wis. 131.

⁵⁵ *McMillan v. Bethold*, 35 Ill. 250.

made of members of his family;⁵⁶ that the deed had been deposited in the postoffice by the grantee directed to another, who testified that he had not received it, and that inquiry had been made at the office of deposit and delivery;⁵⁷ that a certain letter was stamped and addressed and left in a letter-box in a store and an employee testified that, if so left, he had mailed it;⁵⁸ that the paper was tendered to the defendant who threw it aside, and that it was not seen again;⁵⁹ that the letters of which no copies had been made had been mailed to a foreign country and replies received in due course of mail.⁶⁰ That search had been made in vain by the proper custodian in vaults where certain plats were kept, as well as in every other likely place, was also held sufficient.⁶¹ Where there were three grantees named in a *tax deed*, either one of whom was as much the rightful and lawful custodian of the deed as the other, evidence by one of the grantees that he had once had possession of the original, and had searched for it, but could not find it, without proof that it was not in the custody of one of the other two grantees, was insufficient as a predicate for the introduction of secondary evidence, and it was error to admit the copy of the deed.⁶² When a prior deed in the chain of title of the present owners was lost, and diligence was shown to have been used in the search for it with the exception of inquiries from the grantor to the owners of the land, the court held such inquiries unnecessary when it was proved that the deed had been executed more than forty years previously and had been duly recorded, on the ground that it was extremely improbable the grantor had possession of it, he having parted with the whole of his title and having no further interest in the preservation or custody of it.⁶³

⁵⁶ Leland v. Cameron, 31 N. Y. 115.

⁵⁷ McRae v. Pegues, 4 Ala. 158.

⁵⁸ Sanborn v. Cunningham, 4 Cal. Unrep. 95, 33 Pac. 894.

⁵⁹ Stoddard v. Mix, 14 Conn. 12.

⁶⁰ Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786.

⁶¹ McDonald v. Stark, 176 Ill. 456, 52 N. E. 37.

⁶² C. W. Zimmerman Mfg. Co. v. Dunn, 163 Ala. 272, 50 South. 906.

⁶³ Freeman v. Wm. M. Rice Institute (Tex. Civ. App.), 128 S. W. 629. See, also, Jackson v. Russell, 4

§ 215 (215). **Importance of documents as affecting diligence.**—No absolute rule has been or can be laid down defining what search shall be considered as a search prosecuted with reasonable diligence. The degree of diligence which shall be considered necessary, in any case, will depend on the circumstances of the particular case—the character and importance of the paper—the purposes for which it is proposed to use it, and the place where a paper of the kind may naturally be supposed to be likely to be found. The strictness of the rule requiring search and proof of loss varies, therefore, in proportion to the importance and value of the documents. The subject has been elaborately discussed in a New Jersey case which stands sponsor for most of the propositions on the subject.⁶⁴ The value of a paper is a circumstance entering into the degree of diligence required. If the document be an important one, such as that the owner would have an interest in preserving it, or if it be such as is generally carefully preserved, or if there is any reason to suspect that it may be withheld for some improper reason, diligent search and very *strict proof* may be properly required.⁶⁵ Mr. Justice Swayne says,⁶⁶ “The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and im-

Wend. (N. Y.) 543 (search in surrogate's office for ancient will); Teall v. Van Wyck, 10 Barb. (N. Y.) 376 (search for justice's bond); Francis v. Ocean Ins. Co., 6 Cow. (N. Y.) 404 (ship's papers); Minshall v. Lloyd, 2 Mees. & W. 450, 6 L. J. Ex. 115, 1 Jur. 336 (sheriff's warrants); Freeman v. Arkell, 2 Barn. & C. 494, 107 Eng. Reprint, 467 (depositions). For other illustrations see § 212, *ante*.

⁶⁴ Johnson v. Arnwine, 13 Vroom (42 N. J. L.), 451, 36 Am. Rep. 527; and from the abundant supply of good law and illustrations of its

application we have freely availed ourselves.

⁶⁵ Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Waller v. School Dist., 22 Conn. 326; Sexton v. McGill, 2 La. Ann. 190; Winston v. Prevost, 6 La. Ann. 164; Johnson v. Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Wiseman v. Northern Pac. Ry. Co., 20 Or. 425, 23 Am. St. Rep. 135, and note, 26 Pac. 272; Beirne v. Rosser, 26 Gratt. (Va.) 537; Minor v. Tillotson, 7 Pet. 99, 8 L. Ed. 621.

⁶⁶ Nash v. Williams, 20 Wall. (87 U. S.) 226, 22 L. Ed. 254.

position."⁶⁷ But if there is no ground for suspicion as to the existence of the writing or that it is designedly withheld, all that should be required is a reasonably diligent search for the original. If, on the other hand, the document is only of *transitory* interest or little value, as, for instance, an envelope, a newspaper or such private letters as are not usually preserved, very *slight evidence* may suffice, as in such case the loss would be very readily inferred. A greater degree of diligence would be expected in the search for an important paper, such as a deed or a subsisting agreement, than would be required in the effort to procure a paper of comparatively little importance, which there would be no special interest in preserving, such as a satisfied agreement, or an expired lease, or indenture of apprenticeship, or any other document the keeping or destruction of which was a matter of no moment.⁶⁸ So if no direct issue is made upon the fact, either of the existence of the document or its loss, less strictness will be required.⁶⁹ The character of the paper will also influence, greatly, the determination of the place where, or the person with whom, the search should be made.⁷⁰ If the

⁶⁷ Renner v. Bank of Columbia, 9 Wheat. 581, 6 L. Ed. 166; 1 Greenl. Ev., § 84, and note.

⁶⁸ Beall v. Dearing, 7 Ala. 124; Waller v. New Milford Eleventh School Dist., 22 Conn. 326; Crawford v. Hodge, 81 Ga. 728, 8 S. E. 208; Rhode v. McLean, 101 Ill. 467; Atchison etc. R. Co. v. Palmore, 68 Kan. 545, 64 L. R. A. 90, 75 Pac. 509; Wright v. State, 88 Md. 436, 41 Atl. 795; Slocum v. Bracy, 65 Minn. 100, 67 N. W. 843; Baker v. Squier, 3 Thomp. & C. (N. Y.) 465; Chrysler v. Renois, 43 N. Y. 209; Haywood etc. Road Co. v. Bryan, 51 N. C. 82; Johnson v. Arnwine, 42 N. J. L. 461, 36 Am. Rep. 527; American L. Ins. Co. v. Rosenagle, 77 Pa. 507; Spaulding v. Bank of Susquehanna County, 9 Pa. 28; Turner v. Moore,

1 Brev. (S. C.) 236; Williams v. Willard, 23 Vt. 369; Beirne v. Ross, 26 Gratt. (Va.) 537; Bouldin v. Massie, 7 Wheat. (U. S.) 122, 5 L. Ed. 414; Freeman v. Arkell, 2 Barn. & C. 494, 107 Eng. Reprint, 467; Brewster v. Sewell, 3 Barn. & Ald. 296, 22 Rev. Rep. 395, 5 Eng. Com. L. 177, 106 Eng. Reprint, 672; Gathercole v. Miall, 15 Mees. & W. 319, 5 L. J. Ex. 179, 10 Jur. 337.

⁶⁹ Doe v. Aiken, 31 Fed. 393; Anglo-American Packing etc. Co. v. Cannon, 31 Fed. 313; Wiseman v. Northern Pac. R. Co., 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272; Wills v. McDole, 5 N. J. L. 501.

⁷⁰ As was said by Lord Ellenborough, in The King v. Inhabitants of Morton, 4 Mees. & S. 48, 105 Eng. Reprint, 753: "The making search

document be a private paper, in which the party offering secondary evidence of its contents has a personal interest, and it be an important paper, such as, in the usual course of business, would be likely to be in his possession, or in the possession of another, for his benefit—as, for instance, articles of agreement to which he is a party—pursuit of it in every direction in which the original can be traced may reasonably be required, before secondary evidence of its contents will be received.⁷¹ If the document be one in which other persons are also interested, which has been placed in the hands of a custodian for safekeeping, the latter must be required to make search, and the fruitlessness of such search be shown, before secondary evidence can be let in.⁷² If the paper be one of importance chiefly to third persons, search among the papers of such of the parties as would have an interest in the preservation of the paper, or would, under the circumstances, be likely to have it in possession, will be sufficient.⁷³ If the paper be one of a kind that in the usual course of business would have a proper place of deposit, search in that place is all that will be required, and, in the absence of grounds of suspicion that the original has been fraudulently withheld, will justify the admission of secondary evidence, without calling persons who have had access to the paper, and possibly might have the original in their possession.⁷⁴ So

and using due diligence are terms applicable to some known or probable place or person, in respect of which diligence may be used." "If," says Chancellor Green, "the person to whom the paper belongs, or who, by law, has the custody of it, or to whom it has been intrusted by another, testifies that he has made diligent search for it, where it was likely to be found, it is sufficient evidence of its loss": *Clark v. Hornbeck*, 2 C. E. Green (17 N. J. Eq.), 430. "The first inquiry," says Blackburn, J., "is, where would the document naturally be, if it be still in existence, for there the search

should be made, and if not found, then secondary evidence will be admissible". *Reg. v. Overseers of Hinckley*, 3 Best & S. 885, 9 Jur., N. S., 1054, 32 L. J. M. C. 158, 8 L. T., N. S. 270, 9 Jur. 1054, 11 W. R. 663.

⁷¹ *Smith v. Axtell*, Saxt. (1 N. J. Eq.) 494.

⁷² 1 Whart. Ev., § 144; *Hart v. Hart*, 1 Hare, 8, 66 Eng. Reprint, 927.

⁷³ *Reg. v. Overseers of Hinckley*, 3 Best & S. 885; *Minor v. Tillotson*, 7 Pet. (U. S.) 99, 8 L. Ed. 621; *Kingwood v. Bethlehem*, 1 J. S. Green (13 N. J. L.), 221.

⁷⁴ 1 Taylor, Ev., § 401.

after the execution of a deed by the vendor, his title bond is presumed to have been given up and destroyed, and such documents as paid notes, lottery tickets and notices, when the date of the event has passed, have been held to have been of minor importance and not calling for any special exertion of search.⁷⁵ A search for documents is not necessary where, from the nature of the case, it is *evident that it would be unavailing*, as where there is positive proof that the paper had been lost.⁷⁶ The same is true if the paper had never been in the custody or control of the person wishing to give testimony of its contents.⁷⁷

§ 215a (215). **Same—Time of search.**—How long before the trial should the search for a missing document cease? No precise rule can be stated as to the *time* when the search should have been made. Applying the general rule, the search should have been made so *recently* as to satisfy the court that every reasonable effort has been made in good faith to furnish the best evidence. In an English case a search among proper papers three years before the trial was held sufficient.⁷⁸ Though Taylor cites this case as authority for the proposition that the search need not be recent nor for the purposes of the cause, he adds that it would have been more satisfactory had the papers been again examined.⁷⁹ In a Pennsylvania case it was held that a search made more than a year before the trial was not sufficient for the admission of secondary evidence.⁸⁰ This rule was adhered to in a later case in the same state where search had not been made for three years.⁸¹ For ourselves, we confess we do not understand

⁷⁵ Williams v. Mitchell, 3C Ala. 299; May v. Hill, 5 Litt. (Ky.) 307; Yoter v. Sanno, 6 Watts (Pa.), 164; Brown v. Redwyne, 16 Ga. 67; Spencer v. Conrad, 9 Rob. (La.) 78.

⁷⁶ Postal v. Palmer, 71 Iowa, 157, 32 N. W. 257; Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517. See, also, § 214, *ante*.

⁷⁷ Wells v. Miller, 37 Ill. 276.

⁷⁸ Fitz v. Rabbits, 2 Moody & R. 60.

⁷⁹ Tayl. Ev., § 435.

⁸⁰ Porter v. Wilson, 13 Pa. 641.

⁸¹ Burr v. Kase, 168 Pa. 81, 31 Atl. 954.

the reasoning which can fix either one year or three years as sufficient. In our opinion the search should be continued up to so recent a time as to preclude the possibility of the document having become available since the alleged termination of the last search. We prefer the statement of Lumpkin, P. J., in a case where the search was made in a lawyer's office three years before the trial. The learned judge said that there was no evidence that the missing document was not in existence and could not be found at the time the copy of it was sought to be introduced as secondary evidence. That an ineffectual search was made for it at a time long previous to the trial by the person in whose custody it was shown to have been when last seen did not establish the fact that he had not in the meantime found the paper or could not have produced it at the trial.⁸² There is this view, also, that the document may actually have been found in the interval. The safe and proper and logical method, in our opinion, to present the result of the search would be that the search was continued up to the time the secondary evidence is presented in lieu of it, and the evidence should be, not that the document *was* lost, and could not be found, but *is* lost and cannot be found; in other words, that as the loss and search are the foundation for the use of the secondary evidence at the time the secondary evidence is offered, so the evidence of the loss and search should comprise the efforts to find the document right up to the date of the trial.

§ 216 (216). Competency of witnesses to prove loss—Hearsay admissions—Affidavit.—At this date there hardly exists any necessity to address ourselves to this branch of the subject, as the old practice has been almost entirely swept away and replaced by provisions which enable the courts to hear all relevant testimony which may aid in the decision of the preliminary question. The rule forbidding hearsay testimony precludes the admission of the mere *declarations of third persons* who have had the custody

⁸² Lott v. Buck, 113 Ga. 640, 39 S. E. 70.

of documents.⁸³ In such cases the person should be served with a *subpoena duces tecum* or their depositions should in proper cases be taken.⁸⁴ But in England, in a few instances, such declarations seem to have been received, although clearly hearsay evidence, apparently on the theory that, as the evidence was of a preliminary fact and addressed to the court only, the ordinary rule should be relaxed.⁸⁵ The *admissions* of a party or of his attorney or agent that a document has been lost are sufficient proof of loss.⁸⁶ Before the adoption of statutes allowing parties to testify in their own behalf, it was the common practice for the court to receive the *ex parte affidavit* of the party as evidence on this question,⁸⁷ but the affidavit was not admissible as evidence of any other fact.⁸⁸ In such cases, of course, the affidavit had to show due diligence in the search and compliance with the other requirements already stated.⁸⁹ Since parties are allowed to testify in their own behalf, there would seem no good reason for admitting *ex parte* affidavits as evidence. The party should give his

⁸³ *Governor v. Barkley*, 4 Hawks (11 N. C.), 20; *Justice v. Luther*, 94 N. C. 793; *Masterson v. Jordan* (Tex. Civ. App.), 24 S. W. 549; *Rex v. Denio*, 7 Barn. & C. 620, 108 Eng. Reprint, 854; *Walker v. Beauchamp*, 6 Car. & P. 552.

⁸⁴ *Reg. v. Saffron Hill*, 22 L. J. (M. C.) 22, 1 El. & Bl. 93, 118 Eng. Reprint, 371.

⁸⁵ *Tayl. Ev.*, 10th ed., § 430; *Reg. v. Kenilworth*, 2 Ses. Cas. 72, 7 Q. B. 642, 9 Jur. 898; *Reg. v. Braintree*, 27 L. J. (M. C.) 1, 1 El. & Bl. 52, 4 Jur., N. S., 1238, 120 Eng. Reprint, 827; *Smith v. Smith*, Ir. Rep. 10 Eq. 273.

⁸⁶ *Pentecost v. State*, 107 Ala. 81, 18 South. 146; *Elliot v. Dyke*, 78 Ala. 150; *Cooper v. Maddan*, 6 Ala. 431; *Indianapolis Ry. Co. v. Jewett*, 16 Ind. 273; *Fearn v. Taylor*, 4 Bibb (Ky.), 363; *Latapie v. Gravier*,

8 Mart., O. S. (La.), 316; *Mandeville v. Reynolds*, 68 N. Y. 523; *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45; *Diehl v. Emig*, 65 Pa. 320; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. Ed. 641, 2 Sup. Ct. Rep. 313; *Rex v. Haworth*, 4 Car. & P. 254.

⁸⁷ *Ward v. Ross*, 1 Stew. (Ala.) 136; *Skinker v. Flohr*, 13 Cal. 638; *Porter v. Ferguson*, 4 Fla. 102; *Smith v. Atwood*, 14 Ga. 402; *Cleveland v. Worrell*, 13 Ind. 545; *Mitchell v. Shanley*, 12 Gray (Mass.), 206; *Beachbord v. Luce*, 22 Mo. 168; *Stevens v. Reed*, 37 N. H. 49; *Wells v. Martin*, 1 Ohio St. 386; *Wallace v. Wilcox*, 27 Tex. 60; *Patterson v. Winn*, 5 Pet. (U. S.) 233, 8 L. Ed. 108.

⁸⁸ *Mason v. Tallman*, 34 Me. 472.

⁸⁹ *Palmer v. Logan*, 4 Ill. 56; *Carter v. Vaulx*, 2 Swan (Tenn.), 639; *Mason v. Tallman*, 34 Me. 472.

evidence in open court or by deposition as upon other issues. He should be prepared with his witnesses to testify as to execution, acknowledgment⁹⁰ and attestation.⁹¹ If it is sought to establish a copy of the document, proof should be given of its having been made before the date of the loss of the original.⁹² The death of the other party to the instrument does not preclude the survivor from proving the loss.⁹³ It formed one exception to the common-law rule that parties were not competent to testify in their own behalf, that where a deed or other material written instrument of evidence was lost, its contents having been first proved, the party's own oath was received to establish, not the contents of the lost instrument, but the fact and circumstances of its loss.⁹⁴

§ 217 (217). Documents beyond the jurisdiction of the court.—The law relating to secondary evidence of documents beyond the jurisdiction of the court presents a humiliating conflict. There are about twelve states rule one way and twelve another, notwithstanding the United States supreme court has spoken with no uncertain voice upon the question. In the leading case,⁹⁵ Mr. Justice Swayne said: "In the present case the witness lived in

⁹⁰ Rowland v. Day, 17 Ala. 681.

⁹¹ Giannone v. Fleetwood, 93 Ga. 491, 21 S. E. 76; Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Felton v. Pitman, 14 Ga. 530; Jackson v. Vail, 7 Wend. (N. Y.) 125; Sherman v. Champlain Trans. Co., 31 Vt. 162.

⁹² Anderson v. Cox, 6 La. Ann. 9 (a transcript of a record containing a copy of the bond sued on certified by the clerk of the court after action brought).

⁹³ Neely v. Carter, 96 Ga. 197, 23 S. E. 313; Hogg v. Combs, 29 Ky. Law Rep. 559, 93 S. W. 670; Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812.

⁹⁴ 1 Greenl. Ev., 15th ed., § 349;

Shrowders v. Harper, 1 Harr. (Del.) 444; Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275; Delane v. Moore, 14 How. (U. S.) 253, 14 L. Ed. 409; Ellis v. Ellis, 1 Mo. 157 (220). In Gould v. Trowbridge, 32 Mo. 292, 293, the supreme court, speaking of the exceptions, said: "That a party to a suit is competent to prove the loss of a paper by way of laying the foundation for the introduction of secondary evidence of its contents, provided it was lost out of his own custody, is so well settled by the practice of the courts as to admit of no question."

⁹⁵ Burton v. Driggs, 20 Wall. (87 U. S.) 125, 22 L. Ed. 299.

another state and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.⁹⁶ This view is the same as that taken in a large number of states which admit the secondary evidence of the document beyond their jurisdiction *ipso facto*, and therefore irrespective of any efforts to produce the originals.⁹⁷ It has been held, however, in several states that the mere fact that documents are outside the state does not warrant the admission of secondary evidence. These courts hold that effort should be made in such case to ob-

⁹⁶ *Shepard v. Giddings*, 22 Conn. 282; *Brown v. Wood*, 19 Mo. 475; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376. See, also, *Boone v. Dyke's Legatees*, 3 T. B. Mon. (Ky.) 529; *Eaton v. Campbell*, 7 Pick. (Mass.) 10; *Bailey v. Johnson*, 9 Cow. (N. Y.) 115; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58.

⁹⁷ *Sellers v. Farmer*, 151 Ala. 487, 43 South. 967; *Danforth v. Tennessee etc. R. Co.*, 99 Ala. 331, 13 South. 51; *Ware v. Morgan*, 67 Ala. 461; *Memphis & C. Ry. Co. v. Hembree*, 84 Ala. 182, 4 South. 392; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Owers v. Olathe Silver Min. Co.*, 6 Colo. App. 1, 39 Pac. 980; *Elwell v. Mersick*, 50 Conn. 272; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Shirley v. Hicks*, 105 Ga. 504, 31 S. E. 105; *Thom v. Wilson*, 27 Ind. 370; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *State Bank etc. Co. v. Evans*, 198 Mass. 11, 84 N. E. 329; *Stevens v. Miles*, 142 Mass. 571, 8 N. E. 426; *Fuller v. Robinson*, 230 Mo.

22, 130 S. W. 343; *Brown v. Wood*, 19 Mo. 475; *Beattie v. Hilliard*, 55 N. H. 423; *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645; *Bronson v. Tuthill*, 1 Abb. Dec. (N. Y.) 206, 3 Keyes, 32; *Tucker v. Woolsey*, 6 Lans. (N. Y.) 482; *Washington Horse Exch. v. Wilson*, 152 N. C. 21, 67 S. E. 35; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Rhodes v. Seibert*, 2 Pa. 18; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192; *Missouri etc. Ry. Co. v. Gober* (Tex. Civ. App.), 125 S. W. 383; *First Nat. Bank v. Willis*, 82 Tex. 141, 18 S. W. 205; *Smith v. Traders' Nat. Bank*, 82 Tex. 368, 17 S. W. 779; *Johnson v. Union Pac. R. Co.*, 35 Utah, 285, 301, 100 Pac. 390; *Dwyer v. Salt Lake City Copper Mfg. Co.*, 14 Utah, 339, 47 Pac. 311; *Mattocks v. Stearns*, 9 Vt. 326; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299.

tain the best evidence.⁹⁸ The safe practice in such cases is to take the *deposition* of the person having possession of such documents. When a deposition is thus taken, as there is no mode of compelling a nonresident witness to attach the original to his deposition, a copy may be attached and thus become competent evidence.⁹⁹ In such a case secondary evidence as to the contents of the document may be given, if the witness out of the jurisdiction refuses to produce it upon proper notice being given,¹⁰⁰ and the court is made aware that effort has been made unsuccessfully to obtain the document.¹ In dealing so far with the

⁹⁸ *Townsend v. Atwater*, 5 Day (Conn.), 298; *McDonald v. Erbes*, 231 Ill. 295, 83 N. E. 162; *Waite v. High*, 96 Iowa, 742, 65 N. W. 397; *Shaw v. Mason*, 10 Kan. 184; *Lewis v. Beatty*, 8 Mart., N. S. (La.), 287; *Knowlton v. Knowlton*, 84 Me. 283, 24 Atl. 847; *Phillips v. United States Benefit Soc.*, 120 Mich. 142, 79 N. W. 1; *Wood v. Cullen*, 13 Minn. 391; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Roll v. Everett*, 73 N. J. Eq. 697, 17 Ann. Cas. 1196, 71 Atl. 263; *Kirchner v. Laughlin*, 6 N. M. 300, 28 Pac. 505; *Forrest v. Forrest*, 6 Duer (N. Y.), 102; *Justice v. Luther*, 94 N. C. 793; *Deaver v. Rice*, 2 Ired. (N. C.) 280; *Pringey v. Guss*, 16 Okl. 82, 8 Ann. Cas. 412, 86 Pac. 292; *Wiseman v. Northern Pac. R. Co.*, 20 Or. 425, 23 Am. St. Rep. 135, and note, 26 Pac. 272; *McGregor v. Montgomery*, 4 Pa. 237; *De Baril v. Pardo*, 6 Pa. Cas. 148, 8 Atl. 876; *Bunch v. Hurst*, 3 Desaus. (S. C.) 273, 5 Am. Dec. 551; *Floyd v. Mintsey*, 5 Rich. (S. C.) 361; *Read v. Chambers* (Tex. Civ. App.), 45 S. W. 742; *Missouri etc. R. Co. v. Dilworth*, 95 Tex. 327, 67 S. W. 88; *Bruger v. Princeton etc. Ins. Co.*, 129 Wis. 281, 109 N. W. 95; *Boyle v.*

Wiseman, 3 C. L. R. 482, 10 Ex. 647, 1 Jur., N. S., 115, 3 Wkly. Rep. 206, 24 L. J. Ex. 160.

⁹⁹ *Amherst Bank v. Conkey*, 4 Met. (Mass.) 459; *Danforth v. Tennessee & C. Ry. Co.*, 99 Ala. 331, 13 South. 51; *Binney v. Russell*, 109 Mass. 55; *Phillips v. United States Ben. Soc.*, 120 Mich. 142, 79 N. W. 1; *Bailey v. Johnson*, 9 Cow. (N. Y.) 115; *Kearney v. Mayor*, 92 N. Y. 617.

¹⁰⁰ *Thompson-Houston Elect. Co. v. Palmer*, 52 Minn. 174, 38 Am. St. Rep. 536, 53 N. W. 1137.

¹ *Bozeman v. Browning*, 31 Ark. 364; *Elwell v. Nersick*, 50 Conn. 272; *Jackson v. Clifford*, 5 App. Cas. (D. C.) 312; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *Erbes v. McDonald*, 134 Ill. App. 388; *Bullis v. Easton*, 96 Iowa, 513, 65 N. W. 395; *Deitz v. Regnier*, 27 Kan. 94; *State v. Sterling*, 41 La. Ann. 679, 6 South. 583; *Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 44 Am. St. Rep. 354, 38 N. E. 368; *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Carpenter*

subject, we have omitted the case of the primary evidence being in the possession or under the control of the party seeking to introduce the secondary evidence. It is plain that in such case the rule does not apply. Evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character. Proof of the papers, entries and records of a private corporation in possession of that corporation cannot be shown by an opinion or conclusion of a witness. The evidence must be primary, original evidence.² The conflict above referred to does not apply to records of foreign courts for the production of which original documents and the taking them from their own state or country there is no machinery provided by law, other than that for the general authentication of records. In such cases secondary evidence is admissible without further foundation than proof of the existence of the record, the absence of the original being sufficiently accounted for to authorize the proof without production.³ The act of Congress of 1790 only prescribes a general mode of authentication of records; it does not exclude any other evidence which the courts of a particular state may deem expedient.⁴ Other evidence, good according to established principles, independently of the act of Congress, may be admitted.⁵ As the act of Congress has no negative words,

v. Bailey, 56 N. H. 283; Forrest v. Forrest, 6 Duer (N. Y.), 102; Casey v. Williams, 51 N. C. 578; Otto v. Trump, 115 Pa. 425, 8 Atl. 786; Missouri etc. R. Co. v. Dilworth, 95 Tex. 327, 67 S. W. 88; Beirne v. Rosser, 26 Gratt. (Va.) 537; Wisconsin River Lumber Co. v. Walker, 48 Wis. 614, 4 N. W. 803; Gass v. Stinson, 10 Fed. Cas. No. 5262, 3 Sum. 98.

² Mandel v. Swan Land etc. Co., 154 Ill. 177, 45 Am. St. Rep. 124, 27 L. R. A. 313, 40 N. E. 462; King v. Scheuer, 105 Ala. 558, 16 South. 923; Alabama etc. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 South. 356; Hussey v. Roquemore, 27 Ala. 281.

³ Bozeman v. Browning, 31 Ark. 364 (bond for title); Owers v. Olathe etc. Co., 6 Colo. App. 1, 39 Pac. 980 (record of a deed); Lord v. Staples, 23 N. H. 448 (printed copy of statutes); Patten v. Park, Anth. N. P. (N. Y.) 46 (shipping articles in admiralty court); Casey v. Williams, 51 N. C. 578 (note filed with records in another state); Otto v. Trump, 115 Pa. 425, 8 Atl. 786 (copy of assignment filed in Virginia).

⁴ State v. Hinchman, 27 Pa. 479.

⁵ Kean v. Rice, 12 Serg. & R. (Pa.) 203.

even the records of a sister state may be established by any competent proof known to the common law.⁶

§ 217a (217). **Documents of which production cannot be compelled.**—We have now to consider those comparatively rare cases in which the document and the person holding it are both within the jurisdiction, and yet the party desiring production cannot obtain it notwithstanding a *subpoena duces tecum*. Secondary evidence may be given as to the contents of a document in the possession of a *stranger* or third party, if the legal remedies for its production have been exhausted and have proved unavailing. This has been illustrated in cases where attorneys refused after service of a *subpoena duces tecum* to produce documents belonging to their clients which they have the right to withhold. Some of the authorities show that a counsel having the possession of a paper which is material evidence upon the trial is bound to testify to the fact of its being in his possession, and the time and circumstances under which it came there; but he is not bound to produce it or disclose its contents, where he received it in his character of counsel or attorney;⁷ and also where a witness refuses to produce a document on the ground that it may criminate him;⁸ or when *for other reasons of privilege* the one possessing the document can properly withhold it.⁹

§ 217b (217). **Destruction of documents—Abstraction to prevent production.**—Where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its nonproduction, in such cases secondary proof ought not to be received on behalf of the de-

⁶ Baker v. Field, 2 Yeates (Pa.), 532. See, also, Snyder v. Wise, 10 Pa. 157.

⁷ People v. Benjamin, 9 How. Pr. (N. Y.) 419; Baum v. Sauer, 117 Mo. 460, 23 S. W. 147; Kemp v. King, 2 Moody & R. 437, Car. & M.

396; Reg. v. Hankins, 2 Car. & K. 823, 3 Cox C. C. 434.

⁸ State v. Gurnee, 14 Kan. 111.

⁹ Phelps v. Prew, 3 El. & Bl. 430, 118 Eng. Reprint, 1203; State v. Durham, 121 N. C. 546, 28 S. E. 22.

stroyer; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party cannot be charged with default. These are substantially the words of Mr. Justice Todd in a leading case;¹⁰ and the learned justice continued: "If a party should receive the amount of a promissory note in bills, and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof; or, if a party should destroy one paper, believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not." And therefore if a paper is *accidentally destroyed* by the party and without fault, secondary evidence may be given of its contents.¹¹ And even though the destruction of the instrument is *voluntary*, secondary evidence of its contents may be given, if the circumstances accompanying the act are consistent with an honest purpose or in the course of business or show some mistake or misapprehension.¹² But in such cases every inference of

¹⁰ *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483, 6 L. Ed. 140.

¹¹ *Bagley v. McMickle*, 9 Cal. 430; *Stoddard v. Mix*, 14 Conn. 12; *Orne v. Cook*, 31 Ill. 238; *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841 (rejected where the destruction was not *bona fide*). See note to *Gibbs v. Potter*, 9 Ann. Cas. 484; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175; *People v. Dennis*, 4 Mich. 609, 69 Am. Dec. 338; *Adams v. Guice*, 30 Miss. 397; *Holford v. James*, 136 Fed. 553, 69 C. C. A. 263; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483, 6 L. Ed. 140.

¹² *Rodgers v. Crook*, 97 Ala. 722, 12 South. 108; *Bagley v. McMickle*, 9 Cal. 430; *Breen v. Richardson*, 6 Colo. 605; *Blake v. Fash*, 44 Ill. 302; *Murphy v. Olberding*, 107 Iowa, 547,

78 N. W. 205; *Gibbs v. Potter*, 166 Ind. 471, 9 Ann. Cas. 481, 77 N. E. 942; *Rudolph v. Lane*, 57 Ind. 115; *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Wright v. State*, 88 Md. 436, 41 Atl. 795; *Joannes v. Bennett*, 5 Allen (Mass.), 169, 81 Am. Dec. 738; *Oriental Bank v. Haskins*, 3 Met. (Mass.) 332, 37 Am. Dec. 140; *Davis v. Teachout's Estate*, 126 Mich. 135, 86 Am. St. Rep. 531, 85 N. W. 475; *Broadwell v. Stiles*, 8 N. J. L. 58; *West v. New York Cent. etc. R. Co.*, 55 N. Y. App. Div. 464, 67 N. Y. Supp. 104; *Steele v. Lord*, 70 N. Y. 280, 28 Am. Rep. 602; *Pollock v. Wilcox*, 68 N. C. 46; *Coxe v. Skeen*, 25 N. C. 443; *Wallace v. Harmstad*, 44 Pa. 492; *Nelson v. National Drill Mfg. Co.*, 20 S. D. 299, 105 N. W.

fraud must be overcome.¹³ Nor will the destruction of a missing document be presumed. As a general rule, it is clear the legal presumption will be that it is lost, and not destroyed.¹⁴ It follows that where a document has been destroyed by the adverse party, or its production rendered impracticable as by taking or sending it out of the country, secondary evidence will be received of its contents. Cases are rare on the subject so applied, doubtless in consequence of the damage the party would sustain by reason of the unfavorable presumption raised against¹⁵ one suppressing or destroying evidence, but those that are recorded contain clear pronouncements of the rule which guides the courts.¹⁶

§ 218 (218). Effect of notice to produce.—The notice to produce plays a very important part in every action in which documents in the possession or control of one party are required by the opponent for the purposes of the trial. It is so well known that no time need be devoted to its historical aspect, and it is founded on a plain basis which

630; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483, 6 L. Ed. 140; *Cote v. Cantin*, 21 Quebec Super. Ct. 432.

¹³ *Bagley v. Eaton*, 10 Cal. 126; *Bagley v. McMickle*, 9 Cal. 430; *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44; *Blake v. Fash*, 44 Ill. 302; *Gibbs v. Potter*, 166 Ind. 471, 479, 9 Ann. Cas. 481, 77 N. E. 942; *Rudolph v. Lane*, 57 Ind. 115; *Murphy v. Olberding*, 107 Iowa, 547, 78 N. W. 205; *Shields v. Lewis*, 49 S. W. 803, 20 Ky. Law Rep. 1601; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Joannes v. Bennett*, 5 Allen (Mass.), 169, 81 Am. Dec. 738, and note; *Davis v. Teachout*, 126 Mich. 135, 86 Am. St. Rep. 531, 85 N. W. 475; *Schroeder v. Michel*, 98 Mo. 43, 11 S. W. 314; *Jones v. Knaus*, 31 N. J. Eq. 609; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Steele v. Lord*, 70 N. Y. 280, 26 Am. Rep. 602; *Dearing v.*

Pearson, 8 Misc. Rep. 269, 28 N. Y. Supp. 715; *Nelson v. National Drill Mfg. Co.*, 20 S. D. 299, 105 N. W. 630; *Blaha v. Borgman*, 142 Wis. 43, 124 N. W. 1047; *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483, 6 L. Ed. 140; *St. Louis v. Reg.*, 25 Can. S. Ct. 649.

¹⁴ *Foster v. Mackay*, 7 Met. (Mass.) 531; *Clark v. Hornbeck*, 17 N. J. Eq. 430.

¹⁵ See § 17 et seq., *ante*.

¹⁶ *Suburban etc. Co. v. Balkwill*, 94 Ill. App. 454; *McNutt v. McNutt*, 116 Ind. 545, 2 L. R. A. 372, 19 N. E. 115; *Selman v. Cobb*, 4 Iowa, 534; *Lucas v. Brooks*, 23 La. Ann. 117; *Scott v. Pentz*, 5 Sand. (N. Y.) 573 (where the party had violently torn away portion of the document and its place was permitted to be filled by secondary evidence); *Kelly v. Cargill Elevator Co.*, 7 N. D. 343, 75 N. W. 264; *Cheatham v. Riddle*, 8 Tex. 162.

is a permanent satellite to the best evidence rule. The party practically requires his opponent to produce certain documents at the trial and warns him that if he does not so produce them, an application to admit secondary evidence of them will be made, the result of which, if granted, will be that the party so required to produce them will not be allowed to use such originals thereafter in that trial (or that if such originals are subsequently produced, the admission of the secondary evidence will not be thereby prejudiced), or to object to the unsatisfactory nature of the secondary evidence.¹⁷ It will at once be seen how many important circumstances cluster round this notice to produce, such as the giving and failure to give it, the proof of its having been given *bona fide*, that is, among other things, in good and sufficient time to allow for obtaining the documents, the person to whom given and the necessary proof of these facts. Seeing that the best evidence attainable is always to be produced, it is one of the well-recognized excuses for the nonproduction of primary evidence that the document is in the possession or power of the adversary, and that he has not produced it after due notice to do so. On proper proof of the preliminary steps the secondary evidence becomes admissible.¹⁸ It is very

¹⁷ *Mims v. Sturtevant*, 18 Ala. 359; *Phenix Ins. Co. v. Jacobs*, 23 Ind. App. 509, 55 N. E. 778; *Benjamin v. Ellinger*, 80 Ky. 472; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Nealley v. Greenough*, 25 N. H. 325; *Life etc. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. (N. Y.) 31; *Gulf etc. R. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119.

¹⁸ *St. Louis etc. R. Co. v. Sutton*, 169 Ala. 389, Ann. Cas. 1912B, 366, 55 South. 989; *Loeb v. Huddleston*, 105 Ala. 257, 16 South. 714; *Cross v. Johnson*, 30 Ark. 396; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; *Grimes v. Fall*, 15 Cal. 63; *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428;

Mahan v. State, 1 Ga. App. 534, 58 S. E. 265; *Hines v. Johnston*, 95 Ga. 629, 23 S. E. 470; *Rudgear v. U. S. Leather Co.*, 206 Ill. 74, 69 N. E. 30; *People v. Plopper*, 158 Ill. App. 250; *Strickland v. State*, 171 Ind. 642, 87 N. E. 12; *Barklay v. Mahon*, 95 Ind. 101; *Missouri etc. R. Co. v. Elliott*, 2 Ind. Ter. 407, 51 S. W. 1067; *State v. Chase*, 89 Iowa, 38, 56 N. W. 275; *Cooley v. Gilliam*, 80 Kan. 278, 102 Pac. 1091; *Benjamin v. Ellinger*, 80 Ky. 472; *Merritt v. Wright*, 19 La. Ann. 91; *Lowell v. Flint*, 20 Me. 401; *Dick v. Biddle Bros.*, 105 Md. 308, 66 Atl. 21; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Boglarsky v. Singer Mfg.*

clear that the mere fact that the document is in the hands of the opposite party does not warrant the admission of copies or of other secondary evidence. It must also be shown that the one offering the secondary evidence has done all in his power to secure the best evidence by giving the adversary *notice to produce* the document desired.¹⁹ Thus in an action against the selectmen of a town for refusing the vote of an inhabitant, parol evidence that the plaintiff's name was on the *voting list* was refused, there being no notice to produce the list.²⁰ An extract of a *lost letter* could not be given in evidence without calling upon the writer of the letter to produce his letter book.²¹ The rule has been applied generally in the case of *letters*,²²

Co., 65 Mich. 510, 32 N. W. 880; First Nat. Bank v. St. Anthony & D. Elevator Co., 103 Minn. 82, 114 N. W. 265; Hobe v. Swift, 58 Minn. 84, 59 N. W. 831; Cooper v. Granberry, 33 Miss. 117; State v. Poundstone, 140 Mo. App. 399, 124 S. W. 79; Sisk v. American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Sullivan v. Girson, 39 Mont. 274, 102 Pac. 320; Sheridan Coal Co. v. Hull Co., 87 Neb. 117, 138 Am. St. Rep. 435, 127 N. W. 218; Downer v. Button, 26 N. H. 338; Truax v. Truax, 2 N. J. L. 166 (153); March v. Wylcoff, 111 N. Y. Supp. 669; Sessibns v. Palmetter, 75 Hun, 268, 26 N. Y. Supp. 1076; Beard v. Southern R. Co., 143 N. C. 136, 55 S. E. 505; Robards v. McLean, 30 N. C. 522; John v. John, Wright (Ohio) 584; Sugar Pine Door & Lumber Co. v. Garrett, 28 Or. 168, 42 Pac. 129; Strawbridge v. Clamond Tel. Co., 195 Pa. 118, 45 Atl. 677; Richards v. Richards, 37 Pa. 225; Pub. Co. v. Agency, 44 Pa. Sup. Ct. 428; McMeekin v. Southern Ry. Co., 82 S. C. 468, 64 S. E. 413; Rose v. Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Stephens v. Faus, 20 S. D. 367, 106 N. W. 56; Fosmark v. Equitable F. Assn.,

23 S. D. 102, 120 N. W. 777; Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630; Brown v. State, 62 Tex. Cr. App. 592, 138 S. W. 604; Behee v. Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449; McCollum v. Southern Pac. Co., 31 Utah, 494, 88 Pac. 663; Orr v. Clark, 62 Vt. 136, 19 Atl. 929; Maxwell v. Light, 1 Call (Va.), 117; Keenan v. Lauritzen Malt Co., 57 Wash. 367, 106 Pac. 1122; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; Loverin etc. Co. v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Speiser v. Phoenix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207; Dunbar v. United States, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325; Sturge v. Buchanan, 10 Ad. & E. 598, 8 L. J. Q. B. 272, 2 Moody & R. 90, 2 P. & D. 573, 37 Eng. Com. L. 321, 113 Eng. Reprint, 228; Hayball v. Shephard, 25 U. C. Q. B. 536.

¹⁹ Harris v. Whitcomb, 4 Gray (Mass.), 433.

²⁰ Harris v. Whitcomb, 4 Gray (Mass.), 433.

²¹ Dennis v. Barber, 6 Serg. & R. (Pa.) 420.

²² Home Protection v. Whidden, 103 Ala. 203, 15 South. 567; Oberman Brewing Co. v. Adams, 35 Ill.

*telegrams,*²³ *contracts,*²⁴ *powers of attorney,*²⁵ *receipts,*²⁶ *wills,*²⁷ *demands,*²⁸ *proofs of loss of insurance,*²⁹ *corporate records,*³⁰ *deeds and other instruments,*³¹ *and sheriff's returns.*³² Although it is necessary to show that the document in question is in the custody or under the *control of the party* who is called on to produce it, very *slight evidence* of this fact will suffice if it appears that the document belongs to him, or in the usual course of business ought to be under his control,³³ or if the document was last seen in his possession.³⁴ Presumptively the document is in the possession of the one to whom it belongs.³⁵ The proper custodian of a canceled mortgage is the mortgagor;

App. 540; Burlington Co. v. Whitebreast Coal Co., 66 Iowa, 292, 23 N. W. 674; McDowell v. Aetna Ins. Co., 164 Mass. 444, 41 N. E. 665; Augur Steel Axle etc. Co. v. Whittier, 117 Mass. 451; Mortlock v. Williams, 76 Mich. 568, 43 N. W. 592; Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 369; Foster v. Newbrough, 58 N. Y. 481; Sugar Pine Lumber Co. v. Garrett, 28 Or. 168, 42 Pac. 129; Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201; Dunbar v. United States, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325.

²³ Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Western Union Tel. Co. v. Kapp, 35 Tex. Civ. App. 663, 80 S. W. 840.

²⁴ Dupey v. Ashby, 2 A. K. Marsh. (Ky.) 11; Roberts v. Dixon, 50 Kan. 436; 31 Pac. 1083.

²⁵ Rusk v. Sowerwine, 3 Har. & J. (Md.) 97.

²⁶ Ledbetter v. Morris, 1 Jones (46 N. C.), 545.

²⁷ Murchison v. McLeod, 2 Jones (47 N. C.), 239; Keagle v. Pessell, 91 Mich. 618, 52 N. W. 58.

²⁸ Muller v. Hoyt, 14 Tex. 49.

²⁹ Hanover Ins. Co. v. Lewis, 23 Fla. 193, 1 South. 863.

³⁰ Narragansett Bank v. Atlantic

Silk Co., 3 Met. (Mass.) 282; Madison etc. R. Co. v. Whitesel, 11 Ind. 55.

³¹ Gist v. McJunkin, 2 Rich. (S. C.) 154; Newton v. Davis, 20 Tex. 419; Commonwealth v. Emery, 2 Gray (Mass.), 80; Downer v. Button, 26 N. H. 338.

³² Sias v. Badger, 6 N. H. 393.

³³ Blevins v. Pope, 7 Ala. 371; Hills v. Jacobs, 7 Rob. (La.) 406; Thomas v. Harding, 8 Me. 417; Pope v. Mooney, 40 Mo. 104; Jackson v. Shearman, 6 Johns. (N. Y.) 19; McKellip v. McIlhenny, 4 Watts (Pa.), 317, 28 Am. Dec. 711; Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253; Rose v. Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Newsom v. Davis, 20 Tex. 419; Missouri etc. R. Co. v. Elliott, 102 Fed. 96, 42 C. C. A. 188; Sinclair v. Stephenson, 2 Bing. 514, 9 Eng. Com. L. 684, 1 Car. & P. 582, 12 Eng. Com. L. 231, 10 Moore C. P. 46; Henry v. Leigh, 3 Camp. 502; Robb v. Starkey, 2 Car. & K. 143; Greenl. Ev., § 560, and note.

³⁴ Rex v. Thistlewood, 33 How. St. Tr. 757; Harvey v. Mitchell, 2 Moody & R. 366; Smith v. Sleaf, 1 Car. & K. 48.

³⁵ Rex v. Stoke Golding, 1 Barn. & Ald. 173, 106 Eng. Reprint, 64.

and of an outstanding uncanceled mortgage is the mortgagee. Where it appears that due notice has been served on the mortgagee to produce the original mortgage, and that the mortgagor resides beyond the jurisdiction of the court, a sufficient foundation is laid to admit as secondary evidence a properly certified copy of the mortgage.³⁶ So, the grantee is presumed to have the custody of his deed,³⁷ but not necessarily of prior title deeds.³⁸ It is sufficient to give one of two executors notice to produce documents of the estate, or to give notice to a sole executor to produce documents sent to the deceased testator.³⁹ On the presumption of regularity it is sufficient evidence of possession if the letter or document has been sent to the opponent by *due course of mail*.⁴⁰ The document is *presumed to continue* in the possession of a party after notice to produce, unless he apprises the opposite party of the change of possession so that proper steps may be taken for the production.⁴¹

§ 219 (219, 220). Object of notice to produce—Time of giving.—The object of giving notice to produce documents may be fairly gathered from the preceding section, and that it is what its name implies, an admonition to produce at the trial the documents it refers to, with the implied alternative of secondary evidence being admissible on default, and of such presumptions being raised as will necessarily attach to the withholding of them. The notice is, however, an absolute necessity, for a party is generally under no obligation to produce a paper needed by the adversary, unless

³⁶ *Sims v. Schenssler*, 2 Ga. App. 466, 58 S. E. 693.

³⁷ *Lord Buckhurst's Case*, 1 Coke Rep. 1; *Cooke v. Hunter*, 2 Overt. (Tenn.) 113, Fed. Cas. No. 3161; *Nicholson v. Hilliard*, 6 N. C. 270; *Jackson v. Woolsey*, 11 Johns. (N. Y.) 446; *Florence Co. v. Warren*, 91 Ala. 553, 9 South. 384.

³⁸ See authorities last cited.

³⁹ *Kennedy v. Geddes*, 3 Ala. 581,

³⁷ *Am. Dec.* 714; *Fralick v. Presley*, 29 Ala. 457, 65 *Am. Dec.* 413.

⁴⁰ *Shields v. Lewis*, 20 Ky. Law Rep. 1601, 49 S. W. 803; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395, 4 Sup. Ct. Rep. 382; *Augar S. V. & G. Co. v. Whittier*, 117 Mass. 451; *Sugar Pine D. & L. Co. v. Garrett*, 28 Or. 168, 42 Pac. 129.

⁴¹ *Jackson v. Shearman*, 6 Johns. (N. Y.) 19.

full notice has been given to produce the same for use at the trial.⁴² Some of the English authorities for a time maintained that the object of the notice to produce was not only to enable the adverse party to have the document in court, but to enable him to prepare evidence to explain, weaken or confirm it.⁴³ But the rule now obtains in England that the sole *object of the notice is to obtain the document for use as evidence*, and in case of its nonproduction to *admit secondary evidence*.⁴⁴ The notice is necessary "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence."⁴⁵ It was accordingly held in the case which settled this rule that where the party or his attorney had the *document in court*, it might be called for without previous notice, and that, if not produced, secondary evidence might be given.⁴⁶ The same rule prevails in this country, and if the document is proved to be in court,⁴⁷ or easy of access, *notice given at the trial is sufficient*.⁴⁸

⁴² Waring v. Warren, 1 Johns. (N. Y.) 340.

⁴³ Cook v. Hearn, 1 Moody & R. 201; Roe v. Harvey, 4 Burr. 2482.

⁴⁴ Dwyer v. Collins, 7 Ex. 639.

⁴⁵ Dwyer v. Collins, 7 Ex. 639.

⁴⁶ Dwyer v. Collins, 7 Ex. 639.

⁴⁷ Brown v. Isbell, 11 Ala. 1009; Burke v. Table Mountain Water Co., 12 Cal. 403, 5 Morr. Min. Rep. 209; Dana v. Boyd, 2 J. J. Marsh. (Ky.) 587; Overlock v. Hall, 81 Me. 348, 17 Atl. 169; Hauselman v. Doyle, 90 Mich. 142, 51 N. W. 195; McGregor v. Wait, 10 Gray (Mass.), 72, 69 Am. Dec. 305; Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Downer v. Button, 26 N. H. 338; Board of Justices v. Fennimore, 1 N. J. L. 242; Whelan v. Gorton, 15 Misc. Rep. 625, 37 N. Y. Supp. 344; McPherson v. Rathbone, 7 Wend. (N. Y.) 216; Choteau v. Raitt, 20 Ohio, 132; Hampton v. Ray, 52 S. C. 74, 29 S. E. 537;

Reynolds v. Quattlebum, 2 Rich. (S. C.) 140; Chadwick v. United States, 3 Fed. 750; Dwyer v. Collins, 7 Ex. 639, 16 Jur. 569, 21 L. J. Ex. 225, 12 Eng. L. & Eq. 352.

⁴⁸ Atwell v. Miller, 6 Md. 10, 61 Am. Dec. 294; Board of Justices v. Fennimore, 1 N. J. L. 242; Hammond v. Hopping, 13 Wend. (N. Y.) 505; Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661; Buckner v. Morris, 2 J. J. Marsh. (Ky.) 121. But not if the document is in another state: Dade v. Aetna Ins. Co., 54 Minn. 336, 56 N. W. 48; Bates v. Ridgeway, 48 Ala. 611, 614. The only case which appears to have followed the early English rule and which need not now be regarded is Milliken v. Barr, 7 Pa. 23, the court saying that the object of the notice was *inter alia* "to give the party an opportunity to provide the proper testimony to support or impeach it."

That the document is in court may be inferred from the conduct of the party or his attorney, and the courts have presumed that documents connected with the subject matter of the suit are in court or so easy of production that notice given at the trial was sufficient,⁴⁹ and the attorney or party may be compelled to state whether he has the document in court.⁵⁰ That the document is, as we have said, in court may sometimes be presumed from its nature and its connection with the case, but of course this presumption may be rebutted by the oath of the attorney or party.⁵¹ It is impossible to lay down any precise rule as to the requisite *length of time* of notice in those cases where notice to produce is necessary. It is a subject which rests very largely in the sound discretion of the court;⁵² and in the exercise of such discretion, the court should determine whether, under all the circumstances of the case, the notice has been reasonable and such as could have been complied with.⁵³ In an old, but serviceable, case, the court sum-

⁴⁹ *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778; *Ross v. Bruce*, 1 Day (Conn.), 100; *Jack v. Rowland*, 98 Ill. App. 352; *Cummings v. McKinney*, 5 Ill. 57; *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Welch v. New York etc. R. Co.*, 176 Mass. 393, 57 N. E. 668; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50; *Dade v. Aetna Ins. Co.*, 54 Minn. 336, 56 N. W. 48; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Beard v. Southern R. Co.*, 143 N. C. 136, 55 S. E. 505; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Continental Fire Assn. v. Bearden*, 29 Tex. Civ. App. 569, 69 S. W. 982; *Barker v. Barker*, 14 Wis. 131; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *The Osceola*, 18 Fed. Cas. No. 10,602, *Olcott*, 450.

⁵⁰ *Brandt v. Klein*, 17 Johns. (N. Y.) 335.

⁵¹ *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

⁵² *Bourne v. Buffington*, 125 Mass. 481; *Cummings v. McKinney*, 5 Ill. 57; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728. The sufficiency of notice to produce a paper shown to be in the possession of a party is a question of discretion, and if it were impossible to procure it between the time of giving notice and the trial, that fact should be made to appear: *Burke v. Table Mt. Water Co.*, 12 Cal. 403, 5 Morr. Min. Rep. 209; *Cody v. Hough*, 20 Ill. 43; *Julius King Optical Co. v. Treat*, 72 Mich. 599, 40 N. W. 912.

⁵³ *Jefford v. Ringgold*, 6 Ala. 544; *Hemphill v. Townsend*, 7 Ala. 853; *Burke v. Table Mountain Water Co.*, 12 Cal. 403, 5 Morr. Min. Rep. 209. See *Town of Adel v. Woodall*, 122 Ga. 535, 50 S. E. 481; *Jack v. Rowland*, 98 Ill. App. 352; *Warner v. Campbell*,

marized the law as follows:⁵⁴ "The party is to have reasonable notice, according to the circumstances of each particular case. Where the paper is in court, or so near the place where the court is sitting, that it can be obtained without delaying the trial, and without material inconvenience to the party, a notice given after the trial is commenced is sufficient; and where, from the nature of the instrument, or from its connection with the cause, it may fairly be presumed to be in the possession of the party or his counsel in court, he ought affirmatively to deny the fact, or the notice should be held good. Neither a party nor his attorney is bound to leave the court and go for papers or books at a distance,⁵⁵ and the sufficiency of the notice must be, to a considerable extent, a matter of discretion with the judge, depending upon the particular circumstances of each case."

§ 219a (219, 220). **Same—Illustrations.**—The notice has been held sufficient where it was given the *evening before* the *trial* where the residence of the party was near the place of trial;⁵⁶ or *several days* before the trial, though the plaintiff resided out of the state;⁵⁷ or after the term

26 Ill. 282; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Divers v. Fulton*, 8 Gill & J. (Md.) 202; *Glenn v. Rogers*, 3 Md. 312; *Muir v. Kalamazoo Corset Co.*, 155 Mich. 624, 119 N. W. 1079; *Pitt v. Emmons*, 92 Mich. 542, 52 N. W. 1004; *State v. Sherman*, 137 Mo. App. 70, 119 S. W. 479; *State v. Madeira*, 125 Mo. App. 508, 102 S. W. 1046; *Linn v. New York L. Ins. Co.*, 78 Mo. App. 192; *State v. Tucker* (Mo. App.), 137 S. W. 870; *Park v. Viernow*, 16 Mo. App. 383; *Downer v. Button*, 26 N. H. 338; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Sugar Pine Lumber Co. v.*

Garrett, 28 Or. 168, 42 Pac. 129; *Worth v. Norton*, 60 S. C. 293, 38 S. E. 605; *Ellis v. Sharp* (Tex. Civ. App.), 47 S. W. 670; *Burton v. Seifert*, 108 Va. 338, 61 S. E. 933; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *United States v. Duff*, 6 Fed. 45, 19 Blatchf. 9; *Shreve v. Dulany*, 22 Fed. Cas. No. 12,817, 1 Cranch C. C. 499; *Sullivan v. King*, 24 U. C. Q. B. 161.

⁵⁴ *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

⁵⁵ *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296.

⁵⁶ *Shreve v. Dulany*, 1 Cranch C. C. 499, Fed. Cas. No. 12,817.

⁵⁷ *Jefford v. Ringgold*, 6 Ala. 544. See, also, *Mortlock v. Williams*, 76 Mich. 568, 43 N. W. 592.

commenced, but *four days* previous to the trial where the residence of the party served was twelve miles away;⁵⁸ although the cause was partly tried, it appearing that there was still time for the production of the document;⁵⁹ or after the *trial* has been *commenced*, where the document is easy of access;⁶⁰ where there had been a verbal notice to produce at the hearing before the referee, and where the materiality of the document was clear and each party was presumed to have present the papers bearing on the case;⁶¹ *two days* upon a solicitor, although his client had gone abroad;⁶² or a short notice for the production of letters where from long litigation it might be presumed the letters had been returned;⁶³ *nine days* where the paper was one hundred and eighty miles away.⁶⁴ Notice has been held *insufficient* where it was given *one day* before trial, the paper called for being in possession of a person eighty miles away;⁶⁵ and generally if given *during* the *progress of the trial*.⁶⁶ The general rule is that notice should be served in time to give *reasonable opportunity to produce* the paper.⁶⁷

§ 220 (221). **Efficacy and requisites of notice.**—Once a sufficient notice to produce has been served it inures through all the proceedings, and therefore the notice to produce need not be repeated at each succeeding term if

⁵⁸ *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

⁵⁹ *Sturm v. Jeffree*, 2 Car. & K. 442.

⁶⁰ *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296.

⁶¹ *Kerr v. McGuire*, 28 N. Y. 446.

⁶² *Bryan v. Wagstaff, Ryan & M.* 327, 2 Car. & P. 125, 8 D. & R. 208, 5 Barn. & C. 314, 108 Eng. Reprint, 117.

⁶³ *Sturge v. Buchanan*, 10 Adol. & El. 598, 113 Eng. Reprint, 228.

⁶⁴ *Jackson v. Marsh*, 1 Caines (N. Y.), 153.

⁶⁵ *Cody v. Hough*, 20 Ill. 43.

⁶⁶ *Chateau v. Raitt*, 20 Ohio, 132.

⁶⁷ *Bushnell v. Bishop Hill Colony*, 28 Ill. 204; *Pitt v. Emmons*, 92 Mich. 542, 52 N. W. 1004; *Mortlock v. Williams*, 76 Mich. 568, 43 N. W. 592; *Julius King Optical Co. v. Treat*, 72 Mich. 599, 40 N. W. 912; *De Witt v. Prescott*, 51 Mich. 298, 16 N. W. 656; *McDonald v. Carson*, 95 N. C. 377; *Atkinson v. Carter*, 2 Chit. 403; *Bevan v. Waters*, 1 Moody & M. 235, 3 Car. & P. 520; *Sims v. Kitchen*, 5 Esp. 46; *Houseman v. Roberts*, 5 Car. & P. 394; *Lawrence v. Clark*, 14 Mees. & W. 250, 3 D. & L. 87, 15 L. J. Ex. 40; *Byrnes v. Harvey*, 2 Moody & R. 89. See, also, cases cited to § 219.

there are several trials. In such case, or if the trial is postponed several times, *a single notice is sufficient*.⁶⁸ Two cases with a century between them are almost identical in their confirmation of this rule.⁶⁹ And a notice to produce at the trial given in a justice's court is operative in the superior court on appeal.⁷⁰ But it has been held not on a new trial;⁷¹ and, of course, not in a new action though the parties are the same and the cause of action identical.⁷² A notice to a party to produce a paper in his possession is sufficient to authorize the admission of parol evidence, if the notice is so framed that there can be no reasonable doubt as to what papers are meant.⁷³ *Mistakes* which do not actually tend to mislead do not vitiate the notice; for example, when an alleged copy of an instrument attached

⁶⁸ American Ins. Co. v. Bailey, 6 Ga. App. 424, 65 S. E. 160; State v. Kimbrough, 2 Dev. L. (13 N. C.) 431; Jackson v. Shearman, 6 Johns. (N. Y.) 19; Patton v. Goldsborough, 9 Serg. & R. (Pa.) 47; Rawson v. Knight, 73 Me. 340; Battaglia v. Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

⁶⁹ In Jackson v. Shearman, 6 Johns. (N. Y.) 19, the court said: "Notice was given to him, previous to that circuit, to produce it *upon the trial*. The cause was not tried until the circuit in 1809, but the effect of the notice was not spent. It applied to the trial, without reference to the time. It does not appear that the cause was noticed for trial in 1808; and if it had so appeared, it would not have destroyed the effect of the notice, in reference to a subsequent circuit, unless it had appeared that the notice was special, and confined to that particular circuit." In Rollins v. Schawacker, 153 Mo. App. 284, 133 S. W. 409, Caulfield, J., said: "The record discloses that the cause had been originally set down for trial on

May 22, 1907, and plaintiff had given defendant notice to produce the receipt on that day or at such time as the case might be tried. The cause was continued from term to term until February 8, 1909, on which day it was tried. Defendant contends that the notice should have been renewed for the time when the trial was actually had. The cases, such as have been called to our attention, seem to hold contrary to defendant's contention: Gilmore v. Wale, Anth. N. P. (N. Y.) 87; Wilson v. Gale, 4 Wend. (N. Y.) 623; Jackson v. Shearman, 6 Johns. (N. Y.) 19."

⁷⁰ Wilson v. Gale, 4 Wend. (N. Y.) 623; Reab v. Moore, 19 Johns. (N. Y.) 337.

⁷¹ Ellison v. Cruser, 40 N. J. L. 444; although Wooten v. Nall, 18 Ga. 609, is a contrary decision, but is badly founded on an almost obsolete rule.

⁷² Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46.

⁷³ Bemis v. Charles, 1 Met. (Mass.) 440; Walden v. Davidson, 11 Wend. 65, 25 Am. Dec. 602.

to the notice to produce was inaccurate,⁷⁴ and where the notice was entitled in the wrong court, it was held sufficient.⁷⁵ In several English cases it has been held not necessary to specify the exact documents required, but that it is sufficient if the notice is so framed that the party served may reasonably believe that a certain document is required. Thus general notices calling for *all letters* written to the party relating to the matters in dispute or for letters received by the plaintiff from the defendant within certain specified dates have been held sufficient.⁷⁶ It would be difficult to name any arbitrary period over which the request for documents should run, and a notice to produce all letters and papers covering a period of five years where the papers were not indicated either by date or subject or reference to any particular transaction was properly held "altogether too vague." The court, in the case referred to,⁷⁷ said: "A party who is prepared with secondary evidence knows what he wishes to prove. To compel a business man to rummage his files for several years without any indication of what is wanted is unreasonable. The notice should always be such as to reasonably enable the party notified to understand what is wanted. Without such knowledge, he cannot prepare to meet or explain the facts sought to be shown by the documents. There is no authority for making a drag-net out of such a notice." A notice in general terms to produce all papers in the possession or under the control of a party relating to a particular cause or controversy, would in general be held insufficient.⁷⁸ In an early case notice to produce "all letters, papers and documents touching or concerning the bill of

⁷⁴ Bogart v. Brown, 5 Pick. (Mass.) 18; Justice v. Elstob, 1 Fost. & F. 256.

⁷⁵ Lawrence v. Clark, 14 Mees. & W. 250, 3 D. & L. 87, 15 L. J. Ex. 40.

⁷⁶ McDowell v. Royal Ins. Co., 164 Mass. 444, 41 N. E. 665; Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630; Jones v. Parker, 20 N. H. 31; Gourdin v. Staggers, 12

Rich. (S. C.) 307; Rogers v. Custance, 2 Moody & R. 179; Jacob v. Lee, 2 Moody & R. 33; Conybeare v. Farries, L. R. 5 Ex. 16; Morris v. Hauser, 2 Moody & R. 392.

⁷⁷ Arnstine v. Treat, 71 Mich. 561, 39 N. W. 749.

⁷⁸ Walden v. Davison, 11 Wend. (N. Y.) 65, 25 Am. Dec. 602.

exchange" sued on was held too general.⁷⁹ In England, prior to the adoption of rules of court requiring the notice to be in writing, it might be either written or parol.⁸⁰ In this country, however, the written notice is the rule, and it would be very unsafe to rely on a verbal notice, however timely and explicit. It is true there is an old New York case holding that verbal notice in court during the progress of the case is sufficient. The court said: "The general rule of practice requiring a written notice to produce papers has reference to the preliminary preparations for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress, from day to day, and the materiality and pertinency of the document is apparent, and each party is, at least, presumed to have present all papers bearing on the case."⁸¹ While there is much reason in upholding the verbal notice during the progress of the trial, there are many good reasons for reducing the notice to writing where the documents wanted are not in court, and subsequent questions on the admissibility of the secondary evidence will be the more readily answered by reference to the terms of the written notice. An apt illustration of the danger attending verbal notice during a trial occurred in Massachusetts. According to the syllabus of the case, "At the beginning of a trial, the defendant's counsel verbally requested the plaintiff's counsel to produce a bill of sale to the plaintiff, without mentioning its date, and he answered that the plaintiff did not have it in his possession. The presiding judge was of opinion that seasonable notice to produce the original bill of sale had not been given, and excluded secondary evidence thereof. Held, that the defendant had no ground of exception."⁸² Where a demand

⁷⁹ *France v. Lucy*, Ryan & M. 341; *Jones v. Edwards*, 1 McClel. & Y. 139. See, also, *Parish v. Weed Machine Co.*, 79 Ga. 682, 7 S. E. 138, where an adjournment was allowed because the notice was too vague.

⁸⁰ *Smith v. Young*, 1 Camp. 439.

⁸¹ *Kerr v. McGuire*, 28 N. Y. 446.

⁸² *Bourne v. Buffington*, 125 Mass. 481. The danger of verbal notice or demand in criminal cases is well marked in the recent case of *Gillespie v. State*, 5 Okl. Cr. 546, Ann. Cas. 1912D, 259, 35 L. R. A., N. S., 1171,

for a document was made of a witness on the stand, the witness not being one of the parties to the action, it was held to be not such a demand as to put either party in default, even though the right to the document were undoubted.⁸³ The description of the document of which production is sought should be sufficiently—without having to be literally—accurate to enable the holder to identify it, such a description as would apprise a man of ordinary intelligence of the document desired;⁸⁴ and the giver of the notice is limited in his application to let in secondary evidence to such documents named or identifiable in his notice. For instance, where the notice called for production of letters received in answer to letters written on plaintiff's behalf *by* one P. and no such letters were produced, the party giving the notice was not allowed to give secondary evidence of letters written *to* P.⁸⁵ But if the document produced is not the one named in the notice, secondary evidence of the one of which production is sought is admissible, the facts appearing to the court.⁸⁶ And the court, practically, finally deals with the sufficiency or otherwise of the notice and its contents as a preliminary to the ad-

115 Pac. 620, where it was held that to permit such a demand for a document incriminating the accused in a criminal case in open court was a violation of the immunity secured to him by the constitution. See note to Gillespie v. State, 35 L. R. A., N. S., 1171.

⁸³ Hull v. Seattle Ry. Co., 60 Wash. 162, 110 Pac. 804.

⁸⁴ Burke v. Table Mt. Water Co., 12 Cal. 403, 5 Morr. Min. Rep. 209; McDowell v. Aetna Ins. Co., 164 Mass. 444, 41 N. E. 665; Jones v. Parker, 20 N. H. 31; Dole v. Belden, 49 Hun, 607, 1 N. Y. Supp. 667; Beaty v. Southern Ry. Co., 80 S. C. 527, 61 S. E. 1006; Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 N. W. 630; Vasse v. Mifflin, Fed. Cas. No. 16,895, 4 Wash. C. C. 519; United States v. Duff, 6 Fed. 45, 19 Blatchf.

9. In the case last mentioned the document described as being within an envelope, and the notice was held to include the envelope, although production of it was not directly sought.

⁸⁵ Mobile L. Ins. Co. v. Egger, 67 Ala. 134; Moore v. Leonard, 52 N. Y. Super. Ct. (20 Jones & S.) 8. In this case the notice was to produce a certain account-book containing certain entries of money paid by A to B. Such a book was produced and it was alleged that it was not the book the party saw when he was in the office of the owner of the book in question. The contents of the unproduced book were rightly excluded as the notice to produce had been complied with.

⁸⁶ Barnett v. Wilson, 132 Ala. 375, 31 South. 521.

mission of the secondary evidence. In dealing with the objection of short notice to produce documents it has been said: "Whether this was sufficient notice was a matter submitted to the reasonable discretion of the court in view of and what then appeared before it as to the situation of the parties and the place where the originals of said correspondence were."⁸⁷ Whether a sufficient foundation has been laid for the introduction of parol evidence of the existence and contents of a written document rests in the sound discretion of the trial court, and its decision permitting such evidence is reviewable on appeal only in case of an abuse of discretion.⁸⁸

§ 221 (222). Notice to produce—On whom served.—A party to an action having, to the best of his belief, located documents which would be material to his cause in the possession or control of his opponent, must call upon him by notice to produce the documents on the trial of the cause. Having prepared his notice, he must bring it to the knowledge of his opponent by service. In most states the procedure is regulated by statute. The notice to produce may be directed to and served on the party or on his attorney. If there is any doubt as to real party and nominal party or their respective attorneys, then service on all is the safe course.⁸⁹ Notice on the attorney has been held good, although he was only the attorney for the nominal plain-

⁸⁷ *Price v. Kohn*, 99 Ill. App. 115.

⁸⁸ *State v. Salverson*, 87 Minn. 40, 91 N. W. 1. In *Bourne v. Buffington*, *supra*, it is described as a question of fact for the decision of the presiding judge.

⁸⁹ *Simington v. Kent*, 8 Ala. 691; *Sims v. Scheussler*, 2 Ga. App. 466, 58 S. E. 693; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *Lagow v. Patterson*, 1 Blackf. (Ind.) 327; *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 326; *Den v. M'Allister*, 7 N.

J. L. 46; *Sessions v. Palmetter*, 75 Hun (N. Y.), 268, 26 N. Y. Supp. 1076; *Brown v. Littlefield*, 7 Wend. (N. Y.) 454; *Rheinstein Dry Goods Co. v. McDougall*, 149 N. C. 252, 62 S. E. 1085; *Thomas v. Hodgson*, 4 Whart. (Pa.) 492; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 53 S. W. 805; *Boyd v. Leith* (Tex. Civ. App.), 50 S. W. 618; *Rogers v. Custance*, 2 Moody & R. 179; *Cates v. Winter*, 3 Term Rep. 306, 100 Eng. Reprint, 590; *Rég. v. Boucher*, 1 Post. & F. 486.

tiff, and the suit was being prosecuted for the benefit of another party.⁹⁰ Where the party is out of the state, but his attorney of record is within it, service on the attorney is sufficient.⁹¹ And the notice on an attorney remains good, although a change is subsequently made and another attorney takes his place.⁹² The opinion of Kirkpatrick, C. J., in a unique case in New Jersey,⁹³ is instructive as being a decision on a point seldom arising. In an action of ejectment the plaintiff claimed under an entailment in a will. The defendant claimed under a chain of conveyances from the tenant in tail, and the plaintiff gave notice to produce them, serving it on the attorney for the defendant, who admittedly had held them for a defendant in another action concerning another part of the same lands. As a fact, they could not be definitely located and secondary evidence was admitted on their nonproduction, and the defendant moving for a new trial was met by the opinion referred to. Said the learned judge: "Now, can the law presume that these deeds which conveyed away, and handed down his inheritance to a stranger, and by virtue of which that inheritance is still held against him, are, or could possibly have been, in the hands or possession of the plaintiff? Certainly not. Can he then divine, while they are in the hands of his adversaries, of whom there are many, and while they are shuffling them about from one to other, from client to attorney, and from attorney to counsel, and then back again, I say, under such circumstances, can the plaintiff divine in whose hands to find them, so that he may safely serve and rely upon a notice to produce them? And if he could so divine, could he possibly produce proof of such possession in a court of justice? I think it cannot be pretended. The deeds, then, not being presumed by the law to be in the hands of the plaintiff, but of some one of his

⁹⁰ *Brown v. Littlefield*, 7 Wend. (N. Y.) 454; *Lagow v. Patterson*, 1 Blackf. (Ind.) 327; *Simington v. Kent*, 8 Ala. 691.

⁹¹ *Mattocks v. Stearns*, 9 Vt. 326.

⁹² *Doe v. Martin*, 1 Moody & R. 242; *Bright v. Young*, 15 Ala. 112.

⁹³ *Den ex d. Popino v. McAllister*, 7 N. J. L. 46.

adversaries, though not of the defendant in this cause, he had a right to prove the facts alleged by any inferior evidence in itself otherwise lawful, which would make the matter manifest to the jury. And of this inferior kind of evidence copies compared and sworn were certainly of the highest order, and the least liable to error. Upon the strictest construction of the rule, therefore, that the party making an allegation must prove it by the highest evidence the nature of the case will admit of, those copies were rightly admitted." In order, however, to admit secondary evidence, there must be some proof that the party on whom the notice was served had *control of the instrument* in question. But presumptive proof is sufficient.⁹⁴ It has been held immaterial that the document may be in the possession of some third person, provided it may be deemed within the control of the party. Thus, in an early case it was held that in an action against the owner of a vessel, service on him was sufficient, though the document was in the possession of the captain.⁹⁵ On the same principle notice to the party to produce a check drawn by him and in possession of his banker is sufficient.⁹⁶ So the *possession of an attorney* is deemed the possession of the client.⁹⁷ Where a document has been out of the possession of a party but has been traced to the possession of his attorney, the notice served on the attorney is sufficient. Very much less diligence is required on the part of a plaintiff to find a paper that belongs to his adversary, to entitle him to prove its contents, than will be exacted when he seeks to prove the contents of a paper belonging to himself. In the former case, if the defendant is not satisfied with the secondary evidence, he can always produce the paper and have

⁹⁴ Norton v. Heywood, 20 Me. 359; Birkbeck v. Tucker, 2 Hall (N. Y.), 121; declarations of a third party not enough: Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57.

⁹⁵ Birkbeck v. Tucker, 2 Hall (N. Y.), 121.

⁹⁶ Partridge v. Coates, Russ. & M. 156, 1 Car. & P. 534; Burton v. Payne, 2 Car. & P. 520, 31 R. R. 692; Sinclair v. Stephenson, 1 Car. & P. 582, 2 Bing. 514, 10 Moore, 46.

⁹⁷ Rex v. Hunter, 4 Car. & P. 128; Morehead Banking Co. v. Walker, 121 N. C. 115, 28 S. E. 253.

it introduced; but in the latter, the opportunities for fraud in destroying or losing papers expressly to leave their contents resting in the memory of witnesses is so great that courts are rigorous in finding out all about the loss before allowing the secondary proof to be made.⁹⁸ Where the document was last seen in the hands of the party in interest, though he was not a party to the record, notice served on him was held good.⁹⁹ Notice to the attorney of record of a corporation to produce its records is sufficient.¹⁰⁰ But where the possession is in some *third person*, the fact of privity between him and the party—in other words, that the document is within the control of the party—must clearly appear. For example, it might be in the possession of an agent.¹ If it does not appear, the person in possession of the document should be served with a *subpoena duces tecum*.² If the party notified to produce the document proves that it is *lawfully out of his possession*, it is for the judge to determine whether secondary evidence can be given of its contents.³ And where a document belonging to another person, not a party to or connected with the action, happens to be in the possession of the attorney for one party, advantage cannot be taken of the joint facts of his office and his possession to render secondary evidence of it available after notice to produce.⁴ When a careful lawyer has any doubt about the efficacy of the notice to produce, he should serve the party or his attorney with the notice and where practicable the person holding the document with a *subpoena duces tecum*.

⁹⁸ Desnoyer v. McDonald, 4 Minn. (Gil. 402) 515.

⁹⁹ Norton v. Heywood, 20 Me. 359.

¹⁰⁰ Thayer v. Middlesex Mut. Fire Ins. Co., 10 Pick. (Mass.) 326. Other cases illustrating the rule: Baldney v. Ritchie, 1 Stark. 338; Suter v. Burrell, 2 Hurl. & N. 867, 27 L. J. Ex. 193; Rush v. Peacock, 2 Moody & R. 162.

¹ Irwin v. Lever, 2 Fost. & F. 296.

² Birkbeck v. Tucker, 2 Hall (N. Y.), 121; Evans v. Sweet, Ryan & M. 83, 1 Car. & P. 277; Whitford v. Tutin, 10 Bing. 395, 4 M. & S. 166, 6 Car. & P. 228, 3 L. J. C. P. 106.

³ Harvey v. Mitchell, 2 Moody & R. 366.

⁴ Baker v. Pike, 33 Me. 213, which is founded on an entirely different set of circumstances from Popine v. McAllister, *supra*.

§ 222 (223). **Effect of nonproduction after notice.**— Assuming that all preliminary steps have been taken to secure the production of a document, material in evidence, up to and including the service of the notice and the verification of such service in the usual way, the party requiring the document calls for it in open court to be produced. At that stage, if there is a neglect or refusal of the party notified to produce the primary evidence, secondary evidence can be given.⁵ As has been already stated, in such cases every reasonable intendment will be in favor of the secondary evidence, if it is vague or uncertain. And it is then too late for the party having possession of the primary evidence to use it in rebuttal or to meet the secondary

⁵ *Smith v. Collins*, 94 Ala. 394, 10 South. 334; *Cross v. Johnson*, 30 Ark. 396; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; *State v. Swift*, 57 Conn. 496, 18 Atl. 664; *Hines v. Johnston*, 95 Ga. 629, 23 S. E. 470; *Chicago City R. Co. v. Reddick*, 139 Ill. App. 160; *Berry v. Allen & Co.*, 59 Ill. App. 149; *Duringer v. Moschino*, 93 Ind. 495; *Missouri T. R. Co. v. Elliott*, 2 Ind. Ter. 407, 51 S. W. 1067; *Gafford v. American Mtg. & Inv. Co.*, 77 Iowa, 736, 42 N. W. 550; *Cooley v. Gilliam*, 80 Kan. 278, 102 Pac. 1091; *Benjamin v. Ellinger*, 80 Ky. 472; *Hotard v. Texas & P. R. Co.*, 36 La. Ann. 450; *Lowell v. Flint*, 20 Me. 401; *Dick v. Biddle*, 105 Md. 308, 66 Atl. 21; *Walsh v. Gilmor*, 3 Har. & J. 383, 6 Am. Dec. 503; *Commonwealth v. Shurn*, 145 Mass. 150, 13 N. E. 395; *Johnson v. Johnson*, 70 Mich. 65, 37 N. W. 712; *First Nat. Bank v. St. Anthony & D. Elevator Co.*, 103 Minn. 82, 114 N. W. 265; *Hobe v. Swift*, 58 Minn. 84, 59 N. W. 831; *Cooper v. Granberry*, 33 Miss. 117; *State v. Poundstone*, 140 Mo. App. 399, 124 S. W. 79; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Sias v. Badger*, 6

N. H. 393; *Truax v. Truax*, 2 N. J. L. 153 (166); *Carr v. Prudential Ins. Co.*, 115 App. Div. 755, 101 N. Y. Supp. 158; *King v. Lowry*, 20 Barb. (N. Y.) 532; *Robards v. McLean*, 8 Ired. (N. C.) 522; *Johns v. Johns*, 6 Ohio, 271; *Sugar Pine Lumber Co. v. Garrett*, 28 Or. 168, 42 Pac. 129; *Strawbridge v. Clamond Tel. Co.*, 195 Pa. 118, 45 Atl. 677; *Rose v. Winnsboro Nat. Bank*, 41 S. C. 191, 19 S. E. 487; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56; *Farnsworth v. Sharp*, 5 Sneed (Tenn.), 615; *Harlan v. Harlan (Tex. Civ.)*, 125 S. W. 950; *Galveston etc. Co. v. Robinett (Tex. Civ. App.)*, 54 S. W. 263; *McCollum v. Southern Pac. Co.*, 31 Utah, 494, 88 Pac. 663; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929; *Maxwell v. Light*, 1 Call (Va.), 117; *State v. Mann*, 39 Wash. 144, 81 Pac. 561; *Loverin v. Baumgarner*, 59 W. Va. 46, 52 S. E. 1000; *Tewksbury v. Schulenberg*, 48 Wis. 577, 4 N. W. 757; *Dunbar v. United States*, 156 U. S. 185, 39 L. Ed. 390, 15 Sup. Ct. Rep. 325. This is also illustrated by most of the cases cited on the general subject under discussion. See, also, § 19, *ante*.

evidence of the other party with like evidence.⁶ In some states this is declared to be the rule by *statute*.⁷ It has been held, however, that the contumacy of the party in not producing the document is no ground for rejecting his evidence and no ground of estoppel, especially since he may be compelled by *subpoena duces tecum* to produce such paper.⁸ A party will not be permitted to take advantage of his own wrong, by insisting that his adversary shall introduce a particular kind of evidence, when such party wrongfully withholds it, or renders its production impossible. The one side resorts to secondary evidence, not from choice but from a necessity caused by the other. It is equally the right of both parties that the best evidence of which the case admits should be introduced, but, while this is true, it at the same time does not lie in the mouth of the party who withholds such evidence to insist on its production.⁹ As we have already stated, if the party has not the documents sought, he should make known the fact¹⁰ in such mode as the rules of the court provide, generally either by oral testimony or by affidavit giving to the best of his belief an account of where it is, and making it ap-

⁶ Doe ex d. Thompson v. Hodgdon, 12 Ad. & E. 135, 113 Eng. Reprint, 762; Doon v. Donaher, 113 Mass. 151; Gage v. Campbell, 131 Mass. 566; Barnes v. Lynch, 9 Okl. 11, 59 Pac. 995; Cahen v. Continental Life Ins. Co., 69 N. Y. 300; Platt v. Platt, 58 N. Y. 646.

⁷ Flemming v. Lawless, 56 N. J. Eq. 138, 38 Atl. 864.

⁸ Moulton v. Mason, 21 Mich. 364.

⁹ Cooper v. Granberry, 33 Miss. 117.

¹⁰ Bas v. Steele, Fed. Cas. No. 1088, 3 Wash. C. C. 381. The language of Washington, C. J., in this case aptly describes the rule: "The party must entitle himself to the benefits of the section, by showing that the party was in possession of the

papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not; and thus extricate himself from difficulty."

parent that it is beyond his control.¹¹ So soon as the possession of the document is traced to the party called upon to produce it, any improper dealing with it by such possessor to defeat production will sanction the introduction of secondary evidence. In such case, where the possession is traced to him, it makes no difference whether he denies the possession or admits the disappearance of the document by destruction or transmission to some distant place beyond the reach of his opponent either before or after the service of the notice, secondary evidence may be admitted.¹² When the paper is produced, it is, of course, the best evidence, and an alleged copy cannot be received as evidence in the first instance on the part of him who has called for the original, although after the introduction of the original as evidence, it might be shown to be defective or to have been tampered with.¹³ The party who does not produce evidence which is in his power or control has only himself to blame for the presumption raised against him, and for the resolution in his opponent's favor of any doubt or uncertainty as to the absolute correctness of the secondary evidence. It is in his power to produce the originals. It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.¹⁴ One of the important

¹¹ *Hall v. York*, 16 Tex. 18; *Morgan v. Jones*, 24 Ga. 155; *Smith v. Martin*, 2 Overt. (Tenn.) 208.

¹² *Jones v. Jones*, 38 Cal. 584; *Rogers v. Fennimore* (Del.), 41 Atl. 886; *Hiss v. Hiss*, 228 Ill. 414, 81 N. E. 1056; *Suburban R. R. Co. v. Balkwill*, 94 Ill. App. 454; *Lumbert v. Woodard*, 144 Ind. 335, 55 Am. St. Rep. 175, 43 N. E. 302; *Wood v. Lawrence*, 59 Hun, 618, 13 N. Y. Supp.

441; *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45; *Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253; *Hallett v. Aggergaard*, 21 S. D. 554, 114 N. W. 696; *State v. Freshwater*, 30 Utah, 442, 116 Am. St. Rep. 853, 85 Pac. 447.

¹³ *Stitt v. Huidekopers*, 17 Wall. (U. S.) 384, 21 L. Ed. 644 (genuineness of original challenged).

¹⁴ *Rector v. Rector*, 8 Ill. 105; *Hunt v. Collins*, 4 Iowa, 56; *Benjamin v. El-*

consequences of nonproduction of documents is their exclusion after secondary evidence has been given. The reason is obvious. The law will not allow the party to "blow hot and blow cold." In the language of McIver, C. J., the court will not permit a party to speculate upon the chances. If a party who, upon notice, refuses to produce a paper which is in his possession, and thereby forces his adversary to resort to secondary evidence of the contents of such paper, should be permitted afterward to introduce the paper as a part of his own evidence, he would thus be afforded the opportunity of taking the chances whether the secondary evidence offered by his adversary should prove to be satisfactory or unsatisfactory to him. If the latter, then he would have the opportunity of correcting it by producing the paper itself, which, of course, would be the highest evidence of its contents; but, if the former, then he could, by omitting to offer the paper in evidence, suppress the best evidence of the facts in issue; and this no court charged with the administration of justice could for a moment countenance.¹⁵ Another and equally obvious

linger, 80 Ky. 472; McGuinness v. School Dist. No. 10, 39 Minn. 499, 41 N. W. 103; Cross v. Bell, 34 N. H. 82; Life & F. Ins. Co. v. Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 31; Reavis v. Orenshaw, 105 N. C. 369, 10 S. E. 907; Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719; Hay v. Peterson, 6 Wyo. 419, 34 L. R. A. 581, 45 Pac. 1073; Missouri K. & T. Ry. Co. v. Elliott, 102 Fed. 96, 42 C. C. A. 188. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted": Blatch v. Atcher, 1 Cowp. 63, 65, 98 Eng. Reprint, 969. It is said by Starkie in his work on Evidence (volume 1, page 54): "The conduct of the party in omitting to produce that

evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice". McDonough v. O'Niel, 113 Mass. 92; Kirby v. Tallmadge, 160 U. S. 379, 383, 40 L. Ed. 463, 16 Sup. Ct. Rep. 349; Gulf etc. Ry. Co. v. Ellis, 10 U. S. App. 640, 4 C. C. A. 454, 456, 54 Fed. 481. This rule is applied in criminal cases: Commonwealth v. Webster, 5 Cush. 295, 316, 52 Am. Dec. 711; People v. McWhorter, 4 Barb. (N. Y.) 438. See, also, § 17 et seq., *ante*.

¹⁵ Powell v. Pearlstine, 43 S. C. 403, 21 S. E. 328.

consequence is that a party will not be allowed to give secondary evidence of papers which are in his possession and which he has refused to produce upon notice.¹⁶

§ 223 (224). **When notice to produce is not necessary.**—It naturally suggests itself that there are cases in which a formal notice to produce would be idle, as in the case of an action for the wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written characters appeared; and it is on that account that the general rule that notice to produce must be given before secondary evidence can be received of the contents of a paper in the possession of the adverse party does not apply in those cases where the *nature of the proceeding* and the pleadings are *such as to notify the party* that he is charged with the possession of the instrument and that its production is necessary.¹⁷ No notice to produce is necessary in an action of *trover for a written instrument*.¹⁸ In an old case of *trover*, Spencer, C. J., said: “After reviewing all the cases, we held that in action of *trover* for bonds or notes,

¹⁶ *Platt v. Platt*, 58 N. Y. 646; *Dole v. Belden*, 49 Hun, 607, 1 N. Y. Supp. 667. There is an *obiter dictum* in *Moulton v. Mason*, 21 Mich. 363, saying that there is no authority for such exclusion where the document “relates to his own case even where not produced when called for by his adversary”; and 2 Phil. Ev. (Edward’s ed.), 535, is given as authority for it. We cannot appreciate the force of the proposition, especially after the reasoning in the South Carolina case, *supra*.

¹⁷ *Continental Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242; *State v. Mayberry*, 48 Me. 218; *Cross v. Williams*, 72 Mo. 577; *Morrill v. Boston & M. R. Co.*, 58 N. H. 68; *Lawson v. Bachman*, 81 N. Y. 616; *Yarborough v. Hughes*, 139 N. C. 199, 51 S. E. 904; *Murchison v.*

McLeod, 2 Jones (47 N. C.), 239; *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798; *Nichols etc. Co. v. Charlebois*, 10 N. D. 446, 88 N. W. 80; *Scioto Val. Ry. Co. v. Cronin*, 38 Ohio St. 122, 3 Ohio, 515; *Zipp v. Colchester Rubber Co.*, 12 S. D. 218, 80 N. W. 367; *Presidio County v. Clarke*, 38 Tex. Civ. 320, 85 S. W. 475; *Bataglia v. Stahl* (Tex. Civ. App.), 47 S. W. 683; *Dana v. Conant*, 30 Vt. 246.

¹⁸ *Hays v. Riddle*, 1 Sand. (N. Y.) 248; *How v. Hall*, 14 East, 274, 104 Eng. Reprint, 606; *Colling v. Trewick*, 6 Barn. & C. 394, 9 D. & R. 456, 5 L. J. (O. S.) K. B. 132, 30 R. R. 366; *Wilson v. Gale*, 4 Wend. (N. Y.) 623; *Hotchkiss v. Mosher*, 48 N. Y. 478; *Rose v. Lewis*, 10 Mich. 483.

no notice to produce the thing sought to be recovered was necessary; and that where the form of action gives the party notice to be prepared to produce the instrument, if necessary to falsify the evidence of the other party, it is not necessary to give notice to produce the instrument. These principles apply directly in this case. The form of the pleading, we must presume, gave the plaintiff notice, that he had received, and had in his possession, obligations amounting to more than 150 dollars; he was bound, then, if he would falsify the allegation, to have come prepared to produce them."¹⁹ No notice to produce is necessary in *assumpsit* for nondelivery of papers;²⁰ in an action to recover the amount of a *forged bank note* which had been returned to the defendant;²¹ in an action against a *carrier for the nondelivery* of a writing;²² in an action against a telegraph company for failing to deliver a *telegram*;²³ or in an action against a constable for neglecting to return an execution.²⁴ In an action for *conspiracy in restraint of trade*, no notice to produce the illegal agreement is necessary,²⁵ nor a notice required under the condi-

¹⁹ *Hardin v. Kretsinger*, 17 Johns. (N. Y.) 293; *People v. Holbrook*, 13 Johns. (N. Y.) 90.

²⁰ *Jolley v. Taylor*, 1 Camp. 143.

²¹ *Lockett v. Clark*, Litt. Sel. Cas. (Ky.) 178; *Ross v. Bruce*, 1 Day (Conn.), 100.

²² *Jolley v. Taylor*, 1 Camp. 143.

²³ *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620; *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429. *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223, which held the other way, is thus alluded to in the Texas case cited: "We have examined the subject with the assistance of such authorities as are accessible to us, and have found but one case in which the action was based on the telegrams where the original telegrams were required to

be produced. In that case (*West. Union Tel. Co. v. Hopkins*, 49 Ind. 223), the point does not seem to have been pressed in the argument by counsel, or to have been much considered by the court, nor do the authorities cited in support of the position sustain the view taken. We are also the less inclined to follow the rule there laid down, for the further reason that our own courts appear to have adopted a different and better rule in cases where the written instrument is set out in the pleadings and made the basis of a suit." We think the Indiana decision unauthoritative.

²⁴ *Wilson v. Gale*, 4 Wend. (N. Y.) 623.

²⁵ *State v. Dreany*, 65 Kan. 292, 69 Pac. 182.

tions of a contract in writing in an action for *breach of warranty* of machinery.²⁶ In an action in contract it is held that the pleadings imply notice as to the orders and letters constituting the contract.²⁷ So the rule is the same where the writing is a proper matter of defense and the adverse party must understand that it will come in question,²⁸ or where the action is brought on a written contract in the possession of defendant which is fully described in the complaint.²⁹ A similar question arose in a Texas case, as to the introduction of secondary evidence to establish the contents of certain field-notes of a survey, which from the pleadings appeared to be in the possession of one of the parties to the suit. On this point Judge Wheeler remarks: "But whether it was merely notice, or whether any notice was given, is immaterial, for the reason that the case is clearly within an exception to the rule which requires notice to the party in possession of the original instrument to produce it before secondary evidence will be received to prove its contents; and no notice to produce the instrument was necessary. The answer of the defendant charged the plaintiff with the possession of the original field-notes; and he was thereby fully apprised that the defendant relied on proving their contents to make out his case. And the rule is, that where, from the nature of the action, the party has notice that his adversary intends to charge him with the possession of an instrument, notice to produce it is necessary; and this is an exception to the general rule as well established as the rule itself."³⁰ Claim and de-

²⁶ *Nichols & S. Co. v. Charlebois*, 10 N. D. 446, 88 N. W. 80.

²⁷ *Zipp v. Colchester R. Co.*, 12 S. D. 218, 80 N. W. 367.

²⁸ *Kellar v. Savage*, 20 Me. 199; *Brown v. Washington Commonwealth*, 63 N. C. 514.

²⁹ *Dana v. Conant*, 30 Vt. 246; *Ellis v. Sharp*, 20 Tex. Civ. App. 482, 49 S. W. 409.

³⁰ *Hamilton v. Rice*, 15 Tex. 382. In *Dean v. Border*, 15 Tex. 298, the same learned judge, in speaking of the exceptions to the rule of giving notice to produce, mentions as the third exception to the rule the following: "And thirdly where from the nature of the action or pleadings, the party has notice that his adversary intends to charge him with the possession of the instrument."

mand *before* action, however, is not sufficient to obviate the necessity for notice.³¹ The same principle has been applied in *criminal cases* where the charge itself notifies the defendant of the contents of the document as on the trial of an indictment for stealing bank notes,³² or for *stealing* or forging promissory notes.³³ It is not necessary to give notice to produce, *if the adverse party has wrongfully or fraudulently obtained possession of the document*. For example, where a lease which has once been used in evidence in the litigation was sent out of the state by the counsel of the party against whom it was used without the consent of the other party,³⁴ or when it appears that the adverse party has obtained possession of the original from a person subpoenaed to produce it.³⁵ If the document was obtained by the adverse party from the one seeking to use it by fraudulent or forcible means of any character,³⁶ such as obtaining a deed for the alleged purpose of recording it,³⁷ or a conspiracy by which a letter was taken from its possessor,³⁸ it is not necessary to give notice to produce the writing. A defendant having put in evidence what purported to be a letter to himself, signed by the plaintiff, and having asserted that this was all of the letter which he received at that time, though at other times he had received other letters from the plaintiff, it was proper for the court to allow the plaintiff to show that the paper produced did not contain the whole of the letter as written,

³¹ Muller v. Hoyt, 14 Tex. 49.

³² McGinniss v. State, 24 Ind. 500; Commonwealth v. Messinger, 1 Binn. (Pa.), 273, 2 Am. Dec. 441.

³³ Aickles' Case, 1 Leach C. C. 330; Butler's Case, 13 How. St. Tr. 1254; People v. Swetland, 77 Mich. 53, 43 N. W. 779; People v. Holbrook, 13 Johns. (N. Y.) 90.

³⁴ Mitchell v. Jacobs, 17 Ill. 235.

³⁵ Leeds v. Cook, 2 Esp. 256, 6 R. R. 855; Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226; Scott v. Pentz, 5 Sand. (N. Y.) 572.

³⁶ Gray v. Kernham, 2 Mill's Const. (S. C.) 65; State v. Mayberry, 48 Me. 218; Nealley v. Greenough, 25 N. H. 325; Hamilton v. Rice, 15 Tex. 382; Garlock v. Geortner, 7 Wend. (N. Y.) 198; Morgan v. Jones, 24 Ga. 155; Grimes v. Kimball, 3 Allen (Mass.), 518.

³⁷ Davis v. Spooner, 3 Pick. (Mass.) 284.

³⁸ Medley v. People, 49 Ill. App. 218.

and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters.³⁹

§ 224 (225). **Same, continued.**—No notice to produce a document is necessary where the *paper* to be produced is *itself a notice*.⁴⁰ This rule has been applied to *notices to quit*;⁴¹ to the filing of interrogatories for taking out a commission;⁴² to an attorney's bill, which, as a rule, bears the notice that it is the attorney's bill of costs and charges;⁴³ to a notice to an indorser;⁴⁴ notice to remove obstructions from roads and ways;⁴⁵ *notices of action* and of demands;⁴⁶ partnership notices of dissolution;⁴⁷ *notices of dishonor*, provided the action be brought upon the bill, but not otherwise;⁴⁸ notices to railroad corporations of accidents to stock;⁴⁹ notices of *request to repair fences*;⁵⁰ notices rescinding contracts;⁵¹ *notices of appeal* and *notices*

³⁹ Robinson v. Cutter, 163 Mass. 377, 40 N. E. 112.

⁴⁰ Collins v. Alabama Great Southern R. Co., 104 Ala. 390, 16 South. 140; Hyde v. Benson, 6 Ark. 396; Gethin v. Walker, 59 Cal. 502; Florida Cent. etc. R. Co. v. Seymour, 44 Fla. 557, 33 South. 424; Brown v. Booth, 66 Ill. 419; Brentner v. Chicago etc. R. Co., 58 Iowa, 625, 12 N. W. 615; Central Bank v. Allen, 16 Me. 41; Atwell v. Grant, 11 Md. 101; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Quinley v. Atkins, 9 Gray (Mass.), 370; Rose v. Lewis, 10 Mich. 483; Christy v. Horne, 24 Mo. 242; Leavitt v. Simes, 3 N. H. 14; Edwards v. Bonneau, 1 Sand. (N. Y.) 610; Faribault v. Ely, 2 Dev. (13 N. C.) 67; Morrow v. Commonwealth, 48 Pa. 305; Reliance Lumber Co. v. Western Union Tel. Co., 58 Tex. 394, 44 Am. Rep. 620.

⁴¹ Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153; Falkner v. Beers (Mich.), 2 Doug. 117; Hawley

v. Robeson, 14 Neb. 435, 16 N. W. 438.

⁴² Quinley v. Atkins, 9 Gray (Mass.), 370.

⁴³ Colling v. Treweek, 6 Barn. & C. 391, 9 D. & R. 456, 5 L. J. (O. S.) K. B. 132, 30 R. R. 366.

⁴⁴ Eagle Bank v. Chapin, 3 Pick. (Mass.) 180.

⁴⁵ Morrow v. Commonwealth, 48 Pa. 305; McFadden v. Kingsbury, 11 Wend. (N. Y.) 667.

⁴⁶ Jory v. Orchard, 2 Bos. & P. 39, 5 R. R. 537; Christy v. Horne, 24 Mo. 242.

⁴⁷ Salisbury v. Iddings, 29 Neb. 736, 46 N. W. 267.

⁴⁸ Swain v. Lewis, 2 Crompt. M. & R. 261, 4 D. P. C. 261, 1 Gale, 182, 5 Tyr. 998, 4 L. J. Ex. 249; Kine v. Beaumont, 3 Brod. & B. 288, 7 Moore, 112, 24 R. R. 678.

⁴⁹ Brentner v. Chicago etc. Ry. Co., 58 Iowa, 625, 12 N. W. 615.

⁵⁰ Willoughby v. Carleton, 9 Johns. (N. Y.) 136.

⁵¹ Gethin v. Walker, 59 Cal. 502.

generally served in due progress of a cause;⁵² prohibitory notices to liquor dealers;⁵³ notice of assessment;⁵⁴ notices warning off trespassers;⁵⁵ notice of injury allowed by statute;⁵⁶ and to notice of sale.⁵⁷ This rule dispensing with notices to produce papers that are mere notices has been given very wide application. "For if it were otherwise, the notice to produce the original could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising *ad infinitum*, so that the party would be at every step receding instead of advancing."⁵⁸ In England there has been some conflict on this question; some decisions holding that where notices form part of the cause of action they cannot be proved by parol except after notice to produce.⁵⁹ But the weight of authority seems to be in favor of the rule first stated. In the United States there have been also a few cases dissenting from the general doctrine.⁶⁰ No notice to produce is necessary, if the adversary has *admitted the loss of the paper* or its loss is otherwise proved, as the notice would be useless.⁶¹ Nor is it necessary if the adverse party tes-

⁵² Hughes v. Hays, 4 Mo. 209; McFadden v. Kingsbury, 11 Wend. (N. Y.) 667; Young v. Keller, 16 Mo. App. 551.

⁵³ Loranger v. Jardine, 56 Mich. 518, 23 N. W. 208.

⁵⁴ Williams v. German Mut. Fire Ins. Co., 68 Ill. 387; Waterman v. Davis, 66 Vt. 83, 28 Atl. 664; but in Rutland etc. R. Co. v. Thrall, 35 Vt. 536, the rule was held not to extend to a notice by publication in a newspaper.

⁵⁵ Harper v. State, 109 Ala. 28, 19 South. 857.

⁵⁶ McLenon v. Kansas City etc. R. Co., 69 Iowa, 320, 28 N. W. 619.

⁵⁷ McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845.

⁵⁸ Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153.

⁵⁹ Grove v. Ware, 2 Stark. 174; Langdon v. Hulls, 5 Esp. 156; Shaw

v. Markham, Peake, 165; Lanauze v. Palmer, Moody & M. 31, 31 R. R. 709; 4 Phil. Ev., p. 432, note 239.

⁶⁰ McFadden v. Kingsbury, 11 Wend. (N. Y.) 667, while approving the general rule, made an exception with notice of action; Faribault v. Ely, 2 Dev. L. (13 N. C.) 67, is to the same effect. In Georgia there was at the date of Crawford v. Hodge, 81 Ga. 728, 8 S. E. 208, the same ruling, but the general rule laid down in such cases as Frank v. Longstreet, 44 Ga. 178, and Lathrop v. Mitchell, 47 Ga. 610, has been ameliorated, and the United States practice may now be said to be almost uniform.

⁶¹ Rex v. Haworth, 4 Car. & P. 254; Foster v. Pointer, 9 Car. & P. 718; How v. Hall, 14 East, 276, 104 Eng. Reprint, 606; McCreary v. Hood, 5 Blackf. (Ind.) 316; Mc-

tifies that *he never had possession of the document*.⁶² But where a letter was merely left with some person at the office of the intended recipient, and no evidence was furnished that the actual receiver had any business connection or relation with him, no proper foundation was laid for secondary evidence on the denial of the intended recipient of any knowledge of it.⁶³ In such case there should have been identification of the actual receiver as a clerk in the employment of the intended recipient or otherwise, as the case might be. No notice to produce is necessary if the adverse party has voluntarily offered to produce the document required or if he has admitted that he has destroyed it;⁶⁴ nor does the rule apply where the writing is a *mere memorandum* of figures or calculation of amounts.⁶⁵ But if it is sought to give secondary evidence of a document which has been traced to the adverse party, on the ground that it has been destroyed, the usual notice should be given to meet the contingency that the destruction may be disputed.⁶⁶ Of course, there may be a *waiver*, either express, as we have shown, such as the voluntary offer to produce, or constructive, of the notice or of the insufficiency of the notice as to time or sufficiency or accuracy of contents.⁶⁷

Auley v. Earnhart, 1 Jones (42 N. C.), 502; Safe Deposit & T. Co. v. Turner, 98 Md. 22, 55 Atl. 1023; Barmby v. Plummer, 29 Neb. 64, 45 N. W. 277.

⁶² Bickley v. Bickley, 136 Ala. 548, 34 South. 946; Jones v. Jones, 38 Cal. 584; Continental Ins. Co. v. Chew, 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417; Benjamin v. Ellinger, 80 Ky. 472; Augur Steel Axle etc. Co. v. Whittier, 117 Mass. 451; Foster v. Pointer, 9 Car. & P. 718; How v. Hall, 14 East. 276, 104 Eng. Reprint, 606; Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. Rep. 325, 39 L. Ed. 390.

⁶³ Sun Ins. Co. v. Earle, 29 Mich. 406.

⁶⁴ Dwinell v. Larrabee, 38 Me. 464; Baldwin v. Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

⁶⁵ Weaver v. Crocker, 49 Ill. 461; Muller v. Hoyt, 14 Tex. 49.

⁶⁶ Doe ex dem. Phillips v. Norris, 3 Adol. & El. 46, 111 Eng. Reprint, 329.

⁶⁷ Durringer v. Moschino, 93 Ind. 495; Lockhart v. Camfield, 48 Miss. 470; Dwinell v. Larrabee, 38 Me. 464; Willard v. Germer, 1 Sand. (N. Y.) 50; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

§ 225 (226). **Duplicates—Recorded deeds.**—Since duplicates are primary evidence, it is clear that one may be offered in evidence without notice to produce the other.⁶⁸ Where a paper was made in duplicate and one of the originals is shown to be lost and the other in the rightful possession of a person on trial for an offense, sufficient foundation is laid for secondary evidence, as there is no power in the court to compel the accused to produce the paper as evidence against himself.⁶⁹ Since each duplicate is treated as an original, copies cannot be received until the nonproduction of both duplicates is accounted for.⁷⁰ *Letter-press copies* and similar reproductions are not duplicates or originals, and cannot be received without the preliminary proof.⁷¹ As to carbon copies, there is a conflict, as we have already pointed out, and the safe method is to give notice to produce.⁷² In this country, under its *registration system*, statutes very generally permit proof of a large class of recorded documents by means of *certified copies* or other substituted proof.⁷³ When the production of the original is thus dispensed with, it has been held that there need be no notice to produce.⁷⁴ This branch of

⁶⁸ *Totten v. Bucy*, 57 Md. 446; *Pittsburgh etc. R. Co. v. Brown* (Ind.), 98 N. E. 625; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664; *Eastman v. Dunn* (R. I.), 83 Atl. 1057. See § 209, *ante*.

⁶⁹ *State v. Gurnee*, 14 Kan. 111.

⁷⁰ *Cincinnati, N. O. & T. P. Ry. Co. v. Disbrow*, 76 Ga. 253; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Abeel v. Levy* (Tex. Civ. App.), 61 S. W. 937.

⁷¹ *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403; *Seibert v. Ragsdale*, 103 Ky. 206, 44 S. W. 653; *Heilman Milling Co. v. Hotaling*, 21 Ky. Law Rep. 950, 53 S. W. 655; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Westinghouse Co. v. Tilden*, 56 Neb. 129, 76 N. W.

416; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652. As to copies of documents made by mechanical means, as originals, see note to *International Harvester Co. v. Elfstrom*, 12 L. R. A., N. S., 343.

⁷² See § 209, *ante*.

⁷³ *Cunningham v. Cunningham*, 75 Conn. 64, 52 Atl. 318; *Glos v. Cary*, 194 Ill. 214, 62 N. E. 555; *Neosho V. Inv. Co. v. Hannum*, 63 Kan. 621, 66 Pac. 631; *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246; *Samuels v. Borrowscale*, 104 Mass. 207; *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024; *Jackson v. Rice*, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; *Ratliff v. Ratliff*, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887. See, also, 2 *Wigmore, Ev.*, pp. 1459-1471.

⁷⁴ *Winters v. Laird*, 27 Tex. 616.

the subject is dealt with fully later on,⁷⁵ and the reference to it here is for the purpose only of dealing with the necessity for notice to produce. Inasmuch as those statutes which permit in certain cases the use of certified copies are highly technical, it may happen that the certified copy tendered may be rejected for some informality and the party relying on it be unable to furnish secondary evidence for want of the notice to produce. It is therefore advisable invariably to give the notice *ex abundante cautela*, and if the originals are produced in response, the end is perhaps better served than by the introduction of the certified copies, while if they are not produced, the court, in considering the tender of the statutory copy, has been made aware of the *bona fide* efforts of the party to produce the best evidence known to the common law before he has placed reliance upon the statute.

§ 226 (227). Effect of the production of papers upon notice.—We have now to consider that period in the trial of a cause, when in pursuance of a notice to produce the documents named therein are produced on the request of the party desiring to avail himself of them, and we are immediately faced by the question, whether he is obliged to put them in evidence because he has asked for them and seen them. It is necessary to consider just actually what happens, and that by the light of this rule when a paper is produced by the adverse party on notice, *it does not thereby become evidence*, for it may not be material or competent, and cannot be made evidence unless, from its character, it is entitled to be so treated.⁷⁶ If the party calling for it desires to “put it in,” that is, to use it as evidence in the action, then, as a general rule, the *document must be proved* like any other instrument. But if a party to a suit in pursuance of a notice produces an instrument

⁷⁵ Chapter 16, “Documentary Evidence,” *post*.

⁷⁶ *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656;

Austin v. Thomson, 45 N. H. 113;
Hylton v. Brown, Fed. Cas. No. 6982, 1 Wash. C. C. 343.

to which he is party and under which he *claims a beneficial estate*, it is not necessary for the other party to call any attesting witness. In such cases the custody of the paper affords high presumptive evidence that it is held as a muniment of title and is *prima facie* sufficient proof of execution.⁷⁷ But if he, having seen it, does not wish to use it, is he under compulsion so to do, or may he waive it? Under the old English practice he could not; but we do not propose here to deal with the barbaric foundation on which the rule rested—that each party was to be kept in utter ignorance of the strength of the opponent's case, and that excepting the party calling for papers was compelled to use them he might use a notice to produce as a "fishing" inquiry. In this country the task is rendered equally difficult because some jurisdictions have adopted the out-of-date English practice and have not altered their decisions to accord with the modern authorities in both countries. These courts abide by the rule relating to the inspection of documents produced on notice which has been stated in numerous cases, to the effect that though the party calling for the document may waive it, yet when he inspects the document produced pursuant to the notice and becomes acquainted with its contents, the instrument becomes *evidence for both parties*; and the party who produces the paper has the right to insist on its being read. It is urged that any other rule would give one party an unfair advantage over the other. He would have the privilege of looking into the private documents of the other party without any corresponding obligation or risk.⁷⁸

⁷⁷ *Herring v. Rogers*, 30 Ga. 615; *Betts v. Badger*, 12 Johns. (N. Y.) 223, 7 Am. Dec. 309; *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158.

⁷⁸ *Randel v. Chesapeake etc. Canal*, 1 Harr. (Del.) 233; *Wood v. McGuire*, 21 Ga. 576; *Wooten v. Nall*, 18 Ga. 609; *Merrill v. Merrill*, 67 Me. 70; *Blake v. Russ*, 33 Me. 360; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656;

Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661; *Long v. Drew*, 114 Mass. 77; *Clark v. Fletcher*, 1 Allen (Mass.), 53; *Reed v. Anderson*, 12 Cush. (Mass.) 481; *Commonwealth v. Davidson*, 1 Cush. (Mass.) 33; *Anderson v. Root*, 16 Miss. 362; *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10; *Edison etc. Co. v. United States Electric Co.*, 45 Fed. 55; *Calvert v. Flower*, 7 Car. & P. 386;

They do not go the length of saying the party may not waive production—on this point there seems no disagreement⁷⁹—but only that after inspection the document *must* be regarded as evidence. It is of course conceded that a party cannot so waive the introduction of the writing and give secondary evidence of its contents.⁸⁰ In an early Massachusetts case⁸¹ the court, after referring to the English practice, says: "The result of the examination of the cases seems to be: 1. That all the authorities agree that mere calling for the books is not enough to make them evidence; 2. That whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the book evidence, is a *mooted point*; 3. That the books, when produced upon notice, if inspected by the party calling for them, and actually used as evidence by him, are thereby made evidence for the other party."⁸² It is with the second of these propositions only we have to deal. It has been vigorously attacked in a New Hampshire case which comments at some length upon the English cases, claiming that they do not, when scrutinized, support the rule; and that the *dicta* of the English cases have been followed in the United States without careful considera-

Saunders v. Duval, 19 Tex. 467. In Boyle v. Boston Elevated Ry. Co., 208 Mass. 41, 21 Ann. Cas. 1020, 33 L. R. A., N. S., 552, 94 N. E. 247, the court was expressly asked to reconsider the rule established by the authorities in that state on the ground that it was not founded on principle and was against the weight of modern practice. The court's guarded response was that it seemed to be law in Delaware, Georgia, Maine, Mississippi, Pennsylvania, and Texas. It had been decided not to be law in New York and Connecticut, and had been repudiated by statute in California, Idaho, Iowa, Montana and Nebraska, and there was some reason to suppose that it was not law in England. "It has

been said that the rule has been repudiated in New Hampshire. But the result of the practice authorized in Austin v. Thomson, 45 N. H. 113, is in effect the same as the Massachusetts rule. It is not necessary to go into this question in the case at bar."

⁷⁹ Blight v. Ashley, Fed. Cas. No. 1541, Pet. C. C. 15; Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661.

⁸⁰ Stitt v. Huidekopers, 17 Wall. (U. S.) 384, 21 L. Ed. 644. See, also, Gilmore v. Witcher, 6 Allen (Mass.), 113.

⁸¹ Commonwealth v. Davidson, 1 Cush. (Mass.) 33.

⁸² 3 Phil. Ev., 4th Am. ed., 1911.

tion.⁸³ So far back as 1828 the Pennsylvania court said that the argument against such a compulsory use of documents produced but not used was almost insuperable.⁸⁴ "There is, therefore, no such weight of authority as should lead us to adopt a rule which does not commend itself to our judgment, and is not in accordance with our practice in analogous cases."⁸⁵ The same rule is accepted by the

⁸³ *Austin v. Thomson*, 45 N. H. 113. The only reason given for the supposed rule is, "that it would give an unconscionable advantage to enable a party to pry into the affairs of his adversary for the purpose of compelling him to furnish evidence against himself, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties": 1 Greenl. Ev., § 563. But as the party notified is not obliged to produce the papers, and as he may, if he produces them, decline to allow them to be examined except upon the condition that, if examined, they shall be read in evidence (*Huckins v. People's Mut. Fire Ins. Co.*, 31 N. H. 238), parties notified seem amply protected from any such unconscionable advantage, and the reason stated entirely fails; and we see no sufficient reason for a rule that is at variance with the general course of our practice, and that can hardly facilitate the administration of justice, since, if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the court to allow incompetent evidence to go to the jury: See *Gordon v. Secretan*, 8 East, 548, 103 Eng. Reprint, 453. The English cases cited do not establish the rule as laid down in the books first quoted. If, in *Sayer v. Kitchen*, 1 Esp. 210, the defendant inspected the book, as would appear probable from the not very explicit

statement of the case as well as from marginal note (see *Lawrence v. Van Horne*, 1 Caines (N. Y.), 287, 2 Tidd Pr. 737), that case is an authority against the alleged rule. *Wharam v. Routledge*, 5 Esp. 235, 8 R. R. 851, and *Calvert v. Flowers*, 7 Car. & P. 386, in fact go no further than *Huckins v. Insurance Co.*, *supra*, and *Johnson v. Gilson*, 4 Esp. 21, is not in point. In *Wilson v. Bowie*, 1 Car. & P. 10, Parke, B., held that the plaintiff having inspected a paper produced under notice was not bound to read to the jury, it not being material to the case.

⁸⁴ *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10.

⁸⁵ *Austin v. Thomson*, *supra*. In a note to Phillip's Evidence, third American edition, it is said that the principle of the alleged English rule is not clear, and that it seems questionable whether the rule does not go much too far: 2 Phil. Ev. 222, n. 4, and see notes 215a and 234, thereto. Swift states the rule as it is laid down in *Tidd*: *Swift's Ev.* 481. *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276, if an authority at all, goes no further than *Huckins v. People's Mut. Fire Ins. Co.*, *supra*, and the same would seem to be true of *Jordan v. Wilkins*, Fed. Cas. No. 7526, 2 Wash. C. C. 482. *Saunders v. Duval*, 19 Tex. 467, and *Anderson v. Root*, 8 Smedes & M. (6 Miss.) 362, are not in point, though the latter case contains a *dictum* founded upon

courts of several of the states.⁸⁶ It is urged by this line of authorities that the notice to produce a paper and calling for its inspection ought to be considered as analogous to a bill of discovery, where the answer is not evidence except for the adverse party. It is further urged with much force that a party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them; and that the party calling for the inspection of books and papers would be subjected to undue hazard if an inspection merely would make them evidence in the case and further that such a rule would tend to the suppression rather than the discovery of the truth. Several of the western states have by statute repudiated the old illogical English rule.⁸⁷ It may be appropriate here to say that the old practice of bill of discovery has been applied in most English jurisdictions to common-law actions, and that immediately after

the supposed English authority. *Randel v. Chesapeake etc. Canal*, 1 Harr. (Del.) 233, and *Wooten v. Nall*, 18 Ga. 609, are said to have followed the supposed English rule; and, in *Penobscot Co. v. Lamson*, 16 Me. 233, 33 Am. Dec. 656, there is a *dictum* to the same effect, founded upon the authorities already mentioned, which was afterward adopted as the law in *Blake v. Russ*, 33 Me. 360, but without the statement of any reasons. In *Commonwealth v. Davidson*, 1 Cush. (Mass.) 33, the existence of the rule is spoken of as a mooted question, and that question can hardly be deemed to have been settled in *Reed v. Anderson*, 12 Cush. (Mass.) 481; but the subsequent case of *Clark v. Fletcher*, 1 Allen (Mass.), 53, seems to have been decided in accordance with the supposed English rule, and for substantially the same reason that is stated in 1 Greenl. Ev., § 563. In *Kenney v. Clarkson*, 1 Johns. (N. Y.)

385, 3 Am. Dec. 336, and in *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10, it is denied that the law is in accordance with the supposed English rule.

⁸⁶ *Austin v. Thomson*, 45 N. H. 113; *Withers v. Gillespy*, 7 Serg. & R. (Pa.) 10; *Smith v. Rentz*, 131 N. Y. 169, 15 L. R. A. 138, 30 N. E. 54; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; *Sayer v. Kitchen*, 1 Esp. 209. See note on "Effect of Inspection of Document Produced by Opposing Party upon Admissibility Thereof in Evidence," to *Boyle v. Boston Elevated Ry. Co.*, 21 Ann. Cas. 1022.

⁸⁷ In the California Code of Civil Procedure, which we use as the prototype of western state codes, section 1939 provides that though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

appearance is entered the judge directs, on hearing the parties, how and where the action shall be tried, and makes an order for the mutual discovery of papers in the possession of the parties with right to inspect before trial, so that each party may frame his notice to produce thereon, and no papers other than those disclosed may be used by either upon the hearing. It is axiomatic that the production of the document sought precludes secondary evidence of it, even where the party calling for it challenges its accuracy. The United States supreme court dealing with a refusal to admit the secondary evidence in such case said: "The court was right in refusing to admit in the first instance what was conceded to be a copy, when that which was at least *prima facie* the original was in court to answer the notice of the party desiring to use the copy. How far the plaintiff could have been permitted to show a variance of the defendant's paper from the genuine, after it was once introduced, we need not inquire. But a copy could not be introduced until what seemed to be the original had been before the court and become the subject of inspection by the jury."⁸⁸ It is equally elementary where a paper is read by one party, the whole is to be read if required by the adverse party. This rule may be said to be founded upon the reason that the reading of the entire document is necessary to ascertain with certainty its real sense and meaning; and further, that by offering it as an instrument of evidence, its admissibility has been so far affirmed as to preclude objection to it, when introduced by the other side.⁸⁹ This does not, however, necessitate the reading of a package of papers in their entirety by the one calling for the documents connected with a

⁸⁸ *Stitt v. Hindekoper*, 17 Wall. (84 U. S.) 384, 21 L. Ed. 614; *Dean v. Carnahan*, 7 Mart., N. S. (La.), 258.

⁸⁹ *Young v. State Bank*, 5 Ala. 179, 39 Am. Dec. 322; *Vischer v. Talbottom Branch R. Co.*, 34 Ga.

536 (portion of a minute-book of a corporation); *Boudinot v. Winter*, 91 Ill. App. 106; *Commonwealth v. Davidson*, 1 Cush. (Mass.) 33 (portions of account-books); *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241 (letters forming part of a series).

particular matter. He uses what he wants, leaving it for the adversary to deal with the remainder if he wishes. In an action on a policy of life insurance, notice was given to produce "all proofs of death" of the insured, and on the call for them a package of papers was handed from which the proofs of death were selected, the remaining documents being letters, and the trial court ruled that "the papers produced by the company should be received together and in whole, and not in part, agreeably to the contract of insurance in evidence, as bearing on the question of damages claimed by the plaintiff. The effect of the papers to be determined hereafter." Chief Justice Sharswood said: "The plaintiff had a clear right to show that he had complied with the condition of the policy in furnishing proofs of loss. Of the papers produced by the defendant, he had a right to offer such as he chose. He was not bound to offer all, certainly not such as he had not furnished himself. The judge committed a manifest error in refusing to receive some unless he offered all."⁹⁰ *Conditional production* of documents is only entitled to passing notice. There are cases in which a party not being bound to produce papers does so on condition that they are put in evidence. It is more a matter of agreement between the parties, and if they are not produced, secondary evidence could, of course, be admitted in the usual way.⁹¹

§ 227 (228). Proof of the contents of lost documents.—The United States supreme court has said that proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper.⁹² There seems, however, no imperative reason for

⁹⁰ *Heaffer v. New Era Life Ins. Co.*, 101 Pa. 178.

⁹¹ *Wentworth v. McDuffie*, 48 N. H. 402; *Huckins v. People's etc. Ins. Co.*, 31 N. H. 238.

⁹² *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 6 L. Ed. 166; *Bennett v. Waller*, 23 Ill. 97. See

note on "Sufficiency of Proof to Establish Contents of Lost Instrument," to *Capell v. Fagan*, 2 Ann. Cas. 41. As to secondary evidence of contents of will lost after probating or filing for record, see note to *Clark v. Turner*, 38 L. R. A. 456.

insisting upon any extreme strictness suggested by the rule. There are cogent reasons for requiring that lost documents should be proved clearly and in a satisfactory manner, when secondary evidence is resorted to, but in the opinion of the author this is all that should be required. The weight of authority seems to be that when secondary evidence is admissible to prove the contents of documents, the fact to be established should be proved by a fair *preponderance* of evidence, and with reasonable certainty. It is not to be expected that witnesses can recite the contents of written instruments word for word. It is enough, if intelligent witnesses have read the paper and can state substantially its contents and import with reasonable accuracy.⁹³ The court of appeals of New York used this language in respect to a lost deed: "The evidence in such cases, however, should show that the deed was properly executed with the formalities required by law and should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices which it was the object of the statute of frauds to prevent would be encouraged."⁹⁴ The language in another case⁹⁵ appears to us to convey all the necessary requirements of proving the contents of a lost document. "A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it *verbatim* from memory. Indeed, if he were to do so, that circumstance would, in itself, be so suspicious as to call for an explanation. All that parties, in such cases, can be expected to remember, is, that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what property. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed

⁹³ *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Posten v. Rasgette*, 5 Cal. 467; *Rhode v. McLean*, 101 Ill. 467; *Huls v. Kimball*, 52 Ill. 391; *Camden v. Belgrade*, 78 Me.

204, 3 Atl. 652; *Clark v. Houghton*, 12 Gray (Mass.), 38; *Parks v. Caudle*, 58 Tex. 216.

⁹⁴ *Edwards v. Noyes*, 65 N. Y. 125.

⁹⁵ *Perry v. Burton*, 111 Ill. 138.

deed."⁹⁶ In seeking to prove the contents of a lost deed, it is sufficient to prove by whom and to whom the deed was executed, about what time it was so executed,⁹⁷ and the consideration paid therefor, and the property conveyed.⁹⁸ While the courts have adopted this reasonable view as to proof of contents, they have repeatedly held that the proof of execution must contain more than naked assertion that a document was signed by the party named. If the proof is indefinite, incoherent, or vague, they have not hesitated to reject it.⁹⁹ In a Georgia case,¹⁰⁰ it was held that the execution of a lost deed embracing lands in two counties cannot be proved, as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was duly recorded, and without first proving the execution of an original deed, a copy of the same taken from the records of a county in which the land in controversy is not situate cannot be received in evidence. So the testimony of one who has heard a deed read some years before and who can give only a small portion of its contents is insufficient.¹ So when a

⁹⁶ This case is cited in *Bingham Livery etc. Co. v. McDonald*, 37 Utah, 457, 110 Pac. 56, in which case appears a type of evidence which the court considered sufficient.

⁹⁷ *Shorter v. Sheppard*, 33 Ala. 648; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 56 N. E. 63; *Davis v. Davis*, 123 La. 1091, 49 South. 718; *Yingling v. Koblhass*, 18 Md. 148; *Holmes v. Deppart*, 122 Mich. 275, 80 N. W. 1094; *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180; *Felker v. Breece*, 226 Mo. 320, 126 S. W. 424; *Wells v. Flitercraft* (N. J. Ch. 1899), 43 Atl. 659; *Irving v. Campbell*, 56 N. Y. Super. Ct. (24 Jones & S.) 224, 4 N. Y. Supp. 103; *Teller v. Brower*, 14 Or. 405, 14 Pac. 209; *Emig v. Diehl*, 76 Pa. 359; *Anderson v. Robson*, 1 Brev. (S. C.) 263; *Simpson Bank v. Smith*, 52 Tex. Civ. App. 349, 114 S. W. 445; Col-

chester v. Culver, 29 Vt. 111; *Matteson v. Hartman*, 91 Wis. 485, 65 N. W. 58.

⁹⁸ *Harrell v. Enterprise Sav. Bank*, *supra*; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803. The witness is, of course, strictly limited to his recollection of the document, and may not give any opinion testimony as to what its effect is: *Edwards v. Rives*, 35 Fla. 89, 17 South. 416.

⁹⁹ *Duncan v. Last Chance Ditch Co.*, 7 Colo. App. 34, 42 Pac. 171; *Arnold v. Voorhies*, 4 J. J. Marsh. (27 Ky.) 507; *Stovall v. Judah*, 74 Miss. 747, 21 South. 614; *Nessley v. Ladd*, 29 Or. 354, 45 Pac. 904; *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

¹⁰⁰ *Dyson v. Knight*, 130 Ga. 573, 124 Am. St. Rep. 179, 61 S. E. 468.

¹ *Edwards v. Noyes*, *supra*; *Appeal of Richards*, 122 Pa. 547, 15 Atl. 903. In *Jenkins v. Maxwell*

witness had only a hasty glance at a letter and heard only a part of its contents read, it was held that he was not a competent witness to testify to the contents.² The *substance* of the document should be proved satisfactorily. The witness should speak from *recollection* of the writing and not give his impressions drawn from conversations and negotiations preliminary to the contract,³ even though he states his recollection of the written document is that it was the same as the verbal agreement he was testifying to. Chief Justice Marshall expressed the law when he said that when a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. "The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every

Land Grant Co., 15 N. M. 281, 107 Pac. 739, there is an excellent illustration of insufficient proof of contents. "The testimony offered to prove the contents of this deed fell far short of the evidence required to establish the contents of a lost instrument. The only description of the contents was contained in the following testimony of the plaintiff: 'Well, it was a paper about a foot long and ten inches wide, taken out of a book, and it stated something like this. I don't remember very well: 'I have this day sold to John Jenkins my right and title, or something like that, or quitclaim deed, to the tract of land, mentioning the main mounds and every mound on it.' And then at the bottom of the first was 'transferred from Dillon to Boyd and Runyan,' and all the three names were on it.' Nothing could well be vaguer or more uncertain than the description of the land alleged to have been conveyed, and there is no evidence whatever that

the deed was ever acknowledged or recorded."

² Coxe v. England, 65 Pa. 212.

³ Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101; Kelley v. Divver, 6 Mackey (D. C.), 440; Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 South. 874; Osborne & Co. v. Rich, 53 Ill. App. 661; McDonald v. Jackson, 56 Iowa, 643, 10 N. W. 223; Million v. Million (Ky.), 121 S. W. 985; Perkins v. Cushman, 44 Me. 484; Richardson v. Robbins, 124 Mass. 105; Holmes v. Deppert, 122 Mich. 275, 80 N. W. 1094; Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902; Capell v. Fagan, 30 Mont. 507, 2 Ann. Cas. 37, 77 Pac. 55; Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Emig v. Diehl, 76 Pa. 359; Johnson v. McKamey (Tenn.), 53 S. W. 221; Bingham Livery etc. Co. v. McDonald, 37 Utah, 457, 110 Pac. 56; Thomas v. Ribble (Va.), 24 S. E. 241; Board v. Callihan, 33 W. Va. 209, 10 S. E. 382; Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275; Burdick v. Peterson, 72 Fed. 864.

other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement."⁴ Where a sheriff's sale-book having been destroyed in a fire, and a deed made by order of the court was lodged for recording, but was not recorded by reason of being taken to court for production where it was lost, the sheriff's evidence, aided by the court records, was sufficient proof of the contents.⁵ And the drafts, copies and memoranda of a deceased attorney who drew the lost deed were held admissible in support of evidence of its contents. "In connection with the fact testified to by both parties, of his employment in drawing the instrument, and the production of the draft of a settlement prepared by him, corroborating thereby the defendant's statement as to the purpose and contents of the instrument thus drawn, they were valuable *adminicula* of evidence. They were also regularly, although perhaps indefinitely, made in the ordinary course of business, by a deceased person. Had they been very precise as to the contents of the documents, they might have been a subject of suspicion."⁶ And it is not a valid objection to the testimony of one who knows the contents of a letter that the one who wrote the letter is not produced as a witness.⁷ The source of the knowledge of a witness testifying to the contents of a lost instrument is proper matter for searching cross-examination, as its weight would be materially affected by the varying circumstances of his having read the document, or its having been read to him, or to others in his hearing, or to others

⁴ *Tayloe v. Riggs, supra.*

⁵ *Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3.

⁶ *Moffat v. Moffat*, 10 Bosw. (N. Y.) 468. If the counsel had been

living, his evidence would have been competent: *Morrison v. Jackson*, 35 S. C. 311, 14 S. E. 682.

⁷ *Liebanan v. Pooley*, 1 Stark. 167.

in his absence and by them communicated to him;⁸ and an alleged copy should neither be read to nor be put into his hands for the avowed purpose of refreshing his memory. To allow a witness, under such circumstances, to inspect such paper, for the purpose of refreshing his memory of the contents of the original, would impair the reliability of testimony, endanger the rights of litigants, and obstruct the due administration of the law.⁹

§ 228 (229). **Degrees of secondary evidence.**—In these days, when every effort to regulate the law of evidence on its proper logical basis is to be commended, it is matter for surprise that some of our courts cling to the old imported rules which often as not prove to be badly founded. Such an instance is to be found in the perseverance in the proposition that there are no degrees in secondary evidence. As is well known, the rule with reference thereto has become well settled in England; and that when documents are lost, or when they are under the control of the adverse party and are not produced after due notice, parol evidence may be given of their contents, even though there may be a copy or an abstract of the same which might be produced; in other words, it is there held that there are no *degrees of secondary evidence*.¹⁰ But Stephen, in a note to Article 71 in his Digest, wherein he lays it down, “Subject to the provisions hereinafter contained any secondary evidence of a document is admissible,” qualifies it by, “If a counterpart is known to exist, it is

⁸ *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643; *Whalen v. Gleeson*, 81 Conn. 638, 71 Atl. 908; *Rankin v. Crow*, 19 Ill. 626; *Million v. Million* (Ky.), 121 S. W. 985; *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y. 618; *Commonwealth v. Johnson*, 199 Mass. 55, 85 N. E. 188; *Morris v. Swaney*, 7 Heisk. (Tenn.)

591; *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105.

⁹ *Jaques v. Horton*, 76 Ala. 238.

¹⁰ *Doe v. Ross*, 7 M. & W. 102, 106, 8 D. P. C. 389, 10 L. J. Ex. 201, 4 Jur. 321; *Hall v. Ball*, 3 Man. & G. 242, 133 Eng. Reprint 1133; *Brown v. Woodman*, 6 Car. & P. 205, 25 Eng. Com. L. 396.

the safest course to produce or account for it.”¹¹ It seems to us that if we lay down the rule that the best evidence attainable is to be produced, it is illogical to say that if the “best” is not attainable then any, that bears the distinguishing brand of secondary evidence, will do. Surely, if the best is to be produced, it means the best of all, and when what would be the best if it existed cannot be produced by reason, let us suppose, of its loss or destruction, then the *onus* is still on the party to produce the best of what remains. In most of the states in this country, where the question has arisen, this English rule has been rejected. In those states it has been considered more consistent with the general rule requiring the best evidence that a party should not be allowed to give parol evidence of a document, if it is practicable to obtain a correct copy and this fact appears in evidence. This is generally called the *American rule* as distinguished from that which has come to prevail in England on this subject. “The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and imposition. . . . This court has not yet gone the length of the English adjudications which hold, without qualification that there are no degrees in secondary evidence.”¹² This view has been adopted by the supreme court of the United States,¹³ as well as by those of Alabama,¹⁴ Georgia,¹⁵ Illinois,¹⁶ Maine,¹⁷ Missouri,¹⁸ Pennsylvania,¹⁹ Arkansas,²⁰

¹¹ *Munn v. Godbold*, 3 Bing. 297, 130 Eng. Reprint, 526; *Rex v. Castleton*, 7 Term Rep. 236, 101 Eng. Reprint, 530; *Reynolds' Steph. Dig.*, p. 111.

¹² *Nash v. Williams*, 20 Wall. (87 U. S.) 226, 22 L. Ed. 254; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 6 L. Ed. 166.

¹³ *Nash v. Williams*, 20 Wall. (U. S.) 226, 22 L. Ed. 254; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 597, 6 L. Ed. 166.

¹⁴ *Powers v. Hatter*, 152 Ala. 636, 44 South. 859; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344.

¹⁵ *Williams v. Waters*, 36 Ga. 454.

¹⁶ *Illinois Land etc. Co. v. Bonner*, 75 Ill. 315.

¹⁷ *Nason v. Jordan*, 62 Me. 480.

¹⁸ *Martin v. Brand*, 182 Mo. 116, 81 S. W. 443.

¹⁹ *Stevenson v. Hoy*, 43 Pa. 191.

²⁰ *Davies v. Pettit*, 11 Ark. 349; *Kelley v. Laconia Levee Dist.*, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

Wisconsin,²¹ Iowa,²² New York,²³ California,²⁴ Montana,²⁵ New Jersey,²⁶ Tennessee,²⁷ Vermont,²⁸ and Virginia;²⁹ while the English rule prevails in Massachusetts,³⁰ Indiana.³¹ Michigan,³² Nebraska,³³ Minnesota,³⁴ North Carolina,³⁵ South Carolina,³⁶ and Texas.³⁷ Although the so-called American rule seems likely ultimately to prevail in this country, it is by no means a settled question. There has been but very little discussion of the subject; and in

²¹ *Johnson v. Ashland Lumber Co.*, 52 Wis. 458, 9 N. W. 464.

²² *Higgins v. Reed*, 8 Iowa, 298, 74 Am. Dec. 305.

²³ *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; *New York Car Oil Co. v. Richmond*, 6 Bosw. (N. Y.) 213.

²⁴ *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403.

²⁵ *Belk v. Meagher*, 3 Mont. 65.

²⁶ *Popino v. McAllister*, 7 N. J. L. 46.

²⁷ *Southern Ry. Co. v. Seymour*, 113 Tenn. 523, 83 S. W. 674.

²⁸ *Mattocks v. Stearns*, 9 Vt. 326.

²⁹ *Pendleton v. Commonwealth*, 4 Leigh (Va.), 694, 26 Am. Dec. 342.

³⁰ *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469; *Commonwealth v. Smith*, 151 Mass. 491, 24 N. E. 677.

³¹ *Carpenter v. Dame*, 10 Ind. 125.

³² *Eslow v. Mitchell*, 26 Mich. 500; *People v. Christian*, 144 Mich. 247, 107 N. W. 919. Michigan, however, has decided both ways. The English rule cases are led by the old case of *Eslow v. Mitchell*, 26 Mich. 500, while the newer or American rule cases are headed by *Dillon v. Howe*, 98 Mich. 168, 57 N. W. 102, while in *Phillips v. United States Benev. Soc.*, 125 Mich. 186, 84 N. W. 57, Grant, J., said: "I have found no case in this court where the precise question is squarely presented, as it is in this case. I find several where copies were produced. To me it seems so

eminently just that the copy should be produced rather than to leave the contents of the paper to the uncertain memory of those who once read the writing that I am for holding the rule to be that the party must produce a sworn copy, when it is practicable to do so." Two other judges concurred with this, but the chief justice and Hooker, J., expressed themselves as satisfied with *Eslow v. Mitchell*, *supra*. In *People v. Christian*, 144 Mich. 247, 107 N. W. 919, the court squarely supports the old rule, saying there are no degrees in secondary evidence, and that it was error to exclude the copy of a press copy of a lost letter because steps had not been taken to produce the press copy of a lost letter.

³³ *Rawlings v. Young Men's Christian Assn.*, 48 Neb. 216, 66 N. W. 1124.

³⁴ *Magie v. Hermann*, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909.

³⁵ *Osborne v. Ballew*, 29 N. C. 415, although in *Kello v. Maget*, 1 Dev. & B. L. (18 N. C.) 414, the court adopted Starkie's order of proof of, first, counterpart; next, copy; next, abstract; and last the party may even give parol evidence of the contents of a deed.

³⁶ *Beaty v. Southern Ry. Co.*, 80 S. C. 527, 61 S. E. 1006.

³⁷ *Barclay v. Deyerle*, 53 Tex. Civ. App. 236, 116 S. W. 123.

several of the decisions, most frequently cited in its support, the subject was either not discussed or the decision on this point was *obiter dictum*. As *illustrations* of the view that there are no degrees of secondary evidence, it has been held that a party may give parol evidence of a lost deed or letter, though it be shown that he has a copy in his possession;³⁸ that after notice to the adversary to produce the original letter, a copy sworn to be correctly made from a press copy of a letter is admissible to prove the contents without producing the press copy;³⁹ and that if the testimony of a deceased witness is to be proved, any person who heard the testimony may be called, although the testimony was accurately taken down by a stenographer.⁴⁰

§ 229 (230). **Same—Cases illustrating the American rule—The admissibility of circumstantial evidence thereunder.**—While the English cases lay down the rule very broadly that there are no degrees in secondary evidence, the current of American authorities goes very strongly to show that, although the facts may warrant the admission of secondary evidence, the best kind of that character of evidence which appears to be in the power of the party to produce must be offered.⁴¹ To admit secondary evidence, it must, under the circumstances, not only appear to be the best, but it must be the best legal evidence.⁴² The following cases, among others, illustrate the so-called American rule: Where it was proved that a copy of a note could be produced, parol evidence was held improper.⁴³

³⁸ *Brown v. Woodman*, 6 Car. & P. 206; *Doe v. Ross*, 7 M. & W. 102, 8 D. P. C. 389, 10 L. J. Ex. 201, 4 Jur. 321; *Hall v. Ball*, 3 Man. & G. 242, 133 Eng. Reprint, 1133; *People v. Christian*, 144 Mich. 247, 107 N. W. 919.

³⁹ *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469.

⁴⁰ *Jeans v. Wheedon*, 2 Moody & R. 486; *Rex v. Christopher*, 4 Cox C.

C. 76, 2 Car. & K. 994. See, also, *State v. McDonald*, 65 Me. 466.

⁴¹ *Powers v. Hatter*, 152 Ala. 636, 44 South. 859; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344.

⁴² *Phillipson v. Bates*, 2 Mo. 116, 22 Am. Dec. 444.

⁴³ *United States v. Britton*, Fed. Cas. No. 14,650, 2 Mason (U. S.), 464.

The same rule was held to apply in the case of a lost will, there being a certified copy,⁴⁴ as well as in the cases of lost deeds and records.⁴⁵ In another case it was held that after the destruction of a record of conviction, oral proof of the contents was improper, as the law required a transcript of such convictions to be filed in the court of exchequer, which transcript, properly authenticated, the law made good evidence of the conviction.⁴⁶ Objection to testimony under the Chinese exclusion act that the witness saw the name of the defendant on a list of Chinese passengers was sustained because it was not shown who made the list; that it was an authorized list; that it was the list required by law to be made by the customs officials at San Francisco on the arrival of the Chinese there, or the list of the shipmaster required by law to be made; and because, if it was either of such lists, a certified copy of the same should have been produced, as the only legal evidence of the contents thereof in the absence of the original.⁴⁷ When a plaintiff sought to prove orally an authority from a corporation to its agent to make a contract with him, the court said: "The ordinary manner of showing that authority would be by the production of the minute-book, and finding there a resolution vesting the power to make the contract in the person who made it. I do not think, and do not desire to be understood as holding, that the absence of such a resolution from the minute-book would be conclusive upon the plaintiff, but the method by which he has sought to establish its existence is by showing that there was a certain certificate exhibited to him; and therefore it is essential for him to show that there was such a certificate. He proposes to prove that there was, not by its pro-

⁴⁴ *Illinois Land etc. Co. v. Bonner*, 75 Ill. 315.

⁴⁵ *Mariner v. Saunders*, 10 Ill. 113; *Lowry v. Cady*, 4 Vt. 504, 24 Am. Dec. 628; *Nash v. Williams*, 20 Wall. (U. S.) 226, 22 L. Ed. 254; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; *Platt v. Haner*, 27 Mich. 167; *Ellis v. Huff*,

29 Ill. 449; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344; *Kelly v. Cargill etc. Co.*, 7 N. D. 343 75 N. W. 264.

⁴⁶ *Hilts v. Colvin*, 14 Johns. (N. Y.) 182.

⁴⁷ *United States v. Long Hop*, 55 Fed. 58.

duction, but by secondary evidence of its contents of the lowest degree; that is, by the oral testimony of the plaintiff himself. Such evidence is not to be received until the trial judge is satisfied that notice to produce has been given, and that production is refused in answer to that notice, or, perhaps, that a witness having its custody has been subpoenaed to produce the writing, and has failed to do so. As neither of these necessary preliminary steps appears to have been taken, the proposed oral evidence must be excluded."⁴⁸ In a Missouri case, the record of an order of publication and the certified copy which was delivered to the publisher were both lost or destroyed. Under those circumstances it was proper for the court to admit in evidence the files of the paper containing the publication of the lost or destroyed order. The editor swore the files contained a true and correct copy of the order delivered to him by the clerk for publication. This made the files the next best evidence of the publication of the order.⁴⁹ Where it was desired to prove entries in the records of the register of the United States land office by a certificate of that officer that his records contained the matter referred to, the testimony was properly rejected. The proper evidence of these facts, in the absence of the original, was a copy of the records duly authenticated.⁵⁰ The contents of a petition filed in a court of record in a county other than that where the trial took place should be proved by a certified copy of the record, and not by parol.⁵¹ An abstract of title may only be read in evidence when it is shown by preliminary proof that the original of any deed or conveyance, or other written or record evidence, has been lost or destroyed, or that it is not within the power of the party wishing to use it to produce the same, and the record thereof had been destroyed by fire

⁴⁸ *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020.

⁴⁹ *Davis v. Montgomery*, 205 Mo. 271, 103 S. W. 979; *Conn v. McCullough*, 14 Mo. App. 584.

⁵⁰ *Kelley v. Laconia Levee Dist.*, 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

⁵¹ *Parker v. Ballard*, 123 Ga. 442, 51 S. E. 465.

or otherwise. It must be established that such abstract was made in the ordinary course of business prior to such loss or destruction.⁵² In another Missouri case, Fox, J., uses the correct expression when he said, dealing with the admission of parol evidence of a lost certificate of entry on land, "If the original was not in the possession of the plaintiff the next best evidence was a certified copy."⁵³ The term "next best evidence" well describes the call of the American rule.⁵⁴ So it was held that an extract from a lost letter cannot be given in evidence without calling for the writer to produce his letter-book;⁵⁵ that the plaintiff could not prove by parol the contents of a letter when it appeared that he had in his possession a fac-simile of the original,⁵⁶ and that a copy of a certified copy of a lost original is not admissible to prove the contents of the original.⁵⁷ Where commissioners to partition lands had made their report which was lost, secondary evidence was properly admissible to establish its provisions; and seeing that there was no direct testimony as to its contents and no person who had seen it had testified, the court held there could be no doubt that its effects and terms could be established by circumstantial evidence.⁵⁸ But even under the American rule it has been held that when the nature of the case does not itself disclose the existence of such better evidence, the objector must not only prove its existence, but also prove that it was known to the other party in season to have been produced on the trial.⁵⁹

⁵² *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. 234.

⁵³ *Martin v. Brand*, 182 Mo. 116, 81 S. W. 443.

⁵⁴ See, also, *Barnett v. Lucas*, 27 Ind. App. 441, 61 N. E. 683 (lost attachment bond); *Bank of Aurora v. Linzee*, 166 Mo. 496, 65 S. W. 735 (lost deeds of trust); *Staunchfield v. Jeutter*, 4 Neb. (Unof.) 847, 96 N. W. 642; *Southern R. Co. v. Seymour*, 113 Tenn. 523, 83 S. W. 674 (an interesting decision on records lost after

removal of cause to federal court); *Kennedy v. Borah*, 226 Ill. 243, 80 N. E. 767 (lost adoption records).

⁵⁵ *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420.

⁵⁶ *Stevenson v. Hoy*, 43 Pa. 191.

⁵⁷ *Dyer v. Hudson*, 65 Cal. 372, 4 Pac. 235.

⁵⁸ *Johnson v. Franklin* (Tex. Civ. App.), 76 S. W. 611.

⁵⁹ *Doe v. Biggers*, 6 Ga. 188; *Wilson v. South Park Commrs.*, 70 Ill. 46; *Des Moines Sav. Bank v. Ken-*

§ 230 (231.) Same—Parol evidence not allowed when the law requires copies—Original always admissible.—

Although some of the authorities would seem to convey the absolute equality of all kinds of secondary evidence, and that the admission of the “next best” rule cannot be entertained, it is not seriously claimed by the advocates of either rule that all classes of secondary evidence are equally satisfactory. For example, it is not contended that the recollection of one who has read a document is as likely to be correct as a carefully made copy of it. Those who assert that there are no degrees of secondary evidence admit that the jury may draw an unfavorable inference against a party who should give parol evidence of the contents of a document, if he has a correct copy under his control. But they contend that such evidence would be legally competent and that any other theory destroys all the distinctions between the weight and the admissibility of evidence. Even though the rule that there are no degrees of secondary evidence should prevail, it is not claimed that it applies in those cases where the law has expressly substituted certain kinds of copies for primary evidence. For example, certified or examined copies of *public records* should be offered if obtainable, rather than parol evidence;⁶⁰ and in such case parol evidence will not be received, unless it is shown that no copy can be obtained.⁶¹ It might be just as well claimed that in cases to

nedy, 142 Iowa, 272, 120 N. W. 742; Robinson v. Singerly Pulp etc. Co., 110 Md. 382, 72 Atl. 828; Minneapolis Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546; First Nat. Bank of Leavenworth v. Wright, 104 Mo. App. 242, 78 S. W. 686; Grant v. Mitchell, 156 N. C. 15, 71 S. E. 1087; Howe v. Taylor, 9 Or. 288; Sterling v. St. Louis etc. R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655; Masterson v. Harris, 37 Tex. Civ. App. 145, 83 S. W. 428; Lewis v. San Antonio, 7 Tex. 288; Mattocks v. Stearns, 9 Vt.

326; Nash v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254; Bourquin v. Northwestern R. Co., 79 S. C. 217, 60 S. E. 521; 1 Greenl. Ev., § 84, note.

⁶⁰ Tayl. Ev., 10th ed., § 552, and cases cited.

⁶¹ Redd v. State, 65 Ark. 475, 47 S. W. 119; Martin v. Brand, 182 Mo. 116, 81 S. W. 443; Sexsmith v. Jones, 13 Wis. 565; Tayl. Ev., 10th ed., § 552; Doe v. Ross, 7 Mees. & W. 106, 8 D. P. C. 389, 10 L. J. Ex. 201, 4 Jur. 321; MacDougal v. Young, Ryan & M. 392, 2 Car. & P. 278; Robertson v. Du-

which such statutory provision might apply, *originals* should be excluded in favor of copies. Of course it must not be inferred that any of the rules laid down in this chapter *exclude originals*, since they, if relevant, are always admissible. It would be absurd to reject originals simply because copies may be made competent by statute or otherwise. And yet this particular objection has been made to originals. In Alabama the objection was, apparently seriously, taken that the original papers, being the original files and papers in the circuit court of Mobile county, Alabama, in the case of *A. Kory & Sons v. Bradley Timber Company*, the minute-book of the court showing the judgment rendered in the case, the original execution issued therein, and the sheriff's return thereon showing levy, advertisement, and the sale thereunder, although identified by the proper custodian, were in fact secondary evidence, and therefore not admissible as long as certified copies, which it was alleged would be primary evidence, were obtainable. Needless to say, the objection was not sustained.⁶²

§ 231 (232). Cross-examination of witnesses as to writings.—There is, under the circumstances, a singular unanimity in the courts of this country on the principle of cross-examination upon the subject of previous contrary statements contained in writings. It was long a mooted question in England whether the ancient rule, that written instruments, if in existence, should be proved by the instruments themselves, should be so relaxed as to allow witnesses on cross-examination to be asked their contents. It would be profitless to state fully the conclusions on this subject which were announced in the celebrated trial known as *Queen Caroline's case*. The judges, in answer to ques-

Bose, 76 Tex. 1, 13 S. W. 300; Culver v. Uthe, 133 U. S. 655, 10 Sup. Ct. Rep. 415, 33 L. Ed. 776.

⁶² *Bradley Timber Co. v. White*, 121 Fed. 779, 58 C. C. A. 55. See, also, *McAllister v. People*, 28 Colo.

156, 63 Pac. 308; *Ferrell v. State*, 45 Fla. 26, 34 South. 220; *Sawyer v. Garcelon*, 63 Me. 25; *Smith v. Veysey*, 30 Wash. 18, 70 Pac. 94; *Weisbrod v. Chicago etc. Ry. Co.*, 21 Wis. 602.

tions propounded to them by the house of lords, stated as their conclusions that, in their judgment, a party on cross-examination could not represent in the statement of a question the contents of a letter and ask the witness whether he wrote such letter, without having first shown it to the witness and having received an affirmative answer to the question whether the witness had written the letter. They further held that when a writing is produced and a witness is shown a part of the same, he may be asked whether he wrote such part shown him. But that if he should not admit that he did or did not write such part, he could not be examined as to the contents of the writing. And thirdly, it was held that when a letter is produced and the witness admits that he wrote it, he cannot be asked whether or not such and such statements are contained therein. And that, if the letter is read in evidence, it should be offered by the cross-examining counsel as part of his evidence after the opening of the case, unless he suggests to the court that he desires to have it read at once as a basis for cross-examination. And finally it was held that, if a witness is asked on cross-examination whether he has made representations of a particular nature without specifying whether the question refers to representations in writing or in words, the question should be divided into parts and the counsel be directed to ask whether the representation had been made in writing or in words; and if it appeared to be in writing, the testimony would be inadmissible.⁶³ It will be observed that these answers adhered to the old rule that the contents of written instruments should be proved by the instruments themselves. This rule has been so changed by statute in England that a witness may be now cross-examined as to previous written statements made by him without showing him the writing. Stephen has it, "A witness under cross-examination (or a witness examined under the provisions of article 131, by the party who called him as to previous statements inconsistent with his present testimony) may be questioned as to previous

⁶³ Queen's Case, 2 Brod. & B. 284, 292, 129 Eng. Reprint, 976.

statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him.”⁶⁴ We may explain that the reference to it made in this section is only in the aspect of the best evidence, and we recognize, just as feelingly as other text-writers, the hardship it occasionally inflicts on those endeavoring to elicit the truth on cross-examination. But it is hardly probable that so many of the courts in this country would have retained the old English doctrine if they had not found some good use for it, and the time saved in cross-examination is a very important element. True, we may be asked: What would have become of Daniel O’Connell’s great and dramatic cross-examination of Anne M’Garahan, if he had been obliged first to put her letter to Father Maguire in her hand?⁶⁵ The answer is very simple. In lieu of the intensely theatrical situation, we should have had the young woman testifying her untrue statements in her examination in chief, and O’Connell on cross-examination would have shown her her letter and asked if the signature were hers and the letter would, on her affirmative answer, have been read to the jury—probably as effective as the other way. And just the same with Mrs. Price in the Berkeley Peerage case.⁶⁶ It is still the rule in many jurisdictions in this country that the writing should be first produced and shown the witness; so that he may have an opportunity for inspection and examination where such writing is of the subject of the action;⁶⁷ but that a witness may be cross-examined as to the contents of a *writing* which is merely incidental and *collateral to the issue*, and which does not affect the merits of the controversy between the parties, for the purpose of testing his credibility, although no notice to produce the paper has been given. It is a common practice and no violation of the rule to ask a witness whether he testified to a given statement at another trial, without producing the record

⁶⁴ Reynolds’ Steph. on Ev., p. 185.

⁶⁵ M’Garahan v. Maguire, Mongan’s Celebrated Trials in Ireland, 16, 26.

⁶⁶ Berkeley Peerage Trial, Sherwood’s abstract, 120.

⁶⁷ See § 847, *post*.

of such trial.⁶⁸ The retention by a large majority of the states of their adoption of the former English rule even by statute, and the disclaimer by others will be fully dealt with hereinafter in the chapter devoted to attendance and examination of witnesses. We cannot leave the subject here, however, without expressing that the authorities occasionally cited are not at all persuasive. Brougham's illustration of how he was hampered in his defense of Queen Caroline is not a good one. He says he had an honest man on the stand, who honestly swore to what was not true, believing it to be true, while Brougham had under a covered desk the evidence of the man's mistake! What was gained by it? Nothing. And much time would have been saved, at the sacrifice certainly of some of the great orator's forensic eloquence, and the testimony of the man of integrity on seeing his letters would have been correctly taken without his unnecessary humiliation. There is, of course, some foundation for the claim to examine the witness in ignorance of the trap being laid for him, and it cannot be any stronger than Starkie puts it, "An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions which he is on cross-examination ultimately forced to avow; and it often happens that by his palpable and disingenuous attempts to conceal the truth he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give. Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded."⁶⁹ The conclusion to which we are driven is that the opinion of the judges in Queen Caroline's

⁶⁸ See § 847, *post*.

⁶⁹ 1 Stark, Ev. 203. The learned author advocates such a cross-examination as a test for trying the mem-

ory and credit of the witness. "If," he says, "a witness profess to give a minute and detailed account of a transaction long past . . . it is

case was right, and that the legislation in England which changed it years afterward effected little, if any, public benefit by the statute. The American courts retaining it are adopting the logical position of having the best evidence attainable in every instance, and the best evidence in such cases is the document introduced by the cross-examining counsel to confront the witness whose testimony on direct examination conflicts with it.

most desirable to put that memory to the test by every fair and competent means." Such a cross-examination affords no mean test for trying the integrity of the witness.

CHAPTER 8.

SUBSTANCE OF ISSUE.

§ 232. Common-law Rules as to Substance of the Issue—Variances.

§ 233. The Modern Rules as to Substance of the Issue—Amendments.

§ 234. Same, Continued.

§ 232 (233). **Common-law rule as to substance of the issue—Variances.**—The subject of variances between the *allegata* and the *probata* is one only to be collaterally considered by the light of the effect of evidence received compared with that which the pleadings appear to demand. It is rather a matter of pleading and procedure than of evidence proper, and comes under the purview of the writer on the law of evidence mainly by reason of the discussion around the *quantum* of proof necessary to maintain an action or defense as the case may be, as set out in the claim or answer. A variance has been well defined to be an essential difference between the pleading and the proof.¹ It was one of the established rules of the common law that only the substance of the issue need be proved. This rule gave rise to constant discussion, and courts differed widely upon the subject. It was often a question of the greatest importance, because a *variance*,—that is, a disagreement between the allegations and the proof in some matter which in point of law is essential to the charge or claim,²—was as fatal to the case of the party who had the burden of proof as was a total failure of evidence, for the jury was bound to render a verdict against him in case

¹ Sanborn, C. J., in *Mulligan v. United States*, 120 Fed. 98, 56 C. C. A. 50. Other useful definitions will be found in *Mobile etc. R. Co. v. George*, 94 Ala. 199, 10 South. 145; *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1; *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. 1020; *Gilman v. Ferguson*, 116 Ill. App. 347; *Becker v. Baumgartner*, 5 Ind. App. 576, 32

N. E. 786; *Dennis v. Spencer*, 45 Minn. 250, 47 N. W. 795; *Haughey Livery etc. Co. v. Joyce*, 41 Mo. App. 564; *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 6 L. R. A. 524, 43 N. W. 340; *Stegmaier v. Keystone Coal Co.*, 225 Pa. 221, 74 Atl. 58; *Warrington v. State*, 1 Tex. App. 168; *Skinner v. Grant*, 12 Vt. 456.

² Greenl. Ev., § 63.

of such a variance.³ As the plaintiff had the privilege of setting forth his claim in such terms as he chose when he framed his complaint, the courts often gave this rule a very technical construction and forced him to prove his case exactly as he had set it forth in the complaint. The courts were favorably inclined to this technical rule because of the fact that the object of the pleadings was to inform the court and the parties of the real issue and to so perfect the record that at any future time the exact point decided could be found.⁴ Later on we find the power of amendment began to be asserted. A court may, as appears in the next section, in its discretion, allow of amendments in a declaration, which do not change the form or nature of the action, or introduce a new subject matter. Thus in a libel action we find: "In this case the plaintiff was permitted to insert an averment that the words were spoken of him in his clerical capacity. This introduced no new subject matter of action, and no new slander or defamatory words. It was but declaring on the same slander in a different form. It is no fatal objection to an amendment that it may enable a plaintiff to recover when he otherwise cannot. Every necessary amendment always does this. It was insisted that there was a variance between the proof and the declaration. 'Variance' means 'material difference.' It is no variance that the proof does not show all the points in a declaration."⁵ But even in the older practice, the rigidity of the rule was so far relaxed that the agreement between the allegations and the proofs was required only in those particulars legally essential to support the charge or claim. Nor did the court require proof of all that was alleged in the pleadings. If any of the allegations could be

³ Steph. Pl., Tyler's ed., p. 118; Tayl. Ev., 10th ed., § 218.

⁴ Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523; Spangler v. Pugh, 21 Ill. 85, 74 Am. Dec. 77; Ryan v. Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302; Sears v. Barnum, Clarke Ch. (N.

Y.) 139; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. 627; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593; McClelland v. Smith, 3 Tex. 210.

⁵ Skinner v. Grant, 12 Vt. 456.

stricken out without destroying the plaintiff's right of action, they were treated as mere *surplusage*; and no proof of them was required. *Utile non debet per inutile vitiari*.⁶ But the courts adhered with extreme technicality to the rule that all allegations that could not be stricken out without removing facts essential to the cause of action must be strictly proved as alleged. To prove a certain parish to be *St. Ethelburga* which was alleged as *St. Ethelburg* in the pleadings,⁷ or to prove a prosecution before Baron Waterpark of *Waterpark*, when it was alleged as before

⁶ *Twiss v. Baldwin*, 9 Conn. 291; *Gibbs v. Cannon*, 9 Serg. & R. (Pa.) 198; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Livingston v. Swanwick*, 2 Dall. 300, Fed. Cas. No. 8419, 1 L. Ed. 389. As to what constitutes a material variance in proof from the charge in the indictment, the general rule is that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. Hence it is, that even in capital offenses it is not necessary to prove more than the substance of the averment in the indictment. Thus, for example, in an indictment for murder, if it appear that the party was killed by a different weapon from that described in the indictment, it will still maintain the indictment; as, for example, if the wound or killing be alleged to be by a sword, and it be proved to be by an ax or staff; or is alleged to be a wooden staff, and it be proved to be with a stone. For in all these cases the substance is the same—the wounding or killing with a weapon. So, if the indictment be of a death by one sort of poisoning, and it turns out in the evidence to be by another sort of poisoning, the difference is not material; for in each of these cases the mode of the death is substantially the same, viz., by

poisoning. But if the indictment charge a death by poisoning, it will not be supported by the proof of a death entirely different, as by shooting, starving, or strangling: *United States v. Howard*, Fed. Cas. No. 1543. In regard to cases of misnomer, it will be found that, in all the cases where the variance has been held fatal, it was a misnomer of a party whose existence was essential to the offense charged in the indictment; as, for example, in cases of theft, where the property is charged as that of A B, and it turns out, in proof, to be of A C; or in cases of robbery, where the person robbed is alleged to be A B, and it turns out on proof to be C B: See 2 Russ. Crimes, 707, 714, 715. As to surplusage, where the indictment set out that a certain ship belonged to certain persons (naming them), citizens of the United States, and the names were unnecessary, but one of them was Willard Nye, and not William Nye, as stated in the indictment, the court in the case last referred to said, "I think the names of the owners may be either rejected as surplusage; or the variance as to the proof was as to a fact purely immaterial."

⁷ *Wilson v. Gilbert*, 2 Bos. & P. 281, 126 Eng. Reprint, 1282.

Baron Waterpark of *Waterfork*⁸ were both held to be fatal variances under the old common-law rule. So it was held a fatal variance to allege that one partner was the owner of partnership goods that had been stolen, and the accused was acquitted on this ground.⁹ It was a fatal variance to allege a joint liability against four when only one was liable;¹⁰ to allege the ownership of a house in a *feme covert*;¹¹ or an absolute contract where the proof showed it to be in the alternative;¹² or to describe a woman as a "widow," when it was proved that she had never been married;¹³ or as "Ann Gooding," when her full name was "Sarah Ann Gooding";¹⁴ or to describe a wood as "The old Walk," its real name being "The long Walk";¹⁵ or to describe a "heifer" as a "cow";¹⁶ or a "lamb" as a "sheep";¹⁷ or as a "ewe";¹⁸ so the presence of one letter "s" too many at the end of a word created a doubt as to whether this ought not to be considered a fatal variance.¹⁹ So if the pleadings described matters connected with the cause of action with *unnecessary particularity*, the plaintiff was obliged to prove each detail if it could be considered essential to the cause of action.²⁰ Probably the greatest injustice arising from the technical rule of the common law was in the case of *writings* where a mere literal variance in setting forth the essential parts in the pleadings was fatal to the action, for the court had no power of reconciling the record with the evidence.²¹ Although the instances here

⁸ *Walters v. Mace*, 2 Barn. & Ald. 756, 106 Eng. Reprint, 541.

⁹ *Commonwealth v. Trimmer*, 1 Mass. 476.

¹⁰ *Hibberd v. Hubbard*, 211 Pa. 331, 60 Atl. 911.

¹¹ *State v. Martin*, 3 Murph. (N. C.) 533.

¹² *Penny v. Porter*, 2 East, 2, 102 Eng. Reprint, 268.

¹³ *Rex v. Deeley*, 1 Moody C. C. 303, 4 Car. & P. 579.

¹⁴ *Reg. v. Gooding*, Car. & M. 297.

¹⁵ *Rex v. Owen*, 1 Moody C. C. 181.

¹⁶ *Reg. v. Cook*, 1 Leach C. C. 105, 2 East P. C. 616.

¹⁷ *Rex v. Loom*, 1 Moody C. C. 160.

¹⁸ *Rex v. Puddifoot*, 1 Moody C. C. 247.

¹⁹ *Jones v. Mars*, 2 Camp. 305.

²⁰ *Bristow v. Wright*, 2 Doug. 665, 1 Smith Lead. Cas. 1417, 99 Eng. Reprint, 421; *State v. Jackson*, 30 Me. 29.

²¹ *Bristow v. Wright*, 2 Doug. 665, 1 Smith's Lead. Cas. 1417, 99 Eng. Reprint, 421; *Sands v. Ledger*, 2 Ld. Raym. 792, 92 Eng. Reprint, 29; *State*

given to illustrate the strictness of the old rule were for the most part criminal cases, it is hardly necessary to cite authority to the familiar rule of the common law that in both civil and criminal cases every material and essential allegation in the charge or the defense and every circumstance descriptive of anything so alleged, if disputed, had to be proved in substance as averred.²² The old rule has been stated as briefly as possible to render the understanding of the foundation of the new one more rapid and thorough, although we feel there is little necessity to urge any apologetic reason for devoting as little space as possible to either a statement of practically a barbaric rule or to further illustrate it than by the few instances set out. The common sense demands, which called for the modern rule, relegate the further discussion of the ancient one more to the domain of historical compilation, than to that of up-to-date law commentary.

§ 233 (234). The modern rules as to substance of the issue—Amendments.—It is elementary that the material allegations either of the statement of the claim of either plaintiff or defendant must be borne out by the evidence. If the evidence differs from the statement either of claim or defense, the variance arises and calls for treatment according to its nature.²³ It follows, that failing the necessary treatment—amendment according to the circum-

v. Caffey, 2 Murph. (N. C.) 320; Sheehy v. Mandeville, 7 Cranch (U. S.), 208, 217, 3 L. Ed. 317; Commonwealth v. Stow, 1 Mass. 54; Saxton v. Johnson, 10 Johns. (N. Y.) 418. Even such a trivial mistake as using the word "nor" for "not" has been held a fatal variance: Reg. v. Drake, 2 Salk. 660, 91 Eng. Reprint, 563. In Olin v. Chipman, 2 Tyler (Vt.), 148, it was held a fatal variance to use the word "our" in place of the word "the": Browning v. Berry, 107 N. C. 231, 10 L. R. A. 726, 12 S. E. 195;

York v. Fortenbury, 15 Colo. 129, 25 Pac. 163.

²² Greenl. Ev., § 66.

²³ McNerney v. Barnes, 77 Conn. 155, 58 Atl. 714; Farmers' Mut. Fire Ins. Co. v. Jackman, 35 Ind. App. 1, 73 N. E. 730; Bailey v. Gatewood, 68 Kan. 231, 74 Pac. 1117; City of Covington v. Miles, 26 Ky. Law Rep. 609, 82 S. W. 281; Chicago House Wrecking Co. v. Stewart Lumber Co., 66 Neb. 835, 92 N. W. 1009; Kitchen v. Holmes, 42 Or. 252, 70 Pac. 830; Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 S. E. 879.

stances—the party against whom the variance is arrayed must of necessity fail. For the reason stated, therefore, any extended discussions of the old rule is not within the scope of this work, nor is it of any very great importance, since this old common-law rule has been rendered obsolete in most jurisdictions by statutes making it possible to *amend the pleadings*. The statutes, by allowing the correction of slight and nonessential mistakes in pleadings,—of variances between the pleadings and the proof,—prevent the injustice that came from the technical enforcement of the old rule. Often the party would be nonsuited or the real point at issue would not be determined and the parties would be excluded from all further remedy because of the zealous application of the rule. A series of acts have been passed in England abrogating the old rules in both civil and criminal cases. Similar statutes have been adopted throughout this country.²⁴ The courts of this country and of England, both prior and subsequent to any of the late statutory changes in methods of procedure, have always been actuated by a greater or less degree of liberality in allowing amendments to pleadings, for the purpose of doing substantial justice between litigants, and deciding controversies upon their merits. At the present day, the subject of amendments to pleadings, and the powers of the courts to grant or refuse the same, are very generally regulated by statute. Such statutory provisions, especially those which are contained in the codes of the several states which have adopted the reformed system of procedure, although they differ somewhat in detail, are remarkably similar in their general scope and effect. They divide amendments to pleadings into two classes: *first*, those which are permitted before trial, which include amendments allowed as a matter of course, without any

²⁴ A concise historical discussion of the changes in the law relating to variance and a review of the authorities will be found in 1 Smith, Lead. Cas. 1420. See, also, note to

Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155. An exhaustive discussion of the subject of amendments will be found in 1 Ency. of Pl. & Pr. 458–701.

special application to the court, and amendments made as the result of a motion for such purpose, or which are allowed after a demurrer is sustained; and *second*, amendments made during or after trial, for the purpose of harmonizing the allegations of the pleadings with the facts proved, or offered to be proved. The granting or refusing a proposed amendment, in the latter class of cases, is a matter of discretion with the court, to be liberally exercised in furtherance of justice;²⁵ and the refusal to allow an amendment will be presumed to be just unless the contrary appears in the record.²⁶ These statutes make radical changes, modifying the rules which so long prevailed. They not only allow amendments before, but also after, final judgment, when justice seems so to demand. Though these statutes contain similar provisions, the practitioner must refer to the law of his own jurisdiction in order to settle details. In general, they provide that in both civil and criminal cases the court may, either before or after judgment, in furtherance of justice, and on such terms as may be just, amend any process, pleading or other proceeding by conforming the pleadings or other proceedings to the facts proved. This may be done by any amendment that does not substantially change the claim or defense and thus prejudice the rights of the adverse party. It is usually provided that no process shall be quashed for any defect or want of form, if this defect can be remedied by an amendment; and the statutes usually direct the court to disregard such errors or defects in the pleadings or other proceedings as do not affect the rights of the adverse party.²⁷ Many of the statutes allow each pleading to be amended once as a matter of course without special application to the courts. A judgment will not be reversed for a defect in the pleading, when the record shows that there has been a full trial of the case; that substantial justice has been done, and that neither party has been

²⁵ *Tiernan v. Woodruff*, Fed. Cas. No. 14,027, 5 McLean, 135; *Hayden v. Hayden*, 46 Cal. 332.

²⁶ *Jessup v. King*, 4 Cal. 331.

²⁷ See the statutes of the jurisdiction.

prejudiced by the defect.²⁸ With scarcely a single dissent the authorities hold that these statutes should be liberally construed by the courts to further the ends of substantial justice.²⁹ The difficulty which sometimes exists, in the application of the rule, arises from the fact that almost all amendments change, to some extent, the cause of action, as originally stated. An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of the action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alterations being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but

²⁸ *Molen v. Orr*, 44 Ark. 486; *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Colorado Springs etc. Co. v. Allen*, 48 Colo. 4, 108 Pac. 990; *Findley v. Central of Georgia R. Co.*, 7 Ga. App. 180, 66 S. E. 485; *Consolidated Stone Co. v. Williams*, 26 Ind. App. 131, 84 Am. St. Rep. 278, 57 N. E. 558; *Hoben v. Burlington etc. R. R. Co.*, 20 Iowa, 562; *Doniphan v. Street*, 17 Iowa, 317; *Dorsey v. Swann*, 19 Ky. Law Rep. 1387, 43 S. W. 692; *Mason v. Fractional School Dist. No. 1*, 34 Mich. 228; *Mingus v. Bank of Ethel*, 136 Mo. App. 407, 117 S. W. 683; *Hall Grain Co. v. Louisville etc. R. Co.*, 148 Mo. App. 308, 128 S. W. 42; *Parker v. Omaha Packing Co.*, 85 Neb. 515, 123 N. W. 1026; *Halloek v. Commercial Ins. Co.*, 26 N. J. L. 268; *Bailey v. Hornthal*, 154 N. Y. 648, 61 Am. St. Rep. 645, 49 N. E. 56; *Mode v. Penland*, 93 N. C. 292; *Ralston v. Kohl*, 30 Ohio St. 92; *Denn v. Peters*, 36 Or. 486, 59 Pac. 1109; *North Star Boot etc. Co. v. Stebbins*,

3 S. D. 540, 54 N. W. 593; *Texas Central Tel. Co. v. Owens* (Tex. Civ. App.), 128 S. W. 926; *Culmer v. Clift*, 14 Utah, 286, 47 Pac. 85; *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487; *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W. 247, 128 N. W. 975.

²⁹ *Burns v. Scoofy*, 98 Cal. 271, 33 Pac. 86; *Hayden v. Hayden*, 46 Cal. 332; *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335; *Phelps Mfg. Co. v. Enz*, 19 Conn. 58; *Drake v. Drake*, 83 Ill. 526; *Solon v. Perry*, 54 Me. 493; *Beecher v. Wayne*, Circuit Judges, 70 Mich. 363, 38 N. W. 322; *Reyburn v. Mitchell*, 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. 592; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058; *Miller v. Pollock*, 99 Pa. 202; *Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521; *Tiernan v. Woodruff*, Fed. Cas. No. 14,027, 5 McLean, 135.

to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case.³⁰ In the practical application of the power of

³⁰ *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155. The new count, which was admitted in this case, in addition to the statement of the written contract, which was set forth in the original count, contains averments of further stipulations between the parties, made subsequently to that time, and which constituted, in fact, a further contract, superadded to the contract in writing. In one sense, as appears by the opinion in that case, this may be regarded as another contract, made at a subsequent date, and the breach of which would furnish a different cause of action from that which would have arisen by a breach of the original agreement. But this subsequent matter was merely an extension of the original contract, with a variation of the place of performance; and according to the statement of the counsel, the action was in fact founded upon the breach of the contract, as modified and varied by the subsequent agreement; the additional averments, contained in the amended count, being omitted, under a supposition that this additional matter might be offered in evidence, by way of answer to any defense which might be attempted. In that view the case was clearly one of an imperfect declaration upon the contract intended as the foundation of the action, by the omission to set out the farther matter, which modified the original contract

and altered the time and place of performance. The cause of action in both counts was a contract for the delivery of certain cattle, and a breach of that contract. The particulars of time and place, set forth in the amended count, are materially different from those in the original; and the additional averments were founded upon matter superadded by a further contract between the parties, after the original agreement was entered into. But it was upon a breach of the contract as modified that the plaintiff brought his suit; and he asked, by his amendment, to perfect his declaration, so that he might be enabled to prosecute it, and recover for that breach. In this view of the case the amendment was rightly admitted. The form of the action was not changed, and the identity of the cause was preserved. It was a variation in the mode of demanding the same thing, that is, damages for the breach of the original contract for the delivery of the cattle, some of the terms of which were modified by the subsequent agreement of the parties, but the additional matter, through mistake, was not stated: *Burnham v. Spooner*, 10 N. H. 165; *Ball v. Claffin*, 5 Pick. (Mass.) 303, 16 Am. Dec. 407; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; *Mixer v. Howarth*, 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

granting amendments to pleadings, the rule laid down in the New Hampshire case, cited in the notes, that no amendments which change or alter the cause of action contained in the original pleadings are allowed, has, in legal actions, been maintained by an overwhelming weight of judicial authority, and must be considered as the settled doctrine on the subject.³¹ For the purpose of determining whether

³¹ Chit. Pl. 198; Pomeroy's Remedies, § 566; Bliss on Code Pl., § 429. Thus amendments have been refused which sought to change the cause of action from *assumpsit*, on the judgment of another state, to debt, Boston India Rubber Co. v. Hoit, 14 Vt. 92; or from *assumpsit* to account rendered: Strock v. Little, 33 Pa. 409; or from a real action to an action of forcible entry and detainer: Fay v. Taft, 12 Cush. (Mass.) 448; or from trover to *assumpsit*: People v. Wayne Co. Circuit Judge, 13 Mich. 206; or from debt to case; but after such amendment has been allowed, leave will be given to the plaintiff to change his action to its original form: Houghton v. Stowell, 28 Me. 215; or from an action *in rem*, to foreclose a mortgage on a vessel, to an action to recover possession thereof: In re The John Jay, Fed. Cas. No. 7352, 3 Blatchf. C. C. 67. Nor in real actions will an amendment be allowed so as to embrace more or different land from that described in the complaint: Wyman v. Kilgore, 47 Me. 184; Slater v. Nason, 15 Pick. (Mass.) 345; although in Russell v. Conn, 20 N. Y. 81, where the refusal to allow an amendment to the description of land described as bounded on the east, etc., so as to make it read as bounded on the west, etc., was held error. Nor in an action against a stockholder, where the declaration contained allegations sufficient to bring

the case within one statute, will an amendment be permitted so as to bring it within a different statute: Milliken v. Whitehouse, 49 Me. 527. The following additional cases, upholding the general doctrine, are cited, not so much for the purpose of supporting the rule, as of illustrating some of the many instances in which it has been applied: Casnard v. Eve, Dud. (Ga.) 108; Little v. Morgan, 31 N. H. 499; Bishop v. Baker, 19 Pick. (Mass.) 517; Guilford v. Adams, 19 Pick. (Mass.) 376; Ross v. Bates, 2 Root (Conn.), 198; Williams v. Hollis, 19 Ga. 313; Cooper v. Waldron, 50 Me. 80; Lawrence v. Langley, 14 N. H. 70; Butterfield v. Harvell, 3 N. H. 201; Edgerly v. Emerson, 4 N. H. 147; Eagle v. Alner, 1 Johns. Cas. (N. Y.) 332; Steffy v. Carpenter, 37 Pa. 41; Carpenter v. Gookin, 2 Vt. 495, 21 Am. Dec. 566; Sumner v. Brown, 34 Vt. 194. When the amendment sought to be introduced has been apparently barred by the statute of limitations, the general rule is especially applicable: Wood v. Anderson, 25 Pa. 407; Wright v. Hart, 44 Pa. 454; and the same is true if the effect of the amendment would be to deprive defendant of his right to plead the statute of limitations: Van Syckels v. Perry, 3 Robt. (N. Y.) 621. It follows, also, from the tenor of the adjudications, that no distinction can be drawn between a proposed amendment which is embodied in a

the new matter contained in an amendment is entirely foreign to the cause of action already set forth, the latter must receive a liberal construction. Thus, where the complaint alleged ownership of certain lands in the bed of, and near the bank of, a stream, and sought to recover possession thereof from an adverse holder, an amendment, by inserting proper averments of prior appropriation of the water, and a diversion by defendant, with prayer for an injunction, was allowed.³² Notwithstanding the similarity of the provisions of the codes relating to amendments to pleadings, there is a wide difference in the rule established by the courts of the different states as to amendments which alter or vary the cause of action. In a majority of the code states, the courts have established the doctrine that the powers conferred upon them by their codes in this respect are no greater than had previously existed at the common law, and that they were not authorized to grant

new and independent count, provided a separate and distinct cause of action is stated therein, and an amendment of the same character to a count already contained in the original pleading: *Thompson v. Phelan*, 22 N. H. 339; *Wood v. Folsom*, 42 N. H. 70; *Burt v. Kinne*, 47 N. H. 361.

³² *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673. In fact, it may be laid down as a general rule that so long as the plaintiff adheres to the original instrument or contract on which his pleading is based, any alteration of the grounds of recovery on that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action: *Yost v. Eby*, 23 Pa. 327; *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155; *Church v. Syracuse Coal etc. Co.*, 32 Conn. 372; *Cabarga v. Seeger*, 17 Pa. 514. This latter rule, however, is subject to the limitations, that an action, in form *ex contractu*, cannot

be changed to an action *ex delicto*: *Sanborn v. Sanborn*, 7 Gray (Mass.), 142; *Lane v. Beam*, 19 Barb. (N. Y.) 51; *Ramirez v. Murray*, 5 Cal. 222; nor, conversely, can an action in form *ex delicto* be amended so as to state an action *ex contractu*: *Whitecomb v. Hungerford*, 42 Barb. (N. Y.) 177. So, also, where an intended cause of action, although defectively set forth, can be distinguished as clearly from another cause of action as if the original pleading had been perfect, the defect may be cured without infringing against the rule prohibiting a new cause of action from being stated: *Pullen v. Hutchinson*, 25 Me. 249; *Skinner v. Grant*, 12 Vt. 456. Thus, in an action of *assumpsit* by one town against another, for supplies furnished to a family, an amendment was allowed showing a liability of the defendants under the pauper act: *Brewer v. Inhabitants of East Machias*, 27 Me. 489.

amendments, at any stage of the proceedings, which altered or varied the cause of action. While in striking contrast to, and in fact in direct conflict with, them, a few of the states allow amendments which vary or alter the cause of action as originally alleged, when, upon a full consideration of the circumstances attending the application, it appears just. This liberal rule now prevails in New York; the earlier decisions to the contrary have been overruled. The courts of that state have settled the doctrine, that the right of amendment is not restricted to setting forth a cause of action of the same class as that contained in the original complaint, but that one of an entirely different class may be inserted, provided the summons continue to be appropriate.³³ Dealing with the first of these classes the authorities in a majority of the code states hold that courts do not have the power to change the form or vary

³³ *Brown v. Leigh*, 12 Abb. Pr., N. S. (N. Y.), 193. So, also, upon an amendment of course, a new cause of action may be inserted, the only restrictions imposed being that the amendment shall not be for purposes of delay, nor to prevent a trial at a term for which the action is or may be noticed for trial, and that the cause of action added be one that may properly be united with the one contained in the original complaint: *Mason v. Whitely*, 1 Abb. Pr. (N. Y.) 85. And amendment is allowed when a trial has once been had, and a new trial ordered: *Troy etc. R. R. Co. v. Tibbitts*, 11 How. Pr. (N. Y.) 168. See, also, *Brown v. Babcock*, 3 How. Pr. (N. Y.) 305; *MacQueen v. Babcock*, 13 Abb. Pr. (N. Y.) 268, 3 Keyes, 428; *Wyman v. Remond*, 18 How. Pr. (N. Y.) 272. An equally liberal doctrine prevails in North Carolina. Thus, in *Robinson v. Willoughby*, 67 N. C. 84, an action in ejectment, to recover possession of land under an absolute deed, which the court held to be a

mortgage, was allowed to be amended so as to change the form of the action into a bill of foreclosure; and in *Bullard v. Johnson*, 65 N. C. 436, an action brought by a lessor to recover rent, it appeared upon the trial that during the continuance of the term the plaintiff had assigned his right in the premises. The court, however, ordered the assignee to be made a party plaintiff, dismissed the complaint as to the original plaintiff, and gave judgment in favor of the one substituted. In Texas, also, amendments changing the cause of action are allowable, provided: 1. That the amendment does not prejudice the defendant; 2. That the plaintiff pays the costs up to the time of making such amendment; 3. That the amendment shall not relate back to the commencement of the suit, so as to interrupt the running of the statutes of limitations, but be confined, in all respects, to the time of filing: *William v. Randon*, 10 Tex. 74.

the nature of an action by an amendment substituting a wholly new and distinct cause of action, not connected with that embraced in the original pleading.³⁴ They hold, for example, that a cause of action cannot be changed from one at law to one in equity or *vice versa*,³⁵ nor can the cause of action be changed from *tort* to *contract*, nor from *contract* to *tort*.³⁶ Thus where a complaint as originally

³⁴ Ward v. Patton, 75 Ala. 207; Mahan v. Smitherman, 71 Ala. 563; Gibson v. Wheeler, 110 Cal. 243, 42 Pac. 810; Peck v. Sill, 3 Conn. 157; Louisville & N. R. Co. v. Guyton, 47 Fla. 188, 36 South. 84; Lowry Nat. Bank v. Fickett, 122 Ga. 489, 50 S. E. 396; Williams v. Hollis, 19 Ga. 313; Lake St. Elev. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374; Lake Shore etc. Ry. Co. v. Bennett, 89 Ind. 457; Proctor v. Reif, 52 Iowa, 592, 3 N. W. 618; Rutledge v. Vanmeter, 8 Bush (Ky.), 354; State v. Morgan, 35 La. Ann. 1139; Wyman v. Kilgore, 47 Me. 184; People v. Wayne Co. Circuit Judge, 13 Mich. 206; York v. Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968; Cockins v. Bank of Alma, 84 Neb. 624, 133 Am. St. Rep. 642, 122 N. W. 16; Little v. Morgan, 31 N. H. 499; Walleston v. Fahnestock, 116 N. Y. Supp. 743; Child v. New York El. R. Co., 89 App. Div. 598, 85 N. Y. Supp. 604; Freeman v. Grant, 132 N. Y. 22, 30 N. E. 247; Hunt v. Vanderbilt, 115 N. C. 559, 20 S. E. 168; Normile v. Oregon Nav. Co., 41 Or. 177, 69 Pac. 928; Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837; Royse v. May, 93 Pa. 454; Tatham v. Ramey, 82 Pa. 130; Brodck v. Hirschfield, 57 Vt. 12; Sumner v. Brown, 34 Vt. 194; Shenandoah Val. Ry. Co. v. Griffith, 76 Va. 913; Snyder v. Harper, 24 W. Va. 206; Board of Supervisors v. Decker, 34 Wis. 378; Oglesby v. Attrill, 14 Fed. 214, 4 Woods, 114;

Noble v. Atchison etc. R. Co., 4 Okl. 534, 46 Pac. 483; 5 Am. & Eng. R. Cas., N. S., 309. See note to Stevenson v. Mudgett, 34 Am. Dec. 160.

³⁵ Shinnors v. Brill, 38 Wis. 648; Carmichael v. Argard, 52 Wis. 607; White v. Moss, 67 Ga. 89; Bockes v. Lansing, 74 N. Y. 437. But some courts hold that this may be done if the identity of the subject matter of the suit remains the same: Cook v. Chicago Ry. Co., 75 Iowa, 169, 39 N. W. 253; Duff v. Snider, 54 Miss. 245.

³⁶ Steed v. McIntyre, 68 Ala. 407; Hackett v. Bank of Cal., 57 Cal. 335; Farmer v. Cram, 7 Cal. 135; Ramirez v. Murray, 5 Cal. 222; Denver v. Walker, 45 Colo. 387, 101 Pac. 348; Goss v. Boulder County Commrs., 4 Colo. 468; Peck v. Sill, 3 Conn. 157; Wilkinson v. Pensacola etc. R. Co., 35 Fla. 82, 17 South. 71; Brooke v. Cole, 108 Ga. 251, 33 S. E. 849; Frount v. Hardin, 56 Ind. 165, 26 Am. Rep. 18; Straus v. Shaw, 84 Iowa, 300, 50 N. W. 1060; Lucke v. Clothing C. & T. Assembly, 77 Md. 396, 39 Am. St. Rep. 421, 19 L. R. A. 408, 26 Atl. 505; De Bolt v. Kansas City etc. Ry. Co., 123 Mo. 496, 27 S. W. 575; Sumner v. Rogers, 90 Mo. 324, 2 S. W. 476; People v. Dennison, 84 N. Y. 272; Neudecker v. Kohlberg, 81 N. Y. 296; Ross v. Mather, 51 N. Y. 108, 10 Am. Rep. 562; Degraw v. Elmore, 50 N. Y. 1; Noble v. Atchison etc. R. Co., 4 Okl. 534, 46 Pac

framed stated a cause of action for the conversion of money, and after a demurrer thereto had been sustained, plaintiff amended by omitting the allegation, "and converted the same to his own use," etc., upon an appeal from an order striking this amended complaint from the files, the appellate court, in affirming the action of the lower tribunal, said: "An amendment which attempts to change the nature of the action from one in tort to one in contract is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated. The power of amendment does not go to that extent."³⁷ Pomeroy, in commenting upon this decision, remarks that it should be noticed that the actual substantial cause of action was unchanged; the only variation was in the manner and form of its statement.³⁸ Bliss says: "It is believed that in most of the code states this amendment would be permitted."³⁹ The same court has also held, that in an action to enforce a lien for work done and materials furnished under contract, an amendment could not be had, at the trial, for damages resulting from defendant's refusal to permit plaintiff to perform the contract;⁴⁰ but in another case, an action for work and labor was allowed to be amended so as to charge a lien upon defendant's property.⁴¹ Nor can an action against a sheriff to restrain him from removing and selling certain goods be changed to one for conversion;⁴² nor in an action for overflowing land, will an amendment be allowed to charge defendant, under a statute, for appropriating the land to his own use.⁴³ But, on the other hand, in an action

483, 5 Am. & Eng. R. Cas., N. S., 309; *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506; *Peay v. Salt Lake City*, 11 Utah, 331, 40 Pac. 206; *Lane v. Cameron*, 38 Wis. 603; *Pierce v. Carey*, 37 Wis. 232; *Rothe v. Rothe*, 31 Wis. 570; *Wilson v. Haley Livestock Co.*, 153 U. S. 39, 38 L. Ed. 627, 14 Sup. Ct. Rep. 768. See illus-

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trations in note to *Stevenson v. Mudgett*, 34 Am. Dec. 158.

³⁷ *Supervisors v. Decker*, *supra*.

³⁸ *Pomeroy's Remedies*, § 566, n. 1.

³⁹ Bliss, Code Pl. 520.

⁴⁰ *Johnson v. Filkington*, 39 Wis. 62.

⁴¹ *Lackner v. Turnbull*, 7 Wis. 105.

⁴² *Shinners v. Brill*, 38 Wis. 648.

⁴³ *Newton v. Allis*, 12 Wis. 378.

against a corporation upon an express contract, which the court held to be *ultra vires*, an amendment seeking to charge defendant upon an implied contract was allowed.⁴⁴ Again, when a complaint was held bad on demurrer, because no cause of action was stated, an amendment was allowed which changed the alleged cause of action from what it was originally intended or purported to be.⁴⁵ These rules have reference to the substance rather than to the form of the action, as the nice distinctions between the mere forms of action existing at common law have been abolished by the codes, and the facts showing the cause of action are now all that are essential.⁴⁶ As to the second class, as we have shown, the liberality of amendment is carried to the length that the statutes of some states permit certain amendments that change even the form of the action. From the multitude of decisions on the subject, the cases already cited will serve to indicate the line drawn by the courts. As a general rule, when it is within the power of the court to allow an amendment, leave to amend ought not to be refused, unless the court is satisfied that the party is acting in bad faith or that the mistake has caused such injury to the other party that the proposed amendment would operate unjustly, if allowed.⁴⁷ Allegations as to names, time, value, quantity or place may be corrected, changed, added to or stricken out, so long as the cause of action remains the same.⁴⁸ So such changes

⁴⁴ Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

⁴⁵ Vliet v. Sherwood, 38 Wis. 159.

⁴⁶ Crothers v. Acock, 43 Mo. App. 318, 323.

⁴⁷ Kirstein v. Madden, 38 Cal. 158; Bradley v. Parker, 4 Cal. Unrep. 250, 34 Pac. 234; Balch v. Smith, 4 Wash. 497, 504, 30 Pac. 648; Blankhorn v. Penrose, 43 L. T. 668.

⁴⁸ South & N. Alabama Ry. Co. v. Small, 70 Ala. 499; State v. Smith, 12 Ark. 622, 56 Am. Dec. 287; People v. Tonielli, 81 Cal. 275, 22 Pac. 678;

Thomas v. Jameson, 77 Cal. 91, 19 Pac. 177; Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779; Augusta & S. R. Co. v. McElmurry, 24 Ga. 75; Karczenska v. City of Chicago, 144 Ill. App. 516; St. Louis etc. R. Co. v. Winkelmann, 47 Ill. App. 276; Phoenix Mut. L. Ins. Co. v. Hinesley, 75 Ind. 1; Gentry v. Doolin, 1 Bush (Ky.), 1; Buquoi v. Hampton, 6 Mart., N. S. (La.), 8; Wentworth v. Sawyer, 76 Me. 434; Diettrich v. Wolffsohn, 136 Mass. 335; Ross v. Ionia Tp., 104 Mich. 320, 62 N. W. 401; Erickson v. Schuster, 44 Minn.

can be made by amendment as will prevent the failure of an action in such cases as those where the action is *quantum meruit* and the proof shows an agreed price, or *vice versa*.⁴⁹ It has been held in a vast number of cases that the description of property contained in the claim must be substantially proved;⁵⁰ and while this may be more rigidly enforced in comparing the evidence of title or contract⁵¹

441, 46 N. W. 914; State Ins. Co. v. Schreck, 27 Neb. 527, 20 Am. St. Rep. 696, 6 L. R. A. 524, 43 N. W. 340; Elliott v. Clark, 18 N. H. 421; Lyons v. Miller, 10 Misc. Rep. 653, 31 N. Y. Supp. 795; Williams v. Freel, 99 N. Y. 666, 2 N. E. 54; Bank of Cooperstown v. Woods, 28 N. Y. 545; Place v. Minster, 65 N. Y. 89; Miller v. Pollock, 99 Pa. 202; Ward v. Stevenson, 15 Pa. 21; Stout v. Russell, 2 Yeates (Pa.), 334; Degraffireid v. Mitchell, Harp. (S. C.) 437; St. Louis A. & T. R. Co. v. Evans, 78 Tex. 369, 14 S. W. 798; Houston E. & W. T. Ry. Co. v. Blagge, 73 Tex. 24, 12 S. W. 616; City of Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012; Brown v. Pickard, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512; Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. Rep. 1064, 41 L. Ed. 230. In general, an allegation of *time* in a pleading is immaterial, and need not be proved strictly as alleged. But when time is made descriptive of the identity of the subject of the action, it thereby becomes material and must be proved as stated: Greenl. Ev., §§ 56-61; Paine v. Trumbull, 33 Wis. 164; Eastman v. Bodfish, Fed. Cas. No. 4255, 1 Story, 528.

⁴⁹ Ludlow v. Dole, 62 N. Y. 617; Sussdorff v. Schmidt, 55 N. Y. 319.

⁵⁰ Gilmer v. Wallace, 75 Ala. 220; Territory v. Copper Queen etc. Co., 13 Ariz. 198, 108 Pac. 960; Randel v. Wright, 1 Harr. (Del.) 34; Snowden v. Waterman, 100 Ga. 588, 28 S. E. 121;

Central R. etc. Co. v. Tucker, 79 Ga. 128, 4 S. E. 5; City of Bloomington v. Goodrich, 88 Ill. 558; Ross v. Thompson, 78 Ind. 90; Buchanan v. Whitham, 36 Ind. 257; Hurlbut v. Bagley, 99 Iowa, 127, 68 N. E. 585; Lewis v. Commonwealth, 19 Ky. Law Rep. 1139, 42 S. W. 1127; Hereford v. Lake, 15 La. Ann. 693; McNamee v. Minke, 49 Md. 122; Chapin v. White, 102 Mass. 139; Harrington v. Worden, 1 Mich. 487; Carter v. Preston, 51 Miss. 423; Erfort v. Consalus, 47 Mo. 208; Addis v. Van Buskirk, 24 N. J. L. 218; Saxton v. Johnson, 10 Johns. (N. Y.) 418; Abernathy v. Seagle, 98 N. C. 553, 4 S. E. 542; Gaines v. Union Transp. & Ins. Co., 28 Ohio St. 418; Thompson v. Dunn, 44 Tex. 88; Damarin v. Young, 27 W. Va. 436.

⁵¹ United States H. & A. Co. v. Veitch, 161 Ala. 630, 50 South. 95; Lewis v. Montgomery Mut. B. & Loan Assn., 70 Ala. 276; Brantley v. West, 27 Ala. 542; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Cox v. McLaughlin, 63 Cal. 196; Walsh v. Hastings, 20 Colo. 243, 38 Pac. 324; Union Coal Co. v. Edman, 16 Colo. 438, 27 Pac. 1060; Shepard v. Palmer, 6 Conn. 95; Whelan v. City of Milledgeville, 92 Ga. 374, 17 S. E. 339; Iroquois Furnace Co. v. Bignall Hdw. Co., 201 Ill. 297, 66 N. E. 237; Coal Run Coal Co. v. Giles, 49 Ill. App. 585; Russell v. Whiteside's Admrs., 5 Ill. 7; Timmons v. Wiggins, 78 Ind. 297; Jacobs v. Finkel, 7 Blackf. (Ind.) 432; Ogilvie v. Hal-

with the *allegata*, the trend of judicial exercise of the power of amendment is undoubtedly in the direction of permitting in all cases reasonable amendments where the opposite party is not prejudiced, and even where he is prejudiced and can be compensated by terms, terms will be imposed where the case warrants. Most states allow the addition of a new defense or a new cause of action, when this does not change the nature of the action or defense.⁵² In general, any amendment may be made that in the discretion of the court seems just, provided the whole nature and scope of the action is not changed. Equity courts were much more liberal than those at common law in allowing amendment. But the same rules now govern the amendment of pleadings both in equity and at law.⁵³ The discretion of the judge in allowing or refusing these amendments will not be reviewed by any other court, unless in case of manifest abuse of his discretionary power.⁵⁴ It, however, is reversible error to

Iam, 58 Iowa, 714, 12 N. W. 730; Shaw v. Noble, 15 La. Ann. 305; Alford v. Hancock, McGloin (La.), 280; Hill v. Haskins, 8 Pick. (Mass.) 83; Emerson v. Atwater, 7 Mich. 12; Caldwell v. Bruggerman, 4 Minn. 270; Drake v. Surget, 36 Miss. 458; Green v. Crutcher (Mo. App.), 128 S. W. 768; Laclede Const. Co. v. Tudor Iron Wks., 169 Mo. 137, 69 S. W. 384; Deickman v. McCormick, 24 Mo. 596; Silvert v. Kommel, 138 App. Div. 229, 122 N. Y. Supp. 846; Thigpen v. Staton, 104 N. C. 40, 10 S. E. 89; Abernathy v. Seagle, 98 N. C. 553, 4 S. E. 542; Satchell v. Doram, 4 Ohio St. 542; Campbell v. Wasserman & Bros., 9 Pa. Co. Ct. 381; Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305; Galveston R. Co. v. Becht (Tex. Civ. App.), 21 S. W. 971; Michon v. Ayalla, 84 Tex. 685, 19 S. W. 878; Mason v. Kleberg, 4 Tex. 85; Higgins v. Farnsworth, 48 Vt. 512; Mann v. Birchard, 40 Vt.

326, 94 Am. Dec. 398; Harris v. Harris, 2 Rand. (Va.) 431; Davisson v. Ford, 23 W. Va. 617; Thayer v. Jarvis, 44 Wis. 388; Dempster v. Cochran, 174 Fed. 587, 98 C. C. A. 433; Smith v. Barker, 3 Day, 280, 22 Fed. Cas. No. 13,012.

⁵² See statutes of the jurisdiction: Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521; Jones v. Ritter, 56 Ala. 270; Stevens v. Matthewson, 45 Kan. 594, 26 Pac. 38.

⁵³ Curtis v. Leavitt, 11 Paige (N. Y.), 386; Rogers v. Atkinson, 14 Ga. 320; Larkins v. Biddle, 21 Ala. 252; Fenno v. Coulter, 14 Ark. 38.

⁵⁴ Wixon v. Devine, 91 Cal. 477, 27 Pac. 777; Merriam v. Langdon, 10 Conn. 460; Palmer v. Utah Ry. Co., 2 Idaho, 350 (382), 16 Pac. 553; Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; Donnelly v. Pepper, 91 Ky. 63, 15 S. W. 879; Burke v. Baldwin, 54 Minn. 514, 56 N. W. 173; Johnson v. Swayze, 35

refuse to exercise this discretion on ground of want of power when the court really has the power.⁵⁵

§ 234 (235). Same, continued.—The code provisions referred to in the preceding section have not changed the old common-law rule that the cause of action or defense proved must correspond with that averred in the pleadings. The important difference between the old and the new rule, as these statutes are interpreted by the courts of a majority of the states, is that the codes have introduced a new rule for determining what a variance is and what its consequences are.⁵⁶ A fair test is that given in a Connecticut case: "Every allegation essential to the issue must be proved in the form stated; the fact proven must be legally identical with the claim put forth; and this for the defendant's protection; first, that he may know the charge which he is to meet; secondly, if he is unable to disprove it, that the verdict and judgment may protect him from another action based upon the same wrong; of course therefore, where the evidence disproves the substance of the charge the case falls."⁵⁷ The plaintiff can-

Neb. 117, 52 N. W. 835; Brock v. Bateman, 25 Ohio St. 609; Garrison v. Goodale, 23 Or. 307, 31 Pac. 709; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521; Mellish v. Richardson, 9 Bing. 125; Jenkins v. Phillips, 9 Car. & P. 766, 5 Jur. 252; Chirac v. Reinieker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474.

⁵⁵ Russell v. Conn, 20 N. Y. 81.

⁵⁶ Carpenter v. Huffsteller, 87 N. C. 273; Neudecker v. Kahlberg, 81 N. Y. 296; Louisville & N. R. Co. v. Guyton, 47 Fla. 188, 36 South. 84; Moss v. North Carolina R. Co., 122 N. C. 889, 29 S. E. 410.

⁵⁷ Shepard v. New Haven and Northampton Co., 45 Conn. 54. In that case the plaintiff founded his action on injuries received when he jumped from a car to save his life.

The evidence disclosed that he received them in the car. The court said: "If upon these pleadings the plaintiff is permitted to retain this judgment, and should bring an action against these defendants for injuries sustained by him while within the car as the result of a collision, it is difficult to perceive in what manner they could avail themselves of the first, by way of protection against a second judgment. For, although modern decisions have opened the door for the admission of extrinsic evidence consistent with the record, as to what was necessarily determined in a former suit, we are not aware that they have gone so far as to allow the defendants to prove by such evidence upon the trial of the second suit, that a cause of action which is entirely

not recover under the codes when the evidence establishes a wholly different case from that alleged any more than he could under the old common law.⁵⁸ The courts in treating the discrepancies between the allegations and the proof usually distinguish three degrees of discrepancy under the codes,—namely, immaterial variance, material variance and the failure of proof. These codes usually provide that a variance shall be considered material when it has actually misled the adverse party to his prejudice.⁵⁹ If the variance has not so misled the adverse party, it is to be deemed immaterial.⁶⁰ The material variance includes not

inconsistent with the declaration in the former case, is necessary to the existence of the judgment therein and constitutes in fact the only basis upon which it stands.”

⁵⁸ *Fountain v. Fountain*, 23 Ill. App. 529. See *Pom. Rem. & Rem. R.*, § 534, for illustrations of fatal disagreement. But a substantial, not a literal, agreement is all that is required: *Moore v. Lake Company*, 58 N. H. 254.

⁵⁹ *Molen v. Orr*, 44 Ark. 486; *Began v. O'Reilly*, 32 Cal. 11; *Colorado Fuel etc. Co. v. Cummings*, 8 Colo. App. 541, 46 Pac. 875; *Barnhard v. White Cloud*, 108 Mich. 508, 66 N. W. 387; *Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *James v. Hicks*, 58 Mo. App. 521; *Allen v. Bunting*, 18 N. J. L. 299; *Spring v. Bowne*, 89 Hun, 10, 35 N. Y. Supp. 46; *Willis v. Orser*, 6 Duer (N. Y. Super.), 322; *Hill v. Mellon*, 3 Or. 542; *North Star Boot & S. Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

⁶⁰ *Chewacla Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 South. 122; *Molen v. Orr*, 44 Ark. 486; *Moore v. Douglas*, 132 Cal. 399, 64 Pac. 705; *Rio Grande W. R. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac.

76; *Lewis, Cooper & Hancock v. Utah Construction Co.*, 10 Idaho, 214, 77 Pac. 336; *Lucas v. Smith*, 42 Ind. 103; *Robbins v. Diggins*, 78 Iowa, 521, 43 N. W. 306; *Crane v. Ring*, 48 Kan. 61, 29 Pac. 696; *Barnhard v. White Cloud*, 108 Mich. 508, 66 N. W. 387; *Oborn v. Nelson*, 141 Mo. App. 428, 126 S. W. 178; *Toy v. McHugh*, 62 Neb. 820, 87 N. W. 1059; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Place v. Minister*, 65 N. Y. 89; *Mode v. Penland*, 93 N. C. 292; *Robertson v. Moses*, 15 N. D. 351, 108 N. W. 788; *Ralston v. Kohl's Admr.*, 30 Ohio St. 92; *Hill v. Mellon*, 3 Or. 542; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *Bullion Beck & C. Min. Co. v. Eureka Hill Min. Co.*, 5 Utah, 3, 11 Pac. 515; *National M. & M. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128; *Giffert v. West*, 33 Wis. 617. See, also the late cases: *Capital Security Co. v. Holland* (Ala. App.), 60 South. 495; *Culver v. Newhart*, 18 Cal. App. 614, 123 Pac. 975; *Denver City Tramway Co. v. Gawley* (Colo. App.), 129 Pac. 258; *Danielson v. Scott* (Kan.), 129 Pac. 1190; *McCormick v. Obanion* (Mo. App.), 153 S. W. 267; *Chambers v. Van Wagner*, 32 Okl. 774, 123

only the discrepancy between the evidence and the material allegation but of that also which essentially relates to the material allegation.⁶¹ The practical bearing of the distinction drawn between material and immaterial variances is that in the case of a material variance the codes usually provide that an amendment may be allowed on such terms as the courts deem just, while if the variance is immaterial the court may order an immediate amendment, or, what amounts to the same thing, disregard the variance and allow the case to be decided upon the evidence.⁶² Among the many variances that have been held immaterial are slight errors in the amount or description of property,⁶³ or in dates that are not of the gist of the action.⁶⁴ The variance is immaterial where the pleading alleges an express agreement or warranty and the evidence shows an

Pac. 1117; *Wolf v. Hougham* (Or.), 125 Pac. 301; *National Bank v. Lake Erie etc. Co.*, 233 Pa. 421, 82 Atl. 773; *Hewitt v. Pere Marquette R. Co.* (Mich.), 137 N. W. 66; *Parks v. Sullivan* (Tex. Civ. App.), 152 S. W. 704; *Beason v. Western Meat Co.* (Utah), 124 Pac. 335; *Maguire v. Kiesel* (Conn.), 85 Atl. 689; *McCrary v. Henry* (Ga. App.), 76 S. E. 1082; *Bradley v. Goetsche* (Iowa), 138 N. W. 823; *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637.

⁶¹ *McDonald v. Walker*, 95 Ala. 172, 10 South. 225; *Gilmer v. Wallace*, 75 Ala. 220; *Dill v. Rather*, 30 Ala. 57; *Johnson v. Killian*, 6 Ark. 172; *House v. Metcalf*, 27 Conn. 631; *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128; *Branch v. Branch*, 6 Fla. 314; *Robertson v. State*, 97 Ga. 206, 22 S. E. 974; *Germania Fire Ins. Co. v. Lieberman*, 58 Ill. 117; *Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407; *Eichholtz v. Taylor*, 88 Ind. 38; *Morgan v. State*, 61 Ind. 447; *State v. Jackson*, 30 Me. 29; *Hoke v. Wood*, 26 Md. 453; *Downs v. Finnegan*, 58

Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981; *Walsh v. Homer*, 10 Mo. 6, 45 Am. Dec. 342; *State v. Bailey*, 31 N. H. 521; *Vail v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493; *Dibrell v. Miller*, 8 Yerg. (Tenn.) 476, 29 Am. Dec. 126; *Turner v. State*, 3 Heisk. (Tenn.) 452; *Lincoln v. Thrall*, 34 Vt. 110; *Olinger v. MeChesney*, 7 Leigh (Va.), 660; *City Bank v. Press Co.*, 56 Fed. 260; *Lewis v. Hitchcock*, 10 Fed. 4.

⁶² *Carpenter v. Huffstetter*, 87 N. C. 273; *Duke v. Huntington*, 130 Cal. 272, 62 Pac. 510; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26; *Pratt v. Hudson R. Ry. Co.*, 21 N. Y. 305; *Lucas v. Smith*, 42 Ind. 103; *Griffith v. Ridpath*, 38 Wash. 540, 80 Pac. 820; *Giffert v. West*, 33 Wis. 617.

⁶³ *People v. Eaton*, 41 Cal. 657; *Bank of Cooperstown v. Woods*, 28 N. Y. 545.

⁶⁴ *United States v. Le Baron*, 4 Wall. (U. S.) 642, 18 L. Ed. 309; *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352.

implied one;⁶⁵ or where a sale in writing is averred and the proof shows a sale by parol;⁶⁶ or where there is some slight mistake in the names of either party to a civil or criminal action.⁶⁷ There is no necessity to prove either immaterial or impertinent statements in either the cause of action or defense, and if timely objection is taken to the testimony when tendered, it will be excluded.⁶⁸ Objection must be made to the variance between the allegations and the proof before final judgment, or the variance will be

⁶⁵ *Smith v. Lippincott*, 49 Barb. (N. Y.) 398; *Giffert v. West*, 33 Wis. 617; *Farrell v. Palmer*, 36 Cal. 187.

⁶⁶ *Patterson v. Keystone Mining Co.*, 30 Cal. 360, 364.

⁶⁷ *People v. Ferris*, 56 Cal. 442; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *Thompson v. Lee*, 21 Ill. 242; *Choen v. State*, 52 Ind. 347, 21 Am. Rep. 179; *Milk v. Christie*, 1 Hill (N. Y.), 102; *Bratton v. Seymour*, 4 Watts (Pa.), 329; *McKay v. Speak*, 8 Tex. 376; *O'Bannan v. Saunders*, 24 Gratt. (Va.) 138; *Dabneys v. Knapp*, 2 Gratt. (Va.) 354; *Long v. Campbell*, 37 W. Va. 668.

⁶⁸ *Thompson v. Richardson*, 96 Ala. 488, 11 South. 728; *Dudney v. State*, 22 Ark. 251; *Brown v. Rouse*, 93 Cal. 237, 28 Pac. 1044; *Patterson v. Keystone Min. Co.*, 30 Cal. 360; *Coe v. Kutinsky*, 82 Conn. 685, 74 Atl. 1065; *Adams v. Way*, 32 Conn. 160; *Simmons v. State*, 4 Ga. 465; *Aldrich v. Illinois Central R. Co.*, 147 Ill. App. 198; *Overton v. Rogers*, 99 Ind. 595; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Little v. Blunt*, 16 Pick. (Mass.) 359; *Angell v. Loomis*, 97 Mich. 5, 55 N. W. 1008; *McQueen v. Farrow*, 4 Mo. 212; *Frevort v. Swift*, 19 Nev. 400, 13 Pac. 6; *Lyons v. Miller*, 10 Misc. Rep. 653, 31 N. Y. Supp. 795; *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418; *Gibbs v. Cannon*, 9 Serg. & R. (Pa.) 198, 11 Am. Dec.

699; *Walker v. Briggs*, 8 Rich. (S. C.) 440; *First Nat. Bank v. Brown*, 85 Tex. 80, 23 S. W. 862; *Henry v. Tilson*, 17 Vt. 479; *Ferguson v. Harwood*, 7 Cranch (U. S.), 408, 3 L. Ed. 386. Immaterial allegations are not required to be proved as laid, unless they are of such a character as to be important in ascertaining the identity of the thing which is the cause of action. Plaintiff need not state his cause of action with syllogistic accuracy. If bad grammar does not vitiate a declaration, other faults of style ought not to have that effect, unless they produce such a degree of obscurity as to give rise to the belief that the tribunal before which the cause is heard might be misled as to the true issue: *Holt v. Inhabitants of Penobscot*, 56 Me. 15, 96 Am. Dec. 429. Impertinence is described by Lord Chief Baron Gilbert to be "where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question": 1 Dan. Ch. Pl. & Pr., 5th Am. ed., marg. p. 349. It is also said that impertinence is the introduction of any matters in a bill, answer, or other pleading in the suit which are not properly before the court for decision at any particular stage of the suit: *Wood v. Mann*, Fed. Cas. No. 17,952, 1 Sumn. 578. The best test

remedied by the verdict.⁶⁹ There is a marked distinction between an immaterial variance and an absolute failure of proof. The former may be cured, as we have seen, by amendment of the pleading, but the latter is fatal to the action or defense.⁷⁰ A general objection to evidence is not sufficient to raise the question of variance.⁷¹ Where the proof fails to support the allegations, not in some particulars only, but in their entire scope and meaning, and if the divergence extends to such an important fact or group of facts that the cause of action or defense as proved would be another than that set up in the pleadings, it is not a variance but a failure of proof which cannot be cured by amendment and the action must be dismissed.⁷² Thus it has been held fatal to allege tort and prove contract, even if allowed by the court to so amend, as it is a failure of proof;⁷³ and to allege fraud and prove breach of warranty

to ascertain whether matter be impertinent is to try whether the subject of the allegation be put in issue in the matter in dispute between the parties. All matter not material to the suit is regarded as impertinent: 1 Daniell, *supra*; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. Rep. 129, 42 L. Ed. 478.

⁶⁹ Home Ins. Co. v. Bethel, 42 Ill. App. 475; O'Connor v. Delaney, 53 Minn. 247, 39 Am. St. Rep. 601, 54 N. W. 1108; Liddell v. Fisher, 48 Mo. App. 449; Tognini v. Kyle, 17 Nev. 209, 45 Am. Rep. 442, 30 Pac. 829; Coates v. First Nat. Bank, 91 N. Y. 20, 31; Russell v. Loomis, 43 Wis. 545; The City of Lincoln, 19 Fed. 460.

⁷⁰ Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Ballinger's Ann. Codes & St., § 4951.

⁷¹ Richards v. Bestor, 90 Ala. 352, 80 South. 30.

⁷² Pom. Rem. & Rem. R., § 554; Johnson v. Moss, 45 Cal. 515; Cincinnati etc. Ry. Co. v. Bunnell, 61 Ind. 183; Jeffersonville, M. & I. R. Co. v.

Worland, 50 Ind. 339; County Commrs. v. Wise, 75 Md. 38, 23 Atl. 65; Benson v. Dean, 40 Minn. 445, 42 N. W. 207; Wesby v. Bowers, 58 Mo. App. 419, 422; Haughey Livery & U. Co. v. Joyce, 41 Mo. App. 564; Reed v. Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; Faulkner v. Faulkner, 73 Mo. 327; Cape Girardeau etc. Railroad Co. v. Kimmel, 58 Mo. 83; Deickman v. McCormick, 24 Mo. 596; Beck v. Ferrara, 19 Mo. 30; Rosenfeld v. Central Vermont R. Co., 111 App. Div. 371, 97 N. Y. Supp. 905; Southwick v. First Nat. Bank, 84 N. Y. 420, 428; Volkening v. De Graaf, 81 N. Y. 268; Butler v. Livermore, 52 Barb. (N. Y.) 570; Chapman v. Carolin, 3 Bosw. (N. Y. Super.) 456; Pendleton v. Dalton, 96 N. C. 507, 2 S. E. 759; Carpenter v. Huffstetter, 87 N. C. 273; Hale v. Columbia & G. R. Co., 34 S. C. 292, 13 S. E. 537; Waldrop v. Greenwood L. & S. R. Co., 28 S. C. 157, 5 S. E. 471.

⁷³ Hackett v. Bank, 57 Cal. 335; Rothe v. Rothe, 31 Wis. 570; Bank

or of contract;⁷⁴ or to allege a contract and prove a tort.⁷⁵ But a failure of proof as to facts not essential to constitute a cause of action will not defeat the plaintiff's action.⁷⁶

of U. S. v. Schultz, 2 Ohio, 471; De Graw v. Elmore, 50 N. Y. 1.

⁷⁴ Ross v. Mather, 51 N. Y. 108, 10 Am. Rep. 562; Watts v. McAllister, 33 Ind. 264.

⁷⁵ Johannesson v. Borschenius, 35 Wis. 131; Ramirez v. Murray, 5 Cal. 222; Beard v. Yates, 2 Hun (N. Y.), 466.

⁷⁶ Nolte v. Hill, 36 Ohio St. 186.

CHAPTER 9.

ADMISSIONS.

- § 235. Admissions—Confessions—Definitions and Distinctions.
- § 235a. Declarations of a Party in His Own Behalf Inadmissible.
- § 235b. Same—Agents, Employers, Privies, Husband and Wife and Others in Close Relation.
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- § 295. Proof and Weight of Admissions.
- § 296. Same, Continued.

§ 235 (235). Admissions—Confessions—Definitions and distinctions.—There should be no confusion in the present-

day use of the terms "admissions" and "confessions." An admission is defined by Stephen to be "a statement, oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding."¹ Bouvier defines admissions to be "confessions or voluntary acknowledgments made by a party of the existence or truth of certain facts."² A *confession* is a person's declaration of his agency or participation in a crime.³ It has been uniformly held indispensable to show that such confessions were freely and voluntarily given, for without such proof confessions cannot be received. But as the subject of confessions belongs more properly to the criminal law, it is not treated in this work.⁴ In other words, admissions relate in general to civil actions and confessions always to criminal causes. The distinc-

¹ Reynolds' Steph. Ev., art. 15. In the note to that article the learned author says that the "definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in 1 Ph. Ev. 308-401, and T. E., §§ 653-788. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe N. P. (Index, under the word *admissions*). It may, perhaps, be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a disclosure or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admis-

sion, but the judge or jury may, of course, attach degrees of credit to different parts of the matter. This rule is elaborately discussed by Mr. Taylor, §§ 655-665." See, also, §§ 272-274, *post*, "Admissions in Pleadings."

² Bouvier Law Dict. The definitions given by Black are useful: "An admission is a voluntary acknowledgment; confession or concession of the existence of a fact or the truth of an allegation made by a party to the suit."

³ People v. Parton, 49 Cal. 632, 637. As to uncontradicted statement in presence of accused as confession, see note to O'Hearn v. State, in 25 L. R. A., N. S., 542.

⁴ A full review of the authorities will be found in notes to Daniels v. State, 6 Am. St. Rep. 242-251; and to State v. Clifford, 41 Am. St. Rep. 522-524. As to when confession is voluntary, see elaborate note to Ammons v. State, 18 L. R. A., N. S., 768.

tion is thus drawn because there may be admissions in criminal causes but there are no confessions in civil ones. Without trenching on the domain of criminal law, it is not inappropriate to point out that it is well within reason that an accused person may have made admissions which are not confessions.⁵ Admissions have been subdivided into direct and indirect, express, implied, incidental, judicial and extrajudicial, and the names of some of them sufficiently indicate the description of any particular admission to obviate special definition. Direct and express admissions are practically the same. Implied admissions are made by having done or omitted to do some act.⁶ The term "incidental" carries with it that the admission was not made in connection with the matter under judicial inquiry. So judicial admissions are such as may be made in pleadings or in the progress of a trial or gen-

⁵ *People v. Parton, supra*. A "confession," receivable in evidence only after proof that it was made voluntarily, is restricted to an acknowledgment of the defendant's guilt; and the word does not apply to a statement, made by a defendant, of facts which tend to establish his guilt. In the case last referred to, the accused was indicted for rape, and had made statements which were offered in evidence and objected to as confessions admissible only after proof they were voluntarily made. The court said: "An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt. The statement of the defendant objected to was, at most, an admission that he had taken improper liberties with the prosecutrix, or had, with her consent, attempted carnal intercourse with her. However immoral his conduct, his ad-

mission was not a confession of his guilt of the crime for which he was indicted, nor of any offense included in that crime."

⁶ Bouvier says: "Implied admissions are those which result from some act or failure to act of the party," and Anderson's Law Dictionary gives it that an implied admission "results from an act done or undone; as from character assumed, from conduct or silence." They may also arise from acquiescence: *Greenl. Ev.*, § 197; *Carter v. Bennett*, 4 Fla. 283; *Peele v. Merchant's Ins. Co.*, Fed. Cas. No. 10,905, 3 Mason, 27, in which Circuit Justice Story says that cases may even be put where the act will in law prevail over an express declaration, and have been drawn from the mere possession of documents, such as letters found in a bankrupt's possession used as evidence to show that he had knowledge of the event mentioned in the letters: *Cotton v. James, M. & M.* 277, 3 Car. & P. 505.

erally in the course of a judicial proceeding,⁷ and all admissions not so made may be grouped as extrajudicial admissions.

§ 235a (236). Declarations of a party in his own behalf inadmissible.—In the consideration of this highly important branch of our subject, it is necessary to watch with keen attention the results which invariably flow from loose interpretation and perfunctory apprehension. Nothing is more common than to hear from the mouths of lawyers that the declarations of a party in his own favor can never be received in evidence. Under certain circumstances they may be so received, and with those special circumstances we shall hereinafter deal. The danger of such expressions lies in that they are partly true, and that ordinarily such statements are not admissible. It would be obviously unsafe if parties to litigation were without restriction allowed to support their claims by proving their own statements made out of court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony.⁸ Of

⁷ Anderson's Law Dict. See, also, §§ 272-274, *post*.

⁸ *Lynn v. Bean*, 141 Ala. 236, 37 South. 515; *Alexander v. Handley*, 96 Ala. 220, 11 South. 390; *Southern Anthracite Coal Co. v. Hodge* (Ark.), 139 S. W. 292; *Hamburg Bank v. George*, 92 Ark. 472, 123 S. W. 654; *Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Idaho Min. etc. Co. v. Colorado Iron Wks. Co.*, 49 Colo. 66, 111 Pac. 553, 554; *Mills v. Joiner*, 20 Fla. 479; *Kinard v. State*, 1 Ga. App. 146, 58 S. E. 263; *Williams v. English*, 64 Ga. 546; *Sanitary Dist. v. Pearce*, 110 Ill. App. 592; *Adams Express Co. v. Boskowitz*, 107 Ill. 660; *Hitz v. Warner*, 47 Ind. App. 612, 93 N. E. 1005; *Scobey v.*

Armington, 5 Ind. 514; *Zenor v. Smith*, 150 Iowa, 424, 130 N. W. 382; *Corbel v. Beard*, 92 Iowa, 360, 60 N. W. 636; *Provident Sav. etc. Assur. Soc. v. Wayne*, 29 Ky. Law Rep. 160, 93 S. W. 1049; *Talbot v. Talbot*, 2 J. J. Marsh. (25 Ky.) 3; *Drake v. Hays*, 27 La. Ann. 256; *Damren v. Trask*, 102 Me. 39, 65 Atl. 513; *Handly v. Call*, 30 Me. 9; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; *White v. Boston*, 186 Mass. 65, 71 N. E. 75; *Wallace v. Story*, 139 Mass. 115, 29 N. E. 224; *Radley v. Seider*, 99 Mich. 431, 58 N. W. 366; *Griffin v. Bristle*, 39 Minn. 456, 40 N. W. 523; *Presley v. Quarles*, 31 Miss. 151; *North Missouri R. Co. v. Wheatley*, 49 Mo. 136; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395; *Howard v. Hunt*, 57 N. H.

course, when the statements of a party become relevant on other grounds, as when they form part of the act or contract to be proven or where they constitute part of the *res gestae*,⁹ they are admissible whether favorable or unfavorable to his interest. But it is a general rule of broad application that the *declarations of a party* in his own favor are *not admissible in his behalf*.¹⁰ The mere recital of a

467; *In re Myer*, 184 N. Y. 54, 6 Ann. Cas. 26, 76 N. E. 920; *Eggleston v. Columbia Turnpike Road*, 82 N. Y. 278; *Ward v. Hatch*, 26 N. C. 282; *Smith v. Eyre*, 161 Pa. 115, 28 Atl. 1005; *Bowen v. White*, 26 R. I. 68, 58 Atl. 252; *Ring v. Huntington*, 1 Mill Const. (S. C.) 162; *Baker v. De Vitt*, 49 Tex. Civ. App. 607, 110 S. W. 528; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; *Penniman v. Patchin*, 6 Vt. 325; *Witz v. Osburn*, 83 Va. 227, 2 S. E. 33; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *McNichol v. Collins*, 30 Wash. 318, 70 Pac. 753; *Teller v. Patten*, 20 How. (U. S.) 125, 15 L. Ed. 881; *Edwards v. Bates County*, 117 Fed. 526.

⁹ See chapter 11, *post*.

¹⁰ *Weaver v. State*, 1 Ala. App. 48, 55 South. 956; *Martin v. Williams*, 18 Ala. 190; *Hamburg Bank v. George*, 92 Ark. 472, 123 S. W. 654; *Hazen v. Henry*, 6 Ark. 86; *Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141; *Fischer v. Bergson*, 49 Cal. 294; *Idaho Min. etc. Co. v. Colorado Iron Wks. Co.*, 49 Colo. 66, 111 Pac. 553, 554; *Woodbridge Ice Co. v. Semon Ice Cream Co.*, 81 Conn. 479, 71 Atl. 577; *North Stonington v. Stonington*, 31 Conn. 412; *West v. State*, 53 Fla. 77, 82, 43 South. 445; *Norton v. Aiken*, 134 Ga. 21, 67 S. E. 425; *Lewis v. Adams*, 51 Ga. 559; *Work v. Kinney*, 8 Idaho, 771, 71 Pac. 477; *O'Meara v. Coal Co.*, 154 Ill. App. 321; *Tewkesbury v. Beckwith*, 46 Ill. App. 323; *Leimgruber v. Leimgruber*, 171 Ind.

370, 86 N. E. 73, 88 N. E. 593; *Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 283; *In re Bremer*, 151 Iowa, 449, 131 N. W. 667; *Magers v. Magers*, 143 Iowa, 750, 123 N. W. 330; *Luke v. Koenen*, 120 Iowa, 103, 94 N. W. 278; *Cooper v. Bower*, 78 Kan. 156, 96 Pac. 59; *Atchison etc. R. Co. v. Logan*, 65 Kan. 748, 70 Pac. 878; *Graham v. Strawsburg*, 28 Ky. Law Rep. 1204, 91 S. W. 737; *Continental Tobacco Co. v. Campbell*, 25 Ky. Law Rep. 569, 76 S. W. 125; *Trellieu Cypress Lumber Co. v. Albert Hansen Lumber Co.*, 121 La. 700, 46 South. 699; *Williamson v. Gooch*, 103 Me. 402, 69 Atl. 691; *Handley v. Call*, 30 Me. 9; *Peters v. Tilghman*, 111 Md. 227, 73 Atl. 726; *Hagan v. Hendry*, 18 Md. 177; *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416; *Carter v. Gregory*, 8 Pick. (Mass.) 165; *Drake Coal Co. v. Croze*, 165 Mich. 120, 130 N. W. 355, 357; *Ward v. Ward*, 37 Mich. 253; *Hathaway v. Brown*, 18 Minn. 414; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274, and note; *State v. Moore*, 156 Mo. 204, 56 S. W. 883; *Byrne v. Feed Co.*, 143 Mo. App. 85, 122 S. W. 349; *McClatchey v. Anderson*, 84 Neb. 783, 122 N. W. 67; *Bennett v. Taylor*, 4 Neb. (Unof.) 800, 96 N. W. 669; *South Hampton v. Fowler*, 54 N. H. 197; *Judd v. Brentwood*, 46 N. H. 430; *Duysters v. Crawford*, 69 N. J. L. 614, 55 Atl. 823; *Pool v. Anderson*, 150 N. C. 624, 64 S. E. 593; *Ratliff v. Ratliff*, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; *Johnston v. Spoonheim*,

fact, that is, the mere oral assertion, or written entry, by an individual, that a particular fact is true, cannot be received in evidence. But whenever the declaration or entry is itself a fact, and is a part of the *res gestae*, the objection ceases. "The distinction," says a learned author, "between a mere recital, which is not evidence, and a declaration or entry, which is to be considered as a fact in the transaction, and therefore is evidence, frequently occasions much discussion, although the test by which the admissibility is to be tried seems to be simple. If the declaration, or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the *credit* of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is a part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence."¹¹ Declarations of one *accused of crime* when such

19 N. D. 191, 123 N. W. 830; Hoxie v. Walker, 75 N. H. 308, 74 Atl. 183; Kunz v. Mason, 75 N. J. Eq. 616, 73 Atl. 869; Goodfield Realty Co. v. Wormser, 125 N. Y. Supp. 521; Root v. Borst, 142 N. Y. 62, 36 N. E. 814; McAdams v. McAdams, 80 Ohio St. 232, 88 N. E. 542; Kann v. Bennett, 223 Pa. 36, 72 Atl. 342; Miller's Appeal, 100 Pa. 568, 45 Am. Rep. 394; Stiff v. Havens (R. I.), 69 Atl. 553; Griffin v. Forrester, 80 S. C. 220, 61 S. E. 389; Morse v. Stanley County, 26 S. D. 313, 128 N. W. 153; In re McClellan, 20 S. D. 498, 107 N. W. 681; Syler v. Culp (Tex. Civ. App.), 138 S. W. 175; Schmidt v. Huff (Tex. Sup.), 19 S. W. 131; Salt Lake City Brewing Co. v. Hawke, 24 Utah, 199, 66 Pac. 1058; Austin v. Langlois, 83 Vt. 104, 74 Atl. 489; Barber v. Bennett, 62

Vt. 50, 19 Atl. 978; Moore Lumber Corp. v. Walker, 110 Va. 775, 67 S. E. 374; Dempsey v. Dempsey, 61 Wash. 632, 112 Pac. 755; Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927; Chase v. Woodruff, 133 Wis. 555, 126 Am. St. Rep. 972, 113 N. W. 973; Cohn v. Heimbauch, 86 Wis. 176, 56 N. W. 638; Jilsun v. Stebbins, 41 Wis. 235; Woolsey v. Haynes, 165 Fed. 391, 91 C. C. A. 341; Stockley v. Cissna, 119 Fed. 812, 5 C. C. A. 324. See, also, the Canadian cases: Garth v. Montreal Park etc. R. Co., Q. R. 18 S. C. 463; Gilbert v. Palmer, 1 All. 667; Smith v. Millidge, 2 Kerr, 408; Carstens v. Muggah, 37 N. S. Reps. 361.

¹¹ 1 Stark. Ev., §§ 46, 47; Gordon v. Shurtliff, 8 N. H. 260.

declarations form no part of the act are incompetent;¹² so are *letters* written by a party asserting facts favorable to himself;¹³ letters written to the adverse party, there being no proof of any answer or acquiescence;¹⁴ letter of plaintiff making claim for damages against a railway company for personal injuries;¹⁵ so is a report to a city by an expert as to the condition of a plant;¹⁶ and the minute-books of a corporation.¹⁷ But a bankruptcy schedule being in one aspect a solemn oath, taken at the invitation of the creditors, is not considered a self-serving declaration in the absence of any reason why the bankrupt should withhold the truth.¹⁸ *Death* does not render incompetent conduct, admissions and declarations of a party in his own interest, competent.¹⁹

§ 235b. Same—Agents, employees, privies, husband and wife and others in close relation.—It follows that if the statements of the party himself are not admissible on his behalf, unsworn admissions by others for him are equally to be excluded. Under this head come statements

¹² *Oliver v. State*, 17 Ala. 587; *United States v. Milburn*, Fed. Cas. No. 15,764, 2 Cranch C. C. 501; *Golden v. State*, 19 Ark. 590; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *Commonwealth v. Cooper*, 5 Allen (Mass.), 495, 81 Am. Dec. 762; *State v. Hildreth*, 9 Ired. (N. C.) 440, 51 Am. Dec. 369.

¹³ *Freeborn v. Smith*, 2 Wall. (U. S.) 160, 17 L. Ed. 922; *Towle v. Stevenson*, 1 Johns. Cas. (N. Y.) 110; *Champlin v. Tilley*, 3 Day (Conn.), 363, Fed. Cas. No. 2586.

¹⁴ *Fearing v. Kimball*, 4 Allen (Mass.), 125, 81 Am. Dec. 690.

¹⁵ *Howard v. Savannah Ry. Co.*, 84 Ga. 711, 11 S. E. 452.

¹⁶ *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

¹⁷ *Edwards v. Bates County*, 117

Fed. 526. In that case the court strongly expressed itself thus: "It is not the original record evidence of the county court, nor is it a certified copy therefrom; it only purports to be copied onto the book from a certified copy. As such it is a self-serving statement, made up by the railroad company, which, on every rule of law and common justice, is inadmissible against a third party: *Board of Commrs. v. Keene Five Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464; *Coffin v. Board of Commrs.* (C. C.), 114 Fed. 518." See, also, *Oregon and Cal. R. Co. v. De Grubissich* (C. C. A. July, 1913), not yet reported.

¹⁸ *In re Strang*, 166 Fed. 779.

¹⁹ *Ward v. Ward*, 37 Mich. 253; *Jilsun v. Stebbins*, 41 Wis. 235; *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429.

of an agent²⁰ and those standing in that position from which agency might be assumed. In all such cases unsworn statements in favor of the party tendering them must be rejected, whether the relationship be that of employer and employee (including corporations), guardian and ward, principal and agent or surety, partner and co-partner, party and coparty to an action.²¹ In the case of

²⁰ *Warten v. Strane*, 82 Ala. 311, 8 South. 231; *Miller v. McKenzie*, 126 Ga. 746, 55 S. E. 952; *Gray v. Phillips*, 88 Ga. 199, 14 S. E. 205; *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954; *Board of Commrs. Franklin County v. Bunting*, 111 Ind. 143, 12 N. E. 151; *Hall v. Hall*, 34 Ind. 314; *Shelbyville Water etc. Co. v. McDade*, 122 Ky. 639, 92 S. W. 568, 29 Ky. Law Rep. 119; *Peytavin v. Maurin*, 2 La. 480; *Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601; *Nye v. Grubbs*, 8 Smedes & M. (Miss.) 643; *Sira v. Wabash R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; *Low v. Connecticut etc. R. R. Co.*, 46 N. H. 284; *Garnsey v. Rhodes*, 138 N. Y. 461, 34 N. E. 199; *Havens v. Gilmour*, 83 App. Div. 84, 72 N. Y. Supp. 511; *Jones v. Kearns*, 11 Or. 280, 3 Pac. 685; *Harrington v. Bronson*, 161 Pa. 296, 29 Atl. 30; *Wardlaw v. Hammond*, 9 Rich. (S. C.) 454; *Jenkins v. Pickett*, 9 Yerg. (Tenn.) 480; *Shiner v. Abbey*, 77 Tex. 1, 13 S. W. 613; *Upham v. Wheelock*, 36 Vt. 27; *United States v. Barker*, Fed. Cas. 14,520, 4 Wash. C. C. 464; *Dillivan v. German Savings Bank (Iowa)*, 124 N. W. 350; *Snyder v. Patton etc. Co.*, 143 Mich. 350, 106 N. W. 1106; *Supreme Tent Knights of Maccabees v. Port Huron Sav. Bank*, 137 Mich. 627, 109 Am. St. Rep. 690, 100 N. W. 898; *Setzler v. Metropolitan St. R. Co.*, 227 Mo. 454, 127 S. W. 1; *Gearty v. New York*, 183

N. Y. 233, 76 N. E. 12; *Lindquist v. Northwestern Port Huron Co.*, 22 S. D. 298, 117 N. W. 365; *Pierce v. Waller (Tex. Civ. App.)*, 127 S. W. 1077; *Kellogg Lumber etc. Co. v. Webster Mfg. Co.*, 140 Wis. 341, 346, 122 N. W. 737.

²¹ *Hutchins v. Childress*, 4 Stew. & P. (Ala.) 34; *Dennis v. Belt*, 30 Cal. 247; *Denver etc. Inv. Co. v. Rudolph*, 47 Colo. 380, 107 Pac. 816; *Dickerson v. Henrietta Coal Co.*, 158 Ill. App. 454; *Henderson v. Miller*, 36 Ill. App. 232; *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718; *American Merchants' Union Express Co. v. Gilbert*, 57 Ill. 468; *Williams v. State*, 89 Ind. 570; *Graham v. Henderson*, 35 Ind. 195; *Bird v. Lanius*, 7 Ind. 615; *Buffalo Coal Creek Min. Co. v. Troendle*, 99 S. W. 622, 30 Ky. Law Rep. 740; *Brainerd v. Brackett*, 33 Me. 580; *Drake Coal Co. v. Croze*, 165 Mich. 120, 130 N. W. 355, 357; *Nye v. Grubbs*, 8 Smedes & M. (Miss.) 643; *Low v. Connecticut etc. R. R. Co.*, 46 N. H. 284; *Jackson v. Walsh*, 3 Johns. (N. Y.) 226; *Keele v. Cunningham*, 2 Heisk. (Tenn.) 288; *First Nat. Bank v. Pearce (Tex. Civ. App.)*, 126 S. W. 285; *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328; *Conner v. Seattle etc. R. Co.*, 56 Wash. 310, 25 L. R. A., N. S., 930, 105 Pac. 634; *Vale v. Suiter*, 58 W. Va. 353, 52 S. E. 313; *Kellogg Lumber etc. Co. v. Webster Mfg. Co.*, 140 Wis. 341, 346, 122 N. W. 737.

husband and wife, the same rule applies. In a recent case in New Hampshire, specific performance of a contract for the purchase of land, the erection of a house thereon and its conveyance to a third person was sought. The purchaser under the contract died before the conveyance was made, and the third person sued the executor, who offered to show by the widow what the testator had said concerning the house in the absence of the third person. The testimony was inadmissible, for it consisted of declarations in the testator's favor, made away from the land, which were not connected with either the erection of the house or the purchase of the lot.²² It is a short step from the exclusion of the testimony of self-serving statements made by testators to those of predecessors in interest or title. Thus where a widower sought to have an absolute deed made through an intermediary, to his deceased wife, declared a mortgage, evidence of entries in the private diary of the deceased wife supporting the view that it was an absolute conveyance was inadmissible. "If the bill of complaint had been filed against the wife during her life, clearly these entries would have had no probative force against her husband. They seem to us equally objectionable as evidence in favor of those who claim in her right."²³ In an action for flowing land by a dam, it appeared that the common grantor after his conveyance, and while liable on his warranty, and while owning other land bordering on the same pond, cut away part of the dam maintained next before the one in suit. That grantor being dead, the plaintiff offered to prove that while cutting it down he said it was

²² *White v. Poole*, 74 N. H. 71, 65 Atl. 255. See, also, *National Lumberman's Bank v. Miller*, 131 Mich. 564, 100 Am. St. Rep. 623, 91 N. W. 1024 (if husband and wife are sued on a note, and the defense is set up that it was given for his benefit alone, evidence of conversations between them, not shown to have been in the presence of, or communicated to,

the plaintiff, is inadmissible); *Death-erage v. Petruschke*, 106 Minn. 20, 118 N. W. 153; *Griffin v. Train*, 90 N. Y. App. Div. 16, 85 N. Y. Supp. 686; *Saunders v. Ferrill*, 23 N. C. 97; *Conley v. Bentley*, 87 Pa. 40; *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

²³ *Wilson v. Terry*, 71 N. J. Eq. 785, 65 Atl. 983.

too high. Such declaration was held clearly inadmissible.²⁴ The declarant was under a liability by virtue of his covenant of warranty.

§ 236 (237). Such statements are evidence for the adverse party—Why admissions competent.—It was not necessary to set forth in the previous section with any greater particularity the self-evident reasoning which precludes a party from offering self-serving statements. Human nature would not be strong enough to withstand the temptation to make evidence for itself. The objections which have been pointed out in the last section, however, do not hold against the reception of the statements of one party as evidence when such statements are offered by his adversary. Every argument that can be raised against the admission of a party's oral or written statements in his own favor can be successfully turned when such statements are offered against him. "Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for the truth. The same rule, it will be seen, applies to admissions by those who are so *identified in situation and interest* with a party that their declaration may be considered to have been made by himself. As to such evidence the ordinary tests of truth are properly dispensed with; they are inapplicable. An oath is administered to a witness in order

²⁴ Putman v. Fisher, 52 Vt. 191, 36 Am. Rep. 746. See, also, Waldroop v. Ruddell, 96 Ark. 171, 131 S. W. 670; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Turner v. Tubersing, 67 Ga. 161; Gullett v. Otey, 19 Ill. App. 182; Tobin v. Young, 124 Ind. 507, 24 N. E. 121; Neeb v. McMillan, 92 Iowa, 200, 60 N. W. 612; Ware v. Bennett, 143 Ky. 743, 137 S. W. 532; Johnson v. Frisbie, 29 Md. 76, 96 Am. Dec. 508; Lawrence v. Wilson, 160 Mass. 304, 35 N. E. 858; Coppage v. Barnett, 34 Miss. 621; Swope v. Ward, 185 Mo. 316, 84 S. W. 895; Wilson v.

Terry, 71 N. J. Eq. 785, 65 Atl. 983; Garrigue v. Loescher, 3 Bosw. (N. Y.) 578; Griffin v. Tripp, 53 N. C. 64; Johnston v. Spoonheim, 19 N. D. 191, 123 N. W. 830; Sutton v. Whetstone, 21 S. D. 341, 112 N. W. 850; Duren v. Bottoms (Tex. Civ. App.), 129 S. W. 376; Weaver v. Ashcroft, 50 Tex. 427; Lumm v. Howells, 27 Utah, 80, 74 Pac. 432; Hodnett v. Pace, 84 Va. 873, 6 S. E. 217; Gunter v. Gunter, 174 Fed. 933, 98 C. C. A. 945; Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324; Stothert v. James, 1 Car. & K. 121, 47 Eng. Com. L. 121.

to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation; the ordinary *motives of human conduct* are sufficient warrants for belief."²⁵ Although admissions have sometimes been treated as competent evidence under the head of one of the exceptions to hearsay evidence, yet they are open to but few of the objections which may be urged against hearsay testimony. They are, it is true, declarations made out of court and without the sanction of an oath, yet they are statements, not of third persons, but of a *party to the litigation*; and when offered against him it is only fair to presume, until the contrary is shown, that they are correct. But it does not necessarily follow that whatever a party may say, though remotely connected with the litigation, may be offered as an admission against him. And it is right here that the difference between such statements and those forming part of the *res gestae* become so well marked. In the latter case, as we have mentioned in the last section, they are received as part of the occurrence and not merely as statements, acts or admissions. Apart from the *res gestae*, the statement or act should be *self-disserving* or of such a character that from it some inference may be fairly drawn to the party's prejudice. It is but common sense that a certain statement made by a party in the ordinary course of interchange of ideas or spontaneously, bearing upon the subject matter of an action, should be and is competent evidence for use by his adversary.²⁶ It presents itself to us as evidence of

²⁵ Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425; German Nat. Bank v. Leonard, 40 Neb. 676, 59 N. W. 107; Potter v. Ogden, 136 N. Y. 384, 33 N. E. 228; Larrison v. Payne, 52 Hun (N. Y.), 612, 5 N. Y. Supp. 221; Riha v. Pelnar, 86 Wis. 408, 57 N. W. 51; Stark. Ev., 9th ed., p. 52.

²⁶ Sloss-Sheffield Steel etc. Co. v. Sharp, 156 Ala. 284, 47 South. 279; Morgan v. Patrick, 7 Ala. 185; Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425; Roche v. Lewellyn Ironworks Co., 140 Cal. 563, 74 Pac. 147; Geraghty v. Randall, 18 Colo. App. 194, 70 Pac.

high value, when thoroughly established, for it is of that nature which may successfully challenge contradiction when effectively proved. What the party himself has said or done at a time when the litigation perhaps was not thought of, if the certainty of it is established having regard to the circumstances of time, place and person, should and often does furnish a substantial reason for his defeat, when a trial discloses his case founded on facts inconsistent with those which he has himself adopted and to which he has given publication. We have advisedly referred to the necessity of the complete establishment of such statements, for the evidence must be unsatisfactory and the weight correspondingly light if there is either vagueness or uncertainty about it suggesting possible mistake, distortion, or garbling. As strong as it is when of recent occurrence, accurate recounting, and disinterested version, so weak is it when these elements or some of them may be wanting.²⁷ From the multitude of illustrations we

767; *Rountree v. Gaulden*, 128 Ga. 737, 58 S. E. 346; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; *Springfield v. Granite City*, 157 Ill. App. 61; *Colsch v. Chicago etc. R. Co.*, 149 Iowa, 176, Ann. Cas. 1912C, 915, 34 L. R. A., N. S., 1013, 127 N. W. 198; *Leyner v. Leyner*, 123 Iowa, 185, 98 N. W. 628; *Powers v. Powers*, 25 Ky. Law Rep. 1468, 78 S. W. 152; *Canton v. McGraw*, 67 Md. 583, 11 Atl. 287; *Rosseau v. Deschenes*, 203 Mass. 261, 89 N. E. 391; *Fowler v. Middlesex County Commrs.*, 6 Allen (Mass.), 92; *Saginaw Suburban R. Co. v. Connelly*, 146 Mich. 395, 109 N. W. 677; *Ford v. Savage*, 111 Mich. 144, 69 N. W. 240; *McManus v. Nichols-Chisholm Lumber Co.*, 105 Minn. 144, 147, 117 N. W. 223; *Jennings v. Rohde*, 99 Minn. 335, 109 N. W. 597; *Crump v. Geroch*, 40 Miss. 765; *Forrister v. Sullivan*, 231 Mo. 345, 132 S. W. 722; *Brookfield v. Drury College*, 139 Mo.

App. 339, 123 S. W. 86; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Koester v. Rochester Candy Wks.*, 194 N. Y. 92, 16 Ann. Cas. 589, 19 L. R. A., N. S., 783, 87 N. E. 77; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215; *Wilson v. Wilson*, 137 Pa. 269, 20 Atl. 644; *Colt v. Selden*, 5 Watts (Pa.), 525; *Autrey v. Linn* (Tex. Civ. App.), 138 S. W. 197; *Stadtler v. South Texas Lumber Co.* (Tex. Civ. App.), 121 S. W. 1132; *Meyers v. San Pedro etc. R. Co.*, 36 Utah, 307, 21 Ann. Cas. 1229, 104 Pac. 736; *Powell v. Tarry*, 77 Va. 250; *Berger v. Abel etc. Co.*, 141 Wis. 321, 124 N. W. 410; *Riha v. Pelnar*, 86 Wis. 408, 57 N. W. 51; *Dever v. Myshrall*, 8 New Brunsw. 354.

²⁷ In *Greenleaf on Evidence*, fourteenth edition, section 200, the author, in discussing the probative value of such evidence, says: "With respect to

select but a few of the more modern. "We think this testimony was relevant. It tended to contradict the witness as to the extent of his injuries received from the alleged fall. The testimony being relevant and material, it was admissible, if not by way of impeachment then as a statement or admission made by a party to the suit. To exclude it in this case was highly prejudicial to appellant, and the judgment should be reversed."²⁸ "An agent cannot object to his own declarations being shown in evidence as against him, even though they were made by him as agent, and not in his own behalf. There is no more reason for assuming that an agent will make false statements in behalf of his principal than that he will make false statements in his own interest. Previous declarations of a party against interest are admissible on the theory that he cannot complain if such declarations are assumed to have been true. He is not estopped by them, but they may be taken into account as furnishing evidence with reference to the fact as to which such declaration was made. We know of no reason why this rule is not applicable to a married woman who has made statements while acting as agent for her husband."²⁹ "It was also error to exclude the defendant's previous declarations in relation to the subject under investigation. If he was a witness, declarations previously made, inconsistent with his testimony, would be competent to affect his credibility. If not a witness, he was nevertheless the party, and the declarations of a party in relation to the matters set up as a defense by him are competent evidence against him."³⁰ "A

all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the wit-

ness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party actually did say."

²⁸ *Springfield v. Granite City*, 157 Ill. App. 61.

²⁹ *Leyner v. Leyner*, 123 Iowa, 185, 98 N. W. 628.

³⁰ *Wilson v. Wilson*, 137 Pa. 269, 20 Atl. 644.

report of the defendant, made by the secretary, to the Frankfort Accident, Marine and Plate Glass Insurance Company, was received in evidence over the objection and exception of defendant. It was offered as an admission by defendant of certain matters stated therein. So far as it contained admissions of the defendant as to matters material and relevant to the controversy, we are aware of no rule of law that would have justified its exclusion, and the objection to the report as a whole was properly overruled."³¹ "The plaintiff having testified that the defendant, on the witness-stand, admitted at the trial of another action that he had no authority on behalf of Carr to furnish water for irrigation, affords some evidence from which the jury might conclude that, in making the contract entered into with the plaintiff, the defendant exceeded the power delegated to him. The plaintiff's testimony is corroborated by that of the witness Bert Davis, who testified that he was present in court at the trial of the case *Durkee v. Carr*, *supra*, the nature of which action he explained; and, referring to the defendant's testimony given at that trial, he said: 'I remember when they asked him if he had authority to furnish water, and he said he didn't. I remember that very distinctly.' The declarations so imputed to the defendant were against his interest, and therefore admissible, and hence no error was committed in overruling the motion for a judgment of nonsuit."³² "The witness was the agent of the plaintiff in the purchase of the stock, the latter living in another state, and having no personal connection with the transaction. She had testified to the fact of the purchase, to the representations on which it was made, and immediately before the question was asked had stated that, after the real condition of the title to the property came to her knowledge, she had a conversation with the defendant on the subject. The question related to the last conversation, and we are unable

³¹ *Roche v. Lewellyn Ironworks Co.*, 140 Cal. 563, 74 Pac. 147.

³² *Anderson v. Adams*, 43 Or. 621, 74 Pac. 215; *White v. Madison*, 26 N. Y. 117.

to see wherein it was improper. His admissions, if he made any, were competent evidence against him; and on the face of the question its purpose was merely to show what his statements were.”³³ It has always been competent to show admissions made by the parties to the record whether those admissions were made while testifying as a witness, or were made upon the streets. Such statements are evidence for the adverse party. If the testimony is of such a character as to constitute an admission of the party, it is not necessary to lay the foundation for its reception, or even to cross-examine the party on the subject.³⁴ The reason for the admission of such statements is both clear and compelling. They are admitted because conduct of a party to the proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. A party cannot ordinarily prove his own conduct in support of his contention, because he might thus manufacture evidence in his own behalf, but there is a presumption that he will not make evidence against his own interest. The probative force of such declarations must depend on the circumstances of

³³ *Gerahty v. Randall*, 18 Colo. App. 194, 70 Pac. 767.

³⁴ *Moore v. Crosthwait*, 135 Ala. 272, 33 South. 28; *Klair v. Philadelphia etc. R. Co.* (Del.), 78 Atl. 1085; *Brown v. Calumet River R. Co.*, 125 Ill. 600, 18 N. E. 283; *Second Borrowers' etc. Bldg. Assn. v. Cochrane*, 103 Ill. App. 29; *Indianapolis etc. R. Co. v. Hubbard*, 36 Ind. App. 160, 74 N. E. 535; *Pritchett v. Sheridan*, 29 Ind. App. 81, 63 N. E. 865; *Eddings v. Boner*, 1 Ind. Ter. 173, 38 S. W. 1110; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538; *Young v. Kinney*, 79 Neb. 421, 112 N. W. 558; *Churchill v.*

White, 58 Neb. 22, 76 Am. St. Rep. 64, 78 N. W. 369; *McBlain v. Edgar*, 65 N. J. L. 534, 48 Atl. 600; *Stickney v. Ward*, 20 Misc. Rep. 667, 46 N. Y. Supp. 382; *Contreras v. San Antonio Traction Co.* (Tex. Civ. App.), 83 S. W. 870; *Simpson v. Edens*, 14 Tex. Civ. App. 235, 38 S. W. 474; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277, 39 N. W. 558. This only applies to parties as witnesses and not to ordinary witnesses. In the latter case, before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him, a foundation must be laid by interrogating him as to whether he had made such statements. See § 845, *post*.

each case. They may have little, if any, weight, or, in connection with other evidence, they may amount to convincing proof.³⁵ Nor is it necessary that the statement should *at the time of making it* appear to be against the interest of the party. The statement is admissible if at the time of the trial it is inconsistent with the contention of the party who made it.³⁶ When a party to a civil action has made admissions of facts material to the issue, they are, as a rule, admissible against him. So far as affects their competency, it is immaterial whether they are oral,³⁷ including interpreted and telephonic statements, so that they are properly identified,³⁸ or written,³⁹ or to whom

³⁵ State v. Willis, 71 Conn. 293, 41 Atl. 820.

³⁶ State v. Willis, 71 Conn. 293, 41 Atl. 820; State v. Anderson, 10 Or. 448; State v. Mowry, 21 R. I. 376, 43 Atl. 871.

³⁷ Lehman v. McQueen, 65 Ala. 570; Rutz v. Obear, 15 Cal. App. 435, 115 Pac. 67; Schell v. Weaver, 225 Ill. 159, 8 Ann. Cas. 339, 80 N. E. 95; First Nat. Bank v. Farmers' etc. Bank, 171 Ind. 323, 86 N. E. 417; Anderson v. Halverson, 126 Iowa, 125, 101 N. W. 781; Leyner v. Leyner, 123 Iowa, 185, 98 N. W. 628; Powers v. Powers, 25 Ky. Law Rep. 1468, 78 S. W. 152; Diel v. Kellogg, 163 Mich. 162, 128 N. W. 420; Myer etc. Hardware Co. v. Spann (Miss.), 35 South. 177; Clay v. Brown, 148 Mo. App. 541, 128 S. W. 853; Crowley v. See, 63 Misc. Rep. 346, 117 N. Y. Supp. 101; Avery v. Stewart, 136 N. C. 426, 68 L. R. A. 776, 48 S. E. 775; Anderson v. Adams, 43 Or. 621, 74 Pac. 215; Hoffa v. Hoffa, 38 Pa. Sup. Ct. 356; Stewart v. Gleason, 23 Pa. Super. Ct. 325; Dubois v. Roby, 84 Vt. 465, 80 Atl. 150; Garrett v. Ruthford, 108 Va. 478, 62 S. E. 389; Husbrook v. Strawser, 14 Wis. 403; Waldron v. Waldron, 156 U. S. 361, 39 L. Ed. 453, 15 Sup. Ct. Rep. 383; Armstrong v. R. Co., 2 Ont. L. R. 219.

³⁸ Miles v. Andrews, 153 Ill. 262, 38 N. E. 644; Godair v. Ham Nat. Bank, 225 Ill. 572, 116 Am. St. Rep. 172, 8 Ann. Cas. 447, 80 N. E. 407; Galt v. Woliver, 103 Ill. App. 71; Kimbark v. Illinois Car etc. Co., 103 Ill. App. 632; Holzhauer v. Sheeny, 127 Ky. 28, 104 S. W. 1034; Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081; Wolfe v. Missouri etc. R. Co., 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; Star Bottling Co. v. Cleveland Faucet Co., 128 Mo. App. 517, 109 S. W. 802; Globe Printing Co. v. Stahl, 23 Mo. App. 451; Oskamp v. Gadsden, 35 Neb. 7, 37 Am. St. Rep. 428, 17 L. R. A. 440, 52 N. W. 718; Stepp v. State, 31 Tex. Cr. 349, 20 S. W. 753; Merrill v. Southwestern Tel. etc. Co., 31 Tex. Civ. App. 614, 73 S. W. 422.

³⁹ Lewis v. Robertson, 100 Ala. 246, 14 South. 166; Jackson v. Grisham, 171 Ala. 553, 55 South. 165; St. Louis etc. R. Co. v. Dallas, 93 Ark. 209, 124 S. W. 247; Roche v. Lewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Gradwohl v. Harris, 29 Cal. 150; Huntington v. Chisholm, 61 Ga. 270; Home-Riverside Coal Min. Co. v. Fores, 64 Kan. 39, 67 Pac. 445; Put-

they were addressed, or when or where they were made.⁴⁰ The fact that an oral admission is in respect of a written instrument, or of that which should have been in writing, does not affect its admissibility, because the evidence tendered is not of the contents of the document, but of what the person making the original statement said when the

nam v. Gunning, 162 Mass. 552, 39 N. E. 347; McElvain v. St. Louis etc. R. Co., 151 Mo. App. 126, 131 S. W. 736; Griggs v. Deal, 30 Mo. App. 152; Kift v. Mason, 42 Mont. 232, 112 Pac. 392; Stone v. Schlesinger, 110 N. Y. Supp. 852; Bayliss v. Cockcroft, 81 N. Y. 363; Miller v. Campbell Commission Co., 13 Okl. 75, 74 Pac. 507; Beard v. Royal Neighbors of America, 53 Or. 102, 17 Ann. Cas. 1199, 19 L. R. A., N. S., 798, 99 Pac. 83; Lynch v. Troxell, 207 Pa. 162, 56 Atl. 413; McGaughey v. American Nat. Bank, 41 Tex. Civ. App. 191, 92 S. W. 1003; Robertson v. Ephraim, 18 Tex. 118.

⁴⁰ Cook v. Barr, 44 N. Y. 156. See § 266, *post*. The old time objections that admissions made on the law side of the courts were inadmissible in equity suits, and those in the civil and criminal and departmental jurisdictions were limited in like manner, have all been swept away, and the admission of a party in the sense in which we have used it is admissible; its weight only is qualified by the circumstances in each case: Spann v. Torbert, 130 Ala. 541, 30 South. 389; Allred v. Kennedy, 74 Ala. 326; Hendle v. Geiler (Del.), 50 Atl. 632; Beale v. Brown, 6 Mackey (D. C.), 574; Munnerlyn v. Augusta Sav. Bank, 94 Ga. 356, 21 S. E. 575; Gordon v. Green, 10 Ga. 534; Holland v. Spell, 144 Ind. 561, 42 N. E. 1014; Pope v. Bowzer, 1 Kan. App. 727, 41 Pac. 1048; Ring v. Gray, 6 B. Mon. (Ky.) 368; Dunbar v. Dunbar, 80 Me.

152, 6 Am. St. Rep. 166, 13 Atl. 578; Graves v. Graves, 3 Met. (Mass.) 167; Olsen v. Swensen, 53 Minn. 516, 55 N. W. 596; Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39; Perkins v. Towle, 59 N. H. 583; Glenn v. Garrison, 17 N. J. L. 1; Patton v. Freeman, 1 N. J. L. 113; Notara v. De Kamalaris, 22 Misc. Rep. 337, 49 N. Y. Supp. 216; McCoon v. Smith, 3 Hill (N. Y.), 147, 38 Am. Dec. 623; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Curlee v. Smith, 91 N. C. 172; Earl v. Shoulder, 6 Ohio, 409; Meyers v. Dillon, 39 Or. 581, 65 Pac. 867, 66 Pac. 814; In re Bramberry, 156 Pa. 628, 36 Am. St. Rep. 64, 22 L. R. A. 594, 27 Atl. 405; Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924, 58 S. W. 342; Miller v. Denman, 8 Yerg. (Tenn.) 233; Spears v. Walker, 1 Head (Tenn.), 166; Bruce v. Laing (Tex. Civ. App.), 64 S. W. 1019; Flores v. Maverick (Tex. Civ. App.), 26 S. W. 316; Stowe v. Bishop, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494; Hunter v. Jones, 6 Rand. (Va.) 541; Garman v. United States, 34 Ct. of Cl. 237; Fortier v. Sauve, 4 Montreal Super Ct. 30; Doe v. Ross, 5 New Brunsw. (Can.) 346. As to admissions made by a party on a former trial, see Fuller v. Fuller (Ind. App.), 100 N. E. 869; Sweetser v. Jordan, 211 Mass. 393, 97 N. E. 768; Cohen v. Sobel, 137 N. Y. Supp. 897; Potomac etc. R. Co. v. Chichester (Va.), 74 S. E. 162; Davis v. McEwen Bros., 193 Fed. 305, 113 C. C. A. 229.

substance of the document may have formed the topic of conversation. One of the best illustrations of this class of evidence is afforded in a New York case,⁴¹ where it was held that notwithstanding the statutory requirement that acknowledgments and new promises should be in writing, a part payment may be proved by the oral admission of the party, as where he instructed a third person to make a payment on his behalf. This ruling followed other decisions to the same effect.⁴² The cases show the reception of oral admissions concerning negotiable and other written instruments;⁴³ and generally it may be deduced from the decisions that whenever the terms of a written instrument may be legally affected by parol evidence, such evidence in the form of an oral admission is admissible.⁴⁴

§ 237 (238). Admissions by real and nominal parties.— Having thus considered the nature of admissions, their use and range of admissibility, we are drawn to their consideration in the aspects of how and by whom they may be made; and must first regard them as made by the party to the action, taking into account his real position with regard to the suit. The subject is presented in its simplest form when the admissions are made by one who is a party to the record and who is also the real party in interest. In such case it is very clear that the statements and acts of the party, when they afford any presumption against

⁴¹ *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155.

⁴² *Sibley v. Lambert*, 30 Me. 253; *Read v. Hurd*, 7 Wend. (N. Y.) 408; *Sibley v. Phelps*, 6 Cush. (Mass.) 172.

⁴³ *Blackington v. City of Rockland*, 66 Me. 332; *Bayliss v. Cockeroff*, 81 N. Y. 363; *Singleton v. Barrett*, 2 Crompt. & J. 368, 1 L. J. Ex. 134, 2 Tyrw. 409; *Cross v. Kistler*, 14 Colo. 571, 23 Pac. 903; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Dimon v. Keery*, 54 N. Y. App. Div. 318, 66 N. Y. Supp. 817; *Newhall v. Holt*, 4

jur. 610, 9 L. J. Ex. 293, 6 Mees. & W. 662; *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155; *Harris v. Harris*, 2 Harr. (Del.) 354; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893; *Schwartz v. Hersker*, 140 Pa. 550, 21 Atl. 401; *Fetrow v. Koehenour*, 3 Brewst. (Pa.) 138.

⁴⁴ See §§ 207, 208, *ante*, dealing with the parol proof of admissions concerning writings, and § 269 *et seq.*, *post*, for written admissions.

him, may be received in behalf of the adverse party.⁴⁵ There have been occasionally exceptions taken to the admissibility of such statements, but the objections are generally founded on a misapprehension of the nature of the testimony. It cannot be made too plain that such evidence is not by way of attacking the credibility of the party-witness, that there is no occasion to lay the foundation of asking him first if he made the statement. When the statement proven is between the parties to the transaction, it has always been the rule one party could prove the statements of the other at any time which would throw light upon the issues involved or facts relevant to those issues.⁴⁶ Such statements or admissions are original evidence, and

⁴⁵ *Seale v. Chambliss*, 35 Ala. 19; *Shinn v. Tucker*, 37 Ark. 580; *Phelan v. Bonham*, 9 Ark. 389; *Rudd v. Byrnes*, 156 Cal. 636, 20 Ann. Cas. 124, 26 L. R. A., N. S., 134, 105 Pac. 957; *McFadden v. Wallace*, 38 Cal. 51; *Foote v. Brown*, 81 Conn. 218, 70 Atl. 699; *Scott v. Maddox*, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500; *Harvey v. Anderson*, 12 Ga. 69; *Rosnagle v. Armstrong*, 17 Idaho, 246, 105 Pac. 216; *Secor v. Pestana*, 37 Ill. 525; *Denman v. McMahon*, 37 Ind. 241; *Conway v. Murphy*, 135 Iowa, 171, 112 N. W. 764; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *White v. White*, 76 Kan. 82, 90 Pac. 1087; *Greer v. Higgins*, 8 Kan. 519; *Tingle v. Kelly*, 29 Ky. Law Rep. 24, 92 S. W. 303; *Upton v. Adeline Sugar Factory Co.*, 109 La. 670, 33 South. 725; *Call v. Pike*, 68 Me. 217; *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384; *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. 13; *Snow v. Paine*, 114 Mass. 520; *Cooper v. Harlow*, 163 Mich. 210, 128 N. W. 259; *Sherrard v. Cudney*, 134 Mich. 200, 96 N. W. 15; *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 512; *Black v. Epstein*, 221 Mo. 286, 120 S. W. 754;

Cafferatta v. Cafferatta, 23 Mo. 235; *Ogden v. Sovereign Camp Woodmen*, 78 Neb. 806, 113 N. W. 524; *Carlton v. Patterson*, 29 N. H. 580; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Retter v. Olean St. R. Co.*, 140 App. Div. 667, 125 N. Y. Supp. 674; *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178; *Tredwell v. Graham*, 88 N. C. 208; *Stocklen v. Barrett*, 58 Or. 281, 114 Pac. 108; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. 202, 100 Am. Dec. 628, 6 Morr. Min. Rep. 633; *State v. Littlefield*, 3 R. I. 124; *Durant v. Ashmore*, 2 Rich. (S. C.) 184; *Bender v. Brooks* (Tex. Civ. App.), 130 S. W. 653; *Goodnow v. Parsons*, 36 Vt. 46; *Simons v. Cissna*, 60 Wash. 141, 110 Pac. 1011; *Johnston v. Hamburger*, 13 Wis. 175; *Magnet Co. v. Ostheimer*, 159 Fed. Cas. 655, 86 C. C. A. 523; *Robinson v. Wiley*, 20 Fed. Cas. No. 11,968a, Hempst. 38.

⁴⁶ *Moore v. Crosthwait*, 135 Ala. 272, 33 South. 28; *Rahm v. Bunger*, 28 Ky. Law Rep. 806, 90 S. W. 257; *McBlain v. Edgar*, 65 N. J. L. 634, 48 Atl. 600; *Wilson v. Gordan*, 73 S. C. 155, 53 S. E. 79; *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711.

the point in controversy is not their truth or falsity, but whether or not they were made.⁴⁷ It is axiomatic to say they are not conclusive, but are in the nature of *prima facie* evidence, and go to the jury to give them their just weight in settling the question of fact involved in the issue to which they are directed.⁴⁸ It follows that the admissibility of such admissions is independent of explanations which may come later, and of the date or place⁴⁹ at which they were made, or of such other circumstantial verification which ordinarily accompanies the recounting of an event.⁵⁰

⁴⁷ McBlain v. Edgar, *supra*.

⁴⁸ Cafferatta v. Cafferatta, 23 Mo. 235; Friedman v. Ender, 116 N. Y. Supp. 461; Cox v. Buck, 3 Strob. (S. C.) 367; Bartley v. Comer (Tex. Civ. App.), 89 S. W. 82; Voelkel v. Supreme Tent etc. (Wis.), 92 N. W. 1104. In Cox v. Buck, *supra*, the court said: "The principle on which the plaintiff is held bound by his acts, conduct or representations, is of common-law origin, and results from the rule that parties to a suit are bound by admissions, against their interest, respecting the subject of the action. Such admissions, *prima facie*, conclusive against the party who makes them, may be explained or qualified; but if evidence for this purpose is introduced, the whole is submitted to the jury, and the liability of the party decided, by their verdict, as a question of evidence."

⁴⁹ Lorenzana v. Camarillo, 45 Cal. 125; Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; Cloud v. Dupree, 28 Ga. 170; Clark v. Smith, 87 Ill. App. 409; Gottschalk v. Jarmuth, 69 Ill. App. 623; Barlett v. Falk, 110 Iowa, 346, 81 N. W. 602; Turner v. Patterson, 5 Dana (Ky.), 292; Dole v. Young, 24 Pick. (Mass.) 250; Scovill v. Glasner, 79 Mo. 449; Enloe v. Sherrill, 28 N. C. 212; St. John's Lodge v. Callender, 26 N. C. 335;

Morris v. Vanderen (Pa.), 1 Dall. 64, 1 L. Ed. 38; Dotts v. Fetzer, 9 Pa. 88; Campbell v. Day, 16 Vt. 558.

⁵⁰ Brandon v. Cabiness, 10 Ala. 155; Hall v. Bishop, 78 Ind. 370; Scranton v. Stewart, 52 Ind. 68; Rounds v. Alee, 116 Iowa, 345, 89 N. W. 1098; Werner v. Flies, 91 Iowa, 146, 59 N. W. 18; Cincinnati etc. R. Co. v. Cook, 113 Ky. 161, 67 S. W. 383, 23 Ky. Law Rep. 2410; Gordon v. Stubbs, 36 La. Ann. 625; McRainy v. Clark, 4 N. C. 698; Passavant v. Cantor, 62 Hun, 623, 17 N. Y. Supp. 37; Joy v. Liverpool etc. Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Forney v. Ferrell, 4 W. Va. 729; Crowley v. Pendleton, 46 Conn. 62; Brown v. Moore, 6 Yerg. (Tenn.) 272; Smith v. Burnham, 22 Fed. Cas. No. 13,018, 2 Sum. 612. In Beyer v. Schlenker, 150 Mo. App. 671, 131 S. W. 465, the court, after dealing with admissions of those having a community of interest (see § 253, *post*), said: "It is clear from all these cases that, where there is but one devisee, the declarations of that party against that party's own interest, whether made before or after the probate of the will, or before or after its execution by the testator, are admissible in evidence. We know of no authority to the contrary."

The question always is, Did the party⁵¹ make the statement? And if he did, the jury will weigh the presence or absence of confirmation, and the strength or weakness of the establishment of the fact.⁵² Under the ancient practice it often happened that the party to the record was only a nominal party; and it was sometimes held that in such cases his admissions were competent as against the real party in interest. Thus, the admissions of an *assignor*, the nominal plaintiff, that the debt had been paid might be given against his assignee.⁵³ But the rule came to prevail both in equity and in law that where the assignee was obliged in good faith to sue in the name of the assignor, the admissions of the assignor subsequent to the assignment were not admissible to affect the rights of the assignee;⁵⁴ and where in such a case a receipt of payment

⁵¹ By a party is meant party to the action who has been served with process: *Himrod Coal Co. v. Adaek*, 94 Ill. App. 1; *Koplan v. Boston Gas-light Co.*, 177 Mass. 15, 58 N. E. 183; *Wise v. Wheeler*, 28 N. C. 196; *Blackwell v. Davis*, 2 How. (Miss.) 812; *Griswold v. Burroughs*, 60 Hun, 558, 15 N. Y. Supp. 314; *Peck v. Yorks*, 47 Barb. (N. Y.) 131; *Sayre v. Woodyard*, 66 W. Va. 288, 66 S. E. 320. In actions of infants by their next friend, the admissions of parents out of court were excluded even when the next friend of record was the father: *Neff v. City of Cameron*, 213 Mo. 350, 127 Am. St. Rep. 606, 18 L. R. A., N. S., 320, 111 S. W. 1139.

⁵² *Mason v. Lothrop*, 7 Gray (Mass.), 354; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Laidlaw v. Sage*, 2 App. Div. 374, 37 N. Y. Supp. 770 (a specially interesting case, in that the witness testifying to the admission of the party did not know him personally and could only describe him, the time and the place where the statement was made); *Bender v. Brooks* (Tex. Civ. App.),

130 S. W. 653 (where the statement was not made directly to the party interested but addressed to the class at large in which he was included).

⁵³ *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Dillon v. Chouteau*, 7 Mo. 386; *Johnson v. Kerr*, 1 Serg. & R. (Pa.) 25; *Moriarity v. L. C. & D. Ry. Co.*, L. R. 5 Q. B. 320, 39 L. J. Q. B. 109, 22 L. T. 163, 18 W. R. 625.

⁵⁴ *Timan v. Leland*, 6 Hill (N. Y.), 237; *Owings v. Low*, 5 Gill & J. (Md.) 134; *Dunn v. Snell*, 15 Mass. 481; *Chapman v. Shattuck*, 8 Ill. 49; *State v. Jennings*, 10 Ark. 428; *Patrick v. McWilliams*, 23 Ga. 348; *Gillighan v. Tebbetts*, 33 Me. 360; *Cooke v. Cooke*, 29 Md. 538; *Garland v. Harrison*, 17 Mo. 282; *Frear v. Everton*, 20 Johns. (N. Y.) 142. But so long as the admission is made while the party making it retained any interest in the subject matter or in the absence of evidence as to when the interest was wholly parted with, the statement is competent. The *quantum* of interest retained does not affect the question: *Sally v.*

in full from the assignor is produced, the assignee may show that the assignment was previously made.⁵⁵ Where the practice prevails that actions must be brought in the name of the *real party in interest*, it is clear that the admission, in order to be competent, must have been made by the *party* or by someone whose interest in the matter in controversy is identified with that of the party, as of an agent, a joint owner or a predecessor.⁵⁶ If not so identified, the admissions are not competent evidence against either the one beneficially interested or the real party in interest.⁵⁷ When such a state of facts exists that one person has the right to use the name of another as nominal plaintiff suing for the former's use, admissions in the pleadings (prosecuted solely for the benefit of the usee) are not ordinarily admissible in evidence against the nominal plaintiff in another action between the latter and a third person.⁵⁸

Gooden, 5 Ala. 78; Wilmot v. Lyon, 11 Ohio C. C. 238. See, also, §§ 244-247, *post*.

⁵⁵ Frear v. Evertson, 20 Johns. (N. Y.) 142. See, also, Payne v. Rodgers, 1 Doug. (Eng.) 407; Tiernan v. Jackson, 5 Pet. (U. S.) 580, 8 L. Ed. 234; Head v. Shaver, 9 Ala. 791; Winch v. Keeley, 1 Term Rep. 619; Henderson v. Wild, 2 Camp. 561.

⁵⁶ Van Gelder v. Van Gelder, 81 N. Y. 625; Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896, 38 N. E. 620; Goldthorp's Estate, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; H. C. Judd & Root v. New York & T. S. S. Co., 128 Fed. 7, 62 C. C. A. 515. See, also, § 239 et seq., *infra*.

⁵⁷ Sykes v. Lewis, 17 Ala. 261; Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; Dazey v. Mills, 10 Ill. 67; Day v. Baldwin, 34 Iowa, 380; Bissell v. Erwin, 15 La. 94; Butler v. Millett, 47 Me. 492; Owings v. Low, 5 Gill & J. (Md.) 134; Wing v. Bishop, 3

Allen (Mass.), 456; Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694; Eberhardt v. Schuster, 10 Abb. N. C. (N. Y.) 374; Strother v. Aberdeen etc. R. Co., 123 N. C. 197, 31 S. E. 386; Boshear v. Lay, 6 Heisk. (53 Tenn.) 163; Hall v. Clountz, 26 Tex. Civ. App. 348, 63 S. W. 941; Palmer v. Cassin, 18 Fed. Cas. No. 10,687, 2 Cranch C. C. 66.

⁵⁸ Netzow Mfg. Co. v. Southern Ry. Co., 7 Ga. App. 163, 66 S. E. 399. There are two exceptional cases which must be noticed *en passant*. It is a general rule, with but few exceptions, that the answer of one defendant is not evidence against another. Yet when the right of the complainant as against one defendant is only prevented from being complete, by some question between the plaintiff and the second defendant, the answer of the second defendant may be read as evidence. Thus, if a mortgage is assigned, and the assignee files a bill against both the

§ 238 (239). Admissions may be made by those not parties, if identified in interest.—In addition to the real and nominal parties to an action, there often exist those who have such a pecuniary interest in the result that their

mortgagor and the assignor, and the mortgage is proved and the assignor admits the assignment, the complaint will be entitled to a decree, notwithstanding the mortgagor may deny all knowledge of the assignment: See 2 Dan. Ch. Pr. 982; 3 Hare, 165. The reason of this is that the mortgagor has no interest in the assignment, and as the answer of the assignor estops him, the equity of the assignee is complete. If the answer of the assignor is evidence to prove the assignment, his admissions made before the bill is filed must be evidence of the same fact: *McLane & Plowman v. Riddle*, 19 Ala. 180, overruling *Moore v. Hubbard*, 4 Ala. 187, followed in *Nix v. Winter*, 35 Ala. 309. In an action on a duebill the plaintiff proved the signature and rested. The defendant offered in evidence a written statement of the plaintiff's that he had no interest in the action or the bill. The statement was improperly excluded. The court, after stating the facts and that when plaintiff's case was rested he appeared to be the real plaintiff, said: "It would be very strange if a defendant were not at liberty to meet such a case by the plaintiff's own declarations, even if not made in the formal shape in which this statement appears. But it is claimed that the admission of *Sherman* contained in itself evidence that he was not the real plaintiff; and it is urged that the declarations of an assignor are not competent to impeach the title of his assignee. We are not disposed to question the

doctrine that an assignor cannot, after the *bona fide* assignment of a chose in action, and notice to the debtor, admit away his assignee's title; but we do not perceive the applicability of that rule to this case. The plaintiff, while admitting that he has no claim, and never had any, to the duebill in suit, as explicitly denies that he has assigned or disposed of it to anyone. It could by no process become the property of anyone else, without such assignment. And while this admission shows no cause of action in himself, it shows no cause of action legally or equitably belonging to anyone else. For this reason, if for no other, it was admissible": *Hogan v. Sherman*, 5 Mich. 60. The plaintiff of record generally stands (except in official suits and like cases) as the ostensible party in interest. If it is objected to the admissibility of his declarations that he has parted with his interest, that fact is open to controversy, and its decision belongs, not to the court, but to the jury. If the fact of such assignment appears in his admissions, it is for the jury to determine how much of the admission is credible, and how much to be disregarded: 1 Greenl. Ev., § 201. If a court assumes to reject his statements because there is no evidence that he has parted with his interest, it is encroaching upon the province of the jury, by deciding upon a fact which is important in arriving at a verdict: *Hogan v. Sherman*, *supra*; *Campbell v. Day*, 16 Vt. 558.

admissions throw a relevant light upon certain of the facts in issue. Consequently admissions may be made by such persons not parties to the record, provided they have a substantial interest in the result.⁵⁹ By substantial interest is meant something more than natural anxiety, as in the

⁵⁹ *Bowen v. Snell*, 11 Ala. 379; *Hughes v. Spruance*, 15 Colo. 208, 25 Pac. 307; *Blattner v. Weis*, 19 Ill. 246; *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599; *Milton v. Hunter*, 13 Bush (Ky.), 163; *Bigelow v. Foss*, 59 Me. 162; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Tyler v. Ulmer*, 12 Mass. 163; *Bayley v. Bryant*, 24 Pick. (Mass.) 198; *Dillon v. Chouteau*, 7 Mo. 386; *Rich v. Eldredge*, 42 N. H. 153; *Pike v. Wiggin*, 8 N. H. 356; *Hamblett v. Hamblett*, 6 N. H. 333; *Wagner v. Allemania*, 71 Misc. Rep. 448, 128 N. Y. Supp. 629; *Benjamin v. Smith*, 4 Wend. (N. Y.) 332, 12 Wend. (N. Y.) 404; *Shields v. Whitaker*, 82 N. C. 516; *Kerchner v. Reilly*, 72 N. C. 171; *Fay v. Feeley*, 18 R. I. 715, 30 Atl. 342; *Brown v. Moore*, 6 Yerg. (Tenn.) 272; *Robinson v. Hutchinson*, 31 Vt. 443; *Kinnane v. Conroy*, 52 Wash. 651, 101 Pac. 223; *Fourth Nat. Bank v. Albaugh*, 188 U. S. 734, 23 Sup. Ct. Rep. 450, 47 L. Ed. 673; *Coates v. Kelty*, 27 U. C. Q. B. 284. But the statements of a husband claiming ownership cannot be used in an action by a wife for conversion of her property: *McKnight v. United States*, 130 Fed. 659, 65 C. C. A. 37. And the admissions of one entitled under a will are only competent against himself. He may not prejudice the rights of others. The supreme court of Georgia in *Morris v. Stokes*, 21 Ga. 552, said: "Were the sayings of John L. Lewis, a principal legatee, and a real, though not a formal

party to the record, admissible? We are called on for the first time to decide this question. It has become a settled rule of this court that the admissions of the propounder of the will, who is also a legatee for a large amount, may be proven. And this proposition is abundantly sustained by authority. But here the will is propounded for probate by another. Can the sayings of a principal legatee be received in this issue? We think so, in all cases, so far as his own interest is to be affected. And the jury, upon sufficient proof, may strike out his legacy and establish the balance of the will, so that a will may be good as to one party, and bad as to another; valid as to some parts and invalid as to others: *Trimbletown v. D'Alton*, 1 Wms. on Ex'ors, 43; 1 Dow. & C. 85, 6 Eng. Reprint, 456, decided in the House of Lords, on appeal from the Irish Chancery. Beyond this we cannot find sufficient authority to go. There is one reported case in Massachusetts which goes to the extent of allowing the testimony to come in, so as to affect all who take under the will: *Atkins v. Sanger*, 1 Pick. (Mass.) 192. But it is unsustained, and is considered irreconcilable with the general doctrine laid down, both there and elsewhere. Let a community of purpose or joint interest be first made out between all the legatees, and then the admission of one may bind the rest, not otherwise."

case of parent and child. It must be taken to mean pecuniary interest in the way of profit or legal obligation.⁶⁰ It is shown by evidence *dehors* the declarations of such party. It is obvious that the statement of a party claiming interest should not *per se* be sufficient to aid or oust a claim. The rule appears to be that evidence of interest or no interest, as the case may be, should be given as a foundation for the introduction of the admission. In other words, before the declarations of one not a party to the record can be received on the ground that he is the real party in interest, such *interest must be shown* by competent evidence. And the *declarations* of one who is neither a party nor a witness are *inadmissible* for this purpose.⁶¹ For example, the admissions and acts of the *cestui que trust* are admissible, although he is not a party to the record, on the ground that he is the real party in interest.⁶² In an action against a *sheriff* for the default of his deputy the letters and declarations of the deputy are competent, since the deputy is answerable over to the sheriff in another action in which the record of the former action may be used as evidence.⁶³ And where the effect of a contract is that a *surety* shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety.⁶⁴ But ordinarily where a principal is not a party to the suit, his declarations are not admissible, unless they are made while the employment in which the

⁶⁰ Stratford v. Sanford, 9 Conn. 275; Taylor v. Grand Trunk Ry. Co., 48 N. H. 304, 2 Am. Rep. 229.

⁶¹ Bowen v. Snell, 11 Ala. 379; Ryan v. Merriam, 4 Allen (Mass.), 77; Smith v. Aldrich, 12 Allen (Mass.), 553; Mullins v. Lyles, 1 Swan (Tenn.), 337.

⁶² Hanson v. Parker, 1 Wils. 257; Harrison v. Vallance, 1 Bing. 45; Doe v. Wainwright, 3 Nev. & P. 598, 5 Ad. & E. 520, 111 Eng. Reprint, 1262; McLemore v. Nuckolls, 37 Ala. 662.

⁶³ Tyler v. Ulmer, 12 Mass. 163.

⁶⁴ Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Snell v. Allen, 1 Swan (Tenn.), 208; Casky v. Haviland, 13 Ala. 314; United States v. Cutter, Fed. Cas. No. 14,911, 2 Curt. (U. S.) 617; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 64 Am. St. Rep. 475, 71 N. W. 261; Bank of Brighton v. Smith, 12 Allen (Mass.), 243, 90 Am. Dec. 144; Guarantee Co. v. Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

principal was engaged continued, and in such manner as to be part of the *res gestae*.⁶⁵ Greenleaf puts it that: "The admissions, which are thus receivable in evidence, must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party. . . . The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight, as though they were parties to the record. Thus the admissions of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an action by the master for freight; those of the indemnifying creditor, in an action against the sheriff; those of the deputy sheriff, in an action against the high sheriff for the misconduct of the deputy; are all receivable against the party making them. And, in general, the admissions of any party represented by another, are receivable in evidence against his representative."⁶⁶ But it is not every collateral, incidental or contingent interest in the result of a suit that furnishes legal ground for the introduction of hearsay testimony, as being the admission of a party in interest. For instance, take the cases cited by Greenleaf, in the passage just quoted, and we find the kind of interest, which makes the admissions of a person evidence in a case in which he is not a nominal or real party, very different from that of the interest of an insurance company which had paid a claim upon it under the circumstances disclosed in the important New York case referred to in the notes.⁶⁷ Thus,

⁶⁵ Cheltenham Fire Brick Co. v. Cook, 44 Mo. 29; Bailey v. McAlpin, 122 Ga. 616, 50 S. E. 388; Knott v. Peterson, 125 Iowa, 404, 101 N. W. 173; Chelmsford Co. v. Demarest, 7 Gray (Mass.), 1; Commonwealth v. Brassfield, 7 B. Mon. (Ky.) 447; Shelby v. Governor, 2 Blackf. (Ind.) 289; Lee v. Brown, 21 Kan. 458; Cassity v. Robinson, 8 B. Mon. (Ky.) 279; Hatch v. Elkins, 65 N.

Y. 489; White v. German Nat. Bank, 9 Heisk. (Tenn.) 475.

⁶⁶ 1 Greenl. Ev., §§ 179, 180; Lamar v. Micou, 112 U. S. 452, 465, 28 L. Ed. 751, 5 Sup. Ct. Rep. 221.

⁶⁷ H. C. Judd & Root v. New York etc. Co., 128 Fed. 7, 62 C. C. A. 515, we extract the excellent syllabus to that case in full from the Federal Reporter: "In an action by the owner of goods against a carrier

the interest of the *cestui que trust* of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit; so, also, the interest of persons in a policy effected in another's name, for their benefit. So, also, of the ship owners, in an action by the master for freight; the interest of the ship owners and master is identical and original in the thing itself that is sued for, not a mere incidental interest in the result of a suit; so, also, the interest of the indemnifying creditor, in an action against the sheriff for trespass; the creditor controlled the writ under which the sheriff acted, and the sheriff committed the alleged trespass by the direction of the indemnifying creditor. The same is true as to the action of a deputy sheriff, for the misconduct of the deputy.⁶⁸

to recover for a loss of goods through the alleged negligence of the defendant, in order to render admissions of an insurer of the goods, as against its interest, admissible (if admissible under any circumstances), it must have been a party to the suit, either on the record or otherwise, in complete control of the litigation. It must not only have paid to the insured in full and unconditionally the indemnity for which it had become liable, but it must have actually asserted its right of subrogation by bringing and controlling the suit in the name of the assured, before it can be invested with such an interest as a real party as to render its admissions competent evidence in behalf of defendant. The fact that it has a contingent or collateral interest in the result of the suit growing out of its contract with plaintiff, with which defendant has no concern, cannot render its admission competent evidence to relieve defendant from liability under its contract with plaintiff."

⁶⁸ Judd v. New York etc. Co., *supra*. "In no sense," said the court in that case, "are the plaintiffs in this case the representatives of the insurer, in the suit brought by them against the wrongdoer. The liability of the latter to the plaintiffs arose out of a contractual relation between them, to which the insurance company was in no wise privy, and the contract between the plaintiffs and the insurance company was solely collateral thereto. The insurance company, by reason of its insurance, had no original relation to the contract between the plaintiffs and the defendant in this suit, or to the tort which constituted the cause of action. Without undertaking to define with exactness the interest which one must have in the subject matter of the suit, to render his admissions evidence against either plaintiffs or defendant, it is obvious that the interest described by Greenleaf as sufficient for this purpose, in the passage cited, grows out of conditions very different from those existing in the case before us."

It is also a requisite that the statements should have been made *during the continuance of the interest*. Declarations made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay.⁶⁹

§ 239 (240). **Admissions by those in privity of interest—Definitions of “privity”—Mode of proof—Grantor and grantee.**—The words “privity” and “privity” are so frequently used, especially with reference to admissions, that a short inquiry into their signification and application is necessary. Privity means mutual succession or relationship to the same rights of property.⁷⁰ Privies are those who have mutual or successive relationship to the same right of property or subject matter, such as “personal representatives, heirs, devisees, legatees, assignees, voluntary grantees or judgment creditors or purchasers from them with notice of the facts.”⁷¹ Lord Coke divides privies into three classes—1. Privies in blood; 2. Privies in law; and 3. Privies by estate.⁷² The books mention five kinds of privies—privies of blood, such as the heir to the ancestor; privies in representation, as executors and administrators to the deceased; privies in estate between donor and donee, lessor and lessee; privies in respect of contract; and privies on account of estate and contract

⁶⁹ *Deady v. Harrison*, 1 Stark. 60; *Clarke v. Waite*, 12 Mass. 439; *Briggs v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Phoenix v. Dey*, 5 Johns. (N. Y.) 412; *Patton v. Goldsborough*, 9 Serg. & R. (Pa.) 47; *Babb v. Clemson*, 10 Serg. & R. (Pa.) 419, 13 Am. Dec. 684; *Shepherd v. Hayes*, 16 Vt. 486.

⁷⁰ *Greenl. Ev.*, § 523.

⁷¹ *Greenl. Ev.*, § 189; *Story Eq.*, § 165; *Henry v. Woods*, 77 Mo. 277; *Haley v. Bagley*, 37 Mo. 363.

⁷² The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the

same principle, namely, that a party claiming through another is estopped by that which estopped that other respecting the same subject matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims. An executor or administrator, suing or sued as such, would be bound by a verdict against his testator or intestate, to whom he is privy in law. With regard to privies in estate, a verdict against feoffer would estop feoffee, and lessor, the lessee: *Stacy v. Thrasher*, 6 How. (U. S.) 44, 12 L. Ed. 337.

together.⁷³ "The ground of privity is property and not personal relation."⁷⁴ We elsewhere discuss the rule by which judgments are made binding, not only upon parties to the record, but also upon those in privity with such parties.⁷⁵ It is on the same general principle that admissions may be competent when made by anyone who is privy in the character above set out to any party to the proceeding.⁷⁶ In either case the judgment or admission is received on the theory that the person upon whom it operates is identified in interest with the party to the suit. Where one person succeeds to the same rights of property formerly enjoyed by another, there is often such privity that the rights of the owner in such property may be affected by the statements of the latter. It will be seen that this principle has often been applied both in respect to real and personal property. In either case, where the successor in title claims under a former owner, near or remote, he may be charged, subject to the limitations hereafter mentioned, with the admissions of his predecessor qualifying or limiting his rights in respect to such property. It is an established rule of evidence that the declarations of a person under whom title is claimed are receivable against the successor so claiming, if admissible at all, on the theory that there is sufficient identity of interest to render the statements of the former equally receivable with the admissions of the latter himself.⁷⁷ The mode of proving such

⁷³ *Tinkham v. Borst*, 24 How. Pr. (N. Y.) 246.

⁷⁴ *Bigelow*, *Estop.* 142; *Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387.

⁷⁵ See § 587 et seq., *post*.

⁷⁶ *Steph. Ev.*, art. 16; 1 *Greenl. Ev.*, § 189. For definitions and illustrations of different classes of privies, see § 587, *post*. See, also, full note as to declarations of persons in possession, *Lancaster Nat. Bank v. Taylor*, 95 Am. Dec. 70. See, also, the following recent decisions: *Roy v. Moore*, 85 Conn.

159, 82 Atl. 233; *Stewart v. Strider*, 38 App. D. C. 459; *Close v. City of Chicago* (Ill.), 100 N. E. 215; *Burch v. Nicholson* (Iowa), 137 N. W. 1066; *Garrard v. Hibbard*, 152 Ky. 672, 153 S. W. 947; *Whelan v. Union Pac. R. Co.*, 91 Neb. 238, 136 N. W. 20; *Ball v. Danton* (Or.), 129 Pac. 1032; *Rankin v. Rankin* (Tex. Civ. App.), 151 S. W. 527; *Smith v. Stanley* (Va.), 75 S. E. 742.

⁷⁷ *Beasley v. Clarke*, 102 Ala. 254, 14 South. 744; *Arthur v. Gayle*, 38 Ala. 259; *McFadden v. Ellmaker*,

admissions is the same as that already described. After the necessary foundation of privity is laid for them,⁷⁸ the evidence is *prima facie* established when the admission is proved, and there is no *onus* on the party using it to avail himself of the testimony of the one who made the admission.⁷⁹ The admissions with which the successor may be

52 Cal. 348; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Doughty v. McMillan*, 92 Ga. 818, 19 S. E. 59; *Meek v. Holton*, 22 Ga. 491; *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008; *Waggoner v. Cooley*, 17 Ill. 239; *Justice v. Justice* (Ky.), 124 S. W. 351; *Leefe v. Walker*, 18 La. 1; *Fall v. Fall*, 100 Me. 98, 60 Atl. 718; *Robinett v. Wilson*, 8 Gill (Md.), 179; *Blake v. Everett*, 1 Allen (Mass.), 248; *Binney v. Hull*, 5 Pick. (Mass.) 503; *Taylor v. Hess*, 57 Minn. 96, 58 N. W. 824; *Graham v. Busby*, 34 Miss. 272; *Cavin v. Smith*, 24 Mo. 221; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371, and note; *Miller v. Feenane*, 50 N. J. L. 32, 11 Atl. 136; *Jackson v. McChesney*, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521; *Chadwick v. Foner*, 69 N. Y. 404; *Gidney v. Logan*, 79 N. C. 214; *Renwick v. Renwick*, 9 Rich. (S. C.) 50; *Bollinger v. McMin*, 47 Tex. Civ. App. 89, 104 S. W. 1079; *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. 109; *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95; *Fry v. Fearnster*, 36 W. Va. 454, 15 S. E. 253.

⁷⁸ *Erbes v. Smith*, 35 Mont. 38, 88 Pac. 568; *Aiken v. Cato*, 23 Ga. 154; *Harrell v. Culpepper*, 47 Ga. 635; *Fall v. Fall*, 100 Me. 98, 60 Atl. 718. In *Pierce v. Bemis*, 120 Ga. 536, 48 S. E. 128, the alleged

declaration was not fixed in point of time.

⁷⁹ *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Sandifer v. Hoard*, 59 Ill. 246; *Smith v. Le Force*, 14 Ky. Law Rep. 399; *Holt v. Walker*, 26 Me. 107, 45 Am. Dec. 98; *Coale v. Harrington*, 7 Har. & J. (Md.) 147; *Johnson v. Patterson*, 9 N. C. 183, 11 Am. Dec. 756; *Giblehouse v. Strong*, 3 Rawle (Pa.), 437; *Alger v. Andrews*, 47 Vt. 238; *Walthall v. Johnston*, 2 Call (Va.), 275. In England, Lord Mansfield always insisted on the production of the declarant, but that bad law was abrogated by his successor and has not since been recognized. It is alluded to in *Guy v. Hall*, 7 N. C. 150, and the reasoning is so clear that that part of the opinion is extracted. "But, it is said, that the person whose declarations are offered is entirely disinterested and within the process of the court, and therefore should himself be sworn. There would be some weight in this objection, if they were offered as the declarations of a disinterested individual in those cases where such declarations are admissible, to wit, in cases of pedigree and boundary; for then the declarations would be inadmissible, if the higher evidence, the oath of the party, could be had. In all other cases, except those of pedigree and boundary, the declarations of disinterested individuals are inadmissible; for they are nothing but hear-

charged are of course of great variety. For example, it is admissible as against the grantee to prove the declarations of the grantor, while in possession, that his deed had been antedated.⁸⁰ And it has been laid down that they must be statements affecting the property granted and of the knowledge of the declarant. For instance, a statement that the grantor had been told some fact concerning the rightful owner of the land is mere hearsay. Such were the circumstances in an Alabama case,⁸¹ a suit for possession of lands, and a witness for the plaintiff was wrongly permitted to testify that he heard a predecessor in possession of the defendant say that while he (the predecessor) was in possession, his predecessor had told him the nature of the possession, which was pure hearsay.

§ 240 (241). **Same, continued—Illustrations.**—The conduct and declarations of the grantor, before the conveyance, respecting the estate conveyed, which tend to prove a fraudulent intention on his part, are proper upon an inquiry into the validity of such conveyance by a *creditor* or *subsequent purchaser* who alleges it to be fraudulent.⁸² So

say. In this case, they are offered as coming from a *Privy in Estate*, and therefore, *in Law*, from the party himself; for the privy completely represents him, so that the question whether the person be now disinterested to declare the truth and is amenable to the process of the court, does not affect the point now under consideration. It is asked, Why not swear him? The answer is, The party likes his declarations better. He may, from some motive, vary his statement; and the party offering this evidence is alone to judge. It is true, if he be now disinterested, either party may, *if he choose*, call him as a witness.”

⁸⁰ Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267, and the following Canadian cases: Wallace v.

Laidlaw, 2 R. & G. 420; Ring v. Pugsley, 2 P. & B. 303.

⁸¹ Beasley v. Clarke, 102 Ala. 254, 14 South. 744.

⁸² Alexander v. Caldwell, 55 Ala. 517; Visser v. Webster, 8 Cal. 109; Tibbals v. Jacobs, 31 Conn. 428; Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88; Ewing v. Gray, 12 Ind. 64; Hoose v. Robbins, 18 La. Ann. 648; Guidry v. Grivot, 2 Mart., N. S. (La.), 13, 14 Am. Dec. 193; Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Wadsworth v. Williams, 100 Mass. 126; Chadwick v. Fonner, 69 N. Y. 404; Jackson v. Myers, 11 Wend. (N. Y.) 533; Reichart v. Castator, 5 Binn. (Pa.) 109, 6 Am. Dec. 402. See extended note on this subject to Horton

admissions made by one, who at the time held the legal title, to the effect that he had contracted by parol to sell the same to another and had received the pay therefor, are competent evidence against all persons *claiming title under* or through him.⁸³ The principle on which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true. The regard which one so situated would have to his interest is considered sufficient security against falsehood.⁸⁴ But in such a case there must be proof of *notice* to the grantee of such fraudulent intent.⁸⁵ And such notice in the case of a subvendee cannot be proved by declarations of the grantor made after he had parted with his interest and not in the presence of the subvendee.⁸⁶ The declarations of the grantor are admissible against the vendee to show that his possession was *not adverse*;⁸⁷ to show the *source of title*, and that the grantor had only a life estate;⁸⁸ that another person of the same name had the *legal title*;⁸⁹ or the *equitable title*;⁹⁰ that he held as *trustee* merely, even though he be alive at the time of trial;⁹¹ that there was a *mistake* in the deed;⁹² a statement in disparagement of a *homestead* interest;⁹³ statements as to boundaries;⁹⁴ or as to the limits of a *highway*;⁹⁵ that in purchasing at a

v. Smith, 42 Am. Dec. 631; Robinson v. Pitzer, 3 W. Va. 335; Venable v. United States Bank, 2 Pet. (U. S.) 107, 7 L. Ed. 364.

⁸³ Chadwick v. Fonner, 69 N. Y. 404.

⁸⁴ Chadwick v. Fonner, 69 N. Y. 404.

⁸⁵ Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Den ex dem. Pickett v. Pickett, 3 Dev. (N. C.) 6.

⁸⁶ Taylor v. Webb, 54 Miss. 36.

⁸⁷ Betts v. Davenport, 3 Conn. 286.

⁸⁸ Dooley v. Baynes, 86 Va. 644, 10 S. E. 974.

⁸⁹ McDuffie v. Clark, 39 Hun (N. Y.), 166.

⁹⁰ Walker v. Elledge, 65 Ala. 51.

⁹¹ Giblehouse v. Stong, 3 Rawle (Pa.), 437.

⁹² Allen v. McGaughey, 31 Ark. 252.

⁹³ Anderson v. Kent, 14 Kan. 207.

⁹⁴ Flagg v. Mason, 141 Mass. 64, 6 N. E. 702; Fry v. Stowers, 92 Va. 13, 22 S. E. 500; Deming v. Carlington, 12 Conn. 1, 30 Am. Dec. 591; Rix v. Smith, 145 Mich. 203, 108 N. W. 691.

⁹⁵ State v. Vale Mills, 63 N. H. 4.

tax sale he purchased as the agent of another.⁹⁶ Declarations made by a deceased owner, while in possession, as to the corners and *lines* are admissible.⁹⁷ Inasmuch as the basis of the admissibility of the statement is the privity, it cannot be used against one who claims, not under, but against the interest derived from the grantor. Such a claim cannot be affected by the mere declarations of the holder of an adverse title which, in that case, are akin to self-serving statements.⁹⁸ And where a grantor had made admissions before signing a deed to one part of his land, they were inadmissible against a *bona fide* purchaser without notice of the other part of such land.⁹⁹ Although where both parts were sold to the same purchaser they are admissible in respect to the later purchase.¹⁰⁰

§ 241 (242). **Limitations upon the rule—Statements before acquisition—Before and after alienation.**—A little examination will show that the admissions are practically confined to that period between the acquisition of the property by the grantor and up to his alienation of it with the exceptions hereinafter noted as to fraud or the grantor remaining in possession after the execution of the conveyance. It may be stated generally that when one person takes an estate as successor to another, claiming under him, he takes such estate *cum onere*. The rule has often been stated that in such cases the declarations of the grantor against his title, while in possession of the premises, are always admissible, not only against him, but against those who claim under him.¹ It has often been held “that the con-

⁹⁶ *Baucum v. George*, 65 Ala. 259.

⁹⁷ *Gratz v. Beates*, 45 Pa. 495; *Weidman v. Kohr*, 4 Serg. & R. (Pa.) 174; *Davis v. Jones*, 3 Head (40 Tenn.), 603; *Hurt v. Evans*, 49 Tex. 311. See, also, extended note to *People v. Vernon*, 95 Am. Dec. 70.

⁹⁸ *Duff v. Leary*, 146 Mass. 533, 16 N. E. 417; *Geoghegan v. Marshall* (Miss.), 4 South. 63.

⁹⁹ *Kensington Ry. Co. v. Moore*, 115 Md. 36, Ann. Cas. 1912C, 1306, 80 Atl. 614.

¹⁰⁰ *Campbell v. Holland*, 22 Neb. 587, 35 N. W. 871.

¹ *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405; *Beers v. Hawley*, 2 Conn. 467; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Gage*

duct and declarations of the grantor, respecting the estate conveyed, and tending to prove a *fraudulent intention* on his part before the conveyance, are proper evidence for the jury upon an inquiry into the validity of such conveyance, by a creditor or subsequent purchaser, who alleges it to be fraudulent."² Fraud opens the door to inquiry in all cases, and evidence of intention is admissible independently of the fact of privity in regard to the grantor.³ It has been held, in suits instituted to set aside fraudulent conveyances, that evidence of the declarations of the vendor, made before the sale, and in the absence of the vendee, are admissible to show the fraudulent intent of

v. Eddy, 179 Ill. 492, 53 N. E. 1008; Fall v. Fall, 100 Me. 98, 60 Atl. 719; Simpson v. Dix, 131 Mass. 179; Boynton v. Miller, 144 Mo. 681, 46 S. W. 754; Downs v. Lyman, 3 N. H. 486; Jackson v. Myers, 11 Wend. (N. Y.) 533; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Padgett v. Lawrence, 10 Paige Ch. (N. Y.), 170, 40 Am. Dec. 232; Rattiff v. Rattiff, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; Reed v. Dickey, 1 Watts (Pa.), 152; Hays v. Hays, 66 Tex. 606, 1 S. W. 895; Kreekeberg v. Leslie, 111 Wis. 462, 87 N. W. 450; Davies v. Pierce, 2 Term Rep. 53, 100 Eng. Reprint, 30. See, also, cases previously cited in section 239.

² Larkin v. Baty, 111 Ala. 303, 18 South. 666; Bell v. Kendall, 93 Ala. 489, 8 South. 492; James v. Taylor, 93 Ga. 275, 20 S. E. 309; Tarr v. Smith, 68 Me. 97; Pickering v. Reynolds, 119 Mass. 111; Winchester v. Charter, 97 Mass. 140; Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Kirkendall v. Hartsock, 58 Mo. App. 234; Putnam v. Osgood, 52 N. H. 148; Walcott v. Keith, 22 N. H. 196; Vandyke v. Bastedo, 15 N. J. L. 224; Wise v. Grant, 59 Hun, 466, 13 N. Y. Supp. 376; McCanless v. Reynolds, 67 N. C. 268; Beers v.

Aylsworth, 41 Or. 251, 69 Pac. 1025; Robson v. Hamilton, 41 Or. 239, 69 Pac. 651; Wall v. Staley, 91 Pa. 27; Shell v. Haywood, 16 Pa. 523; Mulholland v. Ellitson, 1 Cold. (Tenn.) 307, 78 Am. Dec. 495; Hayward Rubber Co. v. Duncklee, 30 Vt. 29.

³ Murphy v. Butler, 75 Ala. 381; Visser v. Webster, 8 Cal. 109; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381; Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572; Hoose v. Robbins, 18 La. Ann. 648; Fisher v. True, 38 Me. 534; McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305; Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Baldwin v. Buckland, 11 Mich. 389; Gage v. Trawick, 94 Mo. App. 307, 68 S. W. 85; Holmes v. Braidwood, 82 Mo. 610; Armagost v. Rising, 54 Neb. 763, 75 N. W. 534; Kennedy v. Wood, 52 Hun (N. Y.), 46; 4 N. Y. Supp. 758; Burbank v. Wiley, 79 N. C. 501; Satterwhite v. Hicks, 44 N. C. 105, 57 Am. Dec. 577; Head v. Halford, 5 Rich. Eq. (S. C.) 128; Carnahan v. Wood, 2 Swan (Tenn.), 500; Schmitt v. Jacques, 26 Tex. Civ. App. 125, 62 S. W. 956; Bowie v. Hunter, Fed. Cas. No. 1731, 4 Cranch C. C. 699.

the vendor, but they are not binding upon the vendee, unless it is proved that he had knowledge thereof.⁴ It is not necessary, when the declarant is living, to call him as a witness; his statements may be shown by third person.⁵ But the declarations of the grantor are not to be treated as admissions, and are *not competent, if made before his interest in the property in question was acquired*.⁶ As we have already shown,⁷ the successor in title may generally be charged with the qualifying admissions of his predecessor, and this rule applies with full force to grantor and grantee where the statements are made before alienation of the property. The admissions of a grantor against his interest, made while he held all the title that his grantee has acquired or relies upon, are always admissible against the latter, unless he is protected by his character of an innocent *bona fide* purchaser.⁸ And the rule has been

⁴ *Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025; *Trezevant v. Courtney*, 23 La. Ann. 628; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Carver v. Barker*, 73 Hun. 416, 26 N. Y. Supp. 919; *O'Hare v. Duckworth*, 4 Wash. 470, 30 Pac. 724.

⁵ *Jackson v. Myers*, 11 Wend. (N. Y.) 533. See, also, previous sections.

⁶ *Stockwell v. Blamey*, 129 Mass. 312; citing *Noyes v. Morrill*, 108 Mass. 396 (the declarations of a former owner to qualify or disparage his title are only admissible when made while the title is in him. They cannot be allowed to affect a title which is subsequently acquired); *Renneker v. Warren*, 17 S. C. 139. See, also, extended note to *Horton v. Smith*, 42 Am. Dec. 631. See § 352 et seq., *post*.

⁷ See § 239, *ante*.

⁸ *Beasley v. Clarke*, 102 Ala. 254, 14 South. 744; *Allen v. McGaughey*, 31 Ark. 252; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. 1034; *Smith v. Glenn* (Cal.), 62 Pac. 180; *Smith*

v. Martin, 17 Conn. 399; *Roberts v. Neal*, 62 Ga. 163; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442; *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493; *Finch v. Garrett*, 102 Iowa, 381, 71 N. W. 429; *Kitchell v. Hodgen*, 78 Kan. 551, 97 Pac. 369; *Baker v. Dovyns*, 4 Dana (Ky.), 220; *Savenet v. Le Briton*, 8 Mart., N. S. (La.), 501; *Keener v. Kauffman*, 16 Md. 296; *Abbott v. Walker*, 204 Mass. 71, 26 L. R. A., N. S., 814, 90 N. E. 405; *Simpson v. Dix*, 131 Mass. 179; *Taylor v. Hess*, 57 Minn. 96, 58 N. W. 824; *Minor v. Burton*, 228 Mo. 558, 128 S. W. 964; *Dickerson v. Chrisman*, 28 Mo. 134; *Washoe Copper Co. v. Junila*, 43 Mont. 178, 115 Pac. 917; *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. 291; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836; *Morrill v. Foster*, 33 N. H. 379; *Horner v. Stillwell*, 35 N. J. L. 307; *Hutchins v. Hutchins*, 98 N. Y. 56; *Ratliff v. Ratliff*, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; *Magee v. Blankenship*, 95 N. C. 563; *Edgar*

carried a little farther in California. In that state the code provision runs, "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former";⁹ and the declaration of a former owner that, when he held title to two certain mining properties, there was unoccupied and unlocated ground between such two claims, was admitted on the ground, that though it did not apply directly to his own property, it did apply to the limitations of his own claims and the matter of their contiguity, and in that respect was a declaration with reference to his properties.¹⁰ The declarations of a deceased grantor as to his reason for executing a deed in a proceeding to set it aside, would be admissible against him if he were alive and contesting it, and are equally admissible against his representatives.¹¹ But the declarations are not competent if made *after the grantor has conveyed away his interest* in the property in question, since the acts and declarations of the grantor after he has divested himself of his estate cannot be admitted to impeach the title of the grantee,¹² *unless* there is

v. Richardson, 33 Ohio St. 581, 31 Am. Rep. 571; Besser v. Joyce, 9 Or. 310; McIlDowny v. Williams, 28 Pa. 492; Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40; Church of Jesus Christ etc. v. Watson, 25 Utah, 45, 69 Pac. 531; Oakman v. Walker, 69 Vt. 344, 38 Atl. 63; Dooley v. Baynes, 86 Va. 644, 10 S. E. 974; Stewart v. Doak Bros., 58 W. Va. 172, 52 S. E. 95; Northrup v. Lumber Co., 186 Fed. 770, 108 C. C. A. 640; Henderson v. Wanamaker, 79 Fed. 736, 25 C. C. A. 181; Payson v. Good, 5 New Brunsw. 272.

⁹ Cal. Code Civ. Proc., § 184.

¹⁰ Morgan v. Myers, 159 Cal. 187, 113 Pac. 153. See, also, Edmunds v. Barrow, 112 Va. 330, 71 S. E. 544, as to admissibility of predecessor's statement as to boundary line.

¹¹ Broadus v. James, 13 Cal. App. 464, 110 Pac. 158.

¹² Pritchard v. Fowler, 171 Ala. 662, 55 South. 147; Adair v. Craig, 135 Ala. 332, 33 South. 902; Price v. Branch Bank, 17 Ala. 374; Miller v. Miller, 7 Ariz. 316, 64 Pac. 415; King v. Slater, 96 Ark. 589, 133 S. W. 173; Crow v. Watkins, 48 Ark. 169, 2 S. W. 659; Fagan v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Ord v. Ord, 99 Cal. 523, 34 Pac. 83; Redfield v. Buck, 35 Conn. 328, 95 Am. Dec. 241; Hatch v. Straight, 3 Coun. 31, 8 Am. Dec. 152; Barrett v. French, 1 Conn. 354, 6 Am. Dec. 241; Georgia R. etc. Co. v. Fitzgerald, 108 Ga. 507, 49 L. R. A. 175, 34 S. E. 316; Howell v. Howell, 47 Ga. 492; Josslyn

proof of *collusion* or of some fraudulent scheme between the grantor and grantee.¹³ If, however, such admissions

v. Daly, 15 Idaho, 137, 96 Pac. 568; Lang v. Metzger, 206 Ill. 475, 69 N. E. 493; Miller v. Smith, 137 Ill. App. 467; McSweeney v. McMillen, 96 Ind. 298; Doe ex dem. Maxwell v. Moore, 4 Blackf. (Ind.) 445, 30 Am. Dec. 666; Ikard v. Minter, 4 Ind. Ter. 214, 69 S. W. 852; Bixby v. Carskaddon, 70 Iowa, 726, 29 N. W. 626; O'Neil v. Vanderburg, 25 Iowa, 104; Pentico v. Hays, 75 Kan. 76, 9 L. R. A., N. S., 224, 88 Pac. 738; Sumner v. Cook, 12 Kan. 162; Johnson v. Johnson, 8 Ky. Law Rep. 600, 2 S. W. 487; Bra-shear v. Burton, 3 Bibb (Ky.), 9, 6 Am. Dec. 634; Burg v. Rivera, 105 La. 144, 29 South. 482; Pierce v. Faunce, 37 Me. 63; Dodge v. Stanhope, 55 Md. 113; Chase v. Horton, 143 Mass. 118, 19 N. E. 31; Stockwell v. Blamey, 129 Mass. 312; Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Kurtz v. St. Paul etc. R. Co., 61 Minn. 18, 63 N. W. 1; Derby v. Gallup, 5 Minn. 119; Taylor v. Webb, 54 Miss. 36; Stewart v. Thomas, 35 Mo. 202; Zobel v. Bauersachs, 55 Neb. 20, 75 N. W. 43; Price v. Plainfield, 40 N. J. L. 608; Angermiller v. Ewald, 133 App. Div. 691, 118 N. Y. Supp. 195; Padgett v. Lawrence, 10 Paige Ch. (N. Y.) 170, 40 Am. Dec. 232; Osgood v. Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Hcaden v. Womack, 88 N. C. 468; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Voss v. Murray, 50 Ohio St. 19, 32 N. E. 1112; Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Krewson v. Purdon, 11 Or. 266, 3 Pac. 822; Baldwin v. Stier, 191 Pa. 432, 43 Atl. 326; McLaughlin v. McLaughlin, 91 Pa. 462; Agnew v. Adams, 26 S. W. 101, 1 S. E. 414; Merri-man v. Lacefield, 4 Heisk. (Tenn.)

209; Beall v. Oatham, 100 Tex. 371, 99 S. W. 1116; Wallace v. Berry, 83 Tex. 328, 18 S. W. 595; Snow v. Rich, 22 Utah, 123, 61 Pac. 336; Norton v. Perkins, 67 Vt. 203, 31 Atl. 148; Interstate Coal etc. Co. v. Clintwood Coal etc. Co., 105 Va. 574, 54 S. E. 593; Crawford v. Workman, 64 W. Va. 19, 61 S. E. 322; Fry v. Feamster, 36 W. Va. 454, 15 S. E. 253; Northrop v. Columbian Lumber Co., 186 Fed. 770, 108 C. C. A. 640; Kennedy v. Bates, 142 Fed. 51, 73 C. C. A. 237; West v. Houston Oil Co., 136 Fed. 343, 69 C. C. A. 169; Steinbach v. Stewart, 11 Wall. (U. S.) 566, 20 L. Ed. 56; Sidmouth v. Sidmouth, 2 Beav. 447, 9 L. J. Ch. 282, 48 Eng. Reprint, 1254. See note, Horton v. Smith, 42 Am. Dec. 632.

¹³ Bain v. Bain, 150 Ala. 453, 43 South. 562; Ross v. Wellman, 102 Cal. 1, 36 Pac. 402; Durand v. Weightman, 108 Ill. 489; Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961; Daniels v. McGinnis, 97 Ind. 549; Kennedy v. Divine, 77 Ind. 490; Cedar Rapids Nat. Bank v. Lavery, 110 Iowa, 575, 80 Am. St. Rep. 325, 81 N. W. 775; Stickel v. Bender, 37 Kan. 457, 15 Pac. 580; Judah v. Fleming, 4 Ky. Law. Rep. 888; Stam v. Smith, 183 Mo. 464, 81 S. W. 1217; Mueller v. Weitz, 56 Mo. App. 36; Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Strauss v. Murray, 31 Misc. Rep. 69, 63 N. Y. Supp. 201; Cuyler v. McCartney, 33 Barb. 165, 40 N. Y. 221; Hedrick v. Gregg, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24; Homewood People's Bank v. Marshall, 223 Pa. 289, 72 Atl. 627; Pier v. Duff, 63 Pa. 59; Hartman v. Diller, 62 Pa. 37; Maffi v. Stephens (Tex.

are made by the grantor in the *presence of the grantee*, they are competent.¹⁴ If the grantee permits the *grantor to remain in possession* after the conveyance, the declarations of the latter as to the nature of his possession and as to the good faith of the transaction are admissible.¹⁵ The most common instances in which declarations in disparagement of title have been held admissible in evidence are those in which the declarants are in possession, being explanatory of the nature of their possession. Possession being *prima facie* evidence of seisin in fee simple, a declaration qualifying it is admissible.¹⁶ Another and perhaps the most important limitation upon the admission of testimony of this character is that it should not be received to *contradict the terms of written instruments*, as, for example, to vary the tenor of a deed or destroy the record title.¹⁷ Declarations are received for the purpose of quali-

Civ. App.), 93 S. W. 158; Shelley v. Nolan, 38 Tex. Civ. App. 343, 88 S. W. 524; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709. See note to Horton v. Smith, 42 Am. Dec. 633.

¹⁴ See cases cited in note 34, *supra*.

¹⁵ Pier v. Duff, 63 Pa. 59; Osgood v. Eaton, 63 N. H. 355; Creighton v. Hoppis, 99 Ind. 369. See, also, Vrooman v. King, 36 N. Y. 477. See, also, § 352, *post*. See note to Piedmont Savings Bank v. Levy, 3 Ann. Cas. 787.

¹⁶ 1 Greenl. Ev., § 109; Peacable v. Watson, 4 Taunt. 16; Marcy v. Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; Osgood v. Coates, 1 Allen (Mass.), 77; Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Pickering v. Reynolds, 119 Mass. 111; Ware v. Brookhouse, 7 Gray (Mass.), 454. In the last case cited it was sought to introduce declarations of a deceased prior owner that he had title to the right of way in dispute. They were held inadmissible as self-serving declara-

tions. The court say: "But there are, we think, the soundest reasons why such declarations should not be admitted. The first is that titles to real estate are matters of record, and wisely so, and that sound policy obviously requires that we should carefully guard against their being affected and impaired by mere acts *in pais*, and *a fortiori* by mere declarations of parties; secondly, that as to declarations made in disparagement of title and against the interest of the party, we have the evidence of their being made in good faith." In Sullivan Granite Co. v. Gordon, 57 Me. 522, Appleton, C. J., says: "In all the cases in this state and in Massachusetts, in which declarations have been received, they related to the land in controversy, were made by the declarant while in possession, and were offered in evidence against him or those deriving title under him."

¹⁷ Dodge v. Freedman's Sav. etc. Co., 93 U. S. 379, 23 L. Ed. 920; Doe

fying or showing the nature of the possession when they are in disparagement of the declarant's title.¹⁸ But the cases in which a party and his privies may be affected by his admissions are limited to those where the subject matter of admission is subject to parol proof. The rule does not apply to matters which can only be proved by written evidence.¹⁹ It is indispensable to the admissibility of declarations against the tenant that he should be the successor in title to the demanded premises, and that the declarations be in reference to facts provable by parol, and that they tend to establish such facts.²⁰

v. Webster, 12 Ad. & E. 442; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Stone v. O'Brien, 7 Colo. 458, 4 Pac. 792; Mooring v. McBride, 62 Tex. 309. See § 207 et seq., *ante*, and § 354, *post*.

¹⁸ Roberts v. Roberts, 82 N. C. 29; Melvin v. Bullard, 82 N. C. 33. See § 352 et seq., *post*. It was held in McGregor v. Wait, 10 Gray (Mass.), 72, 69 Am. Dec. 305, that the remainderman is not estopped by the silence of the tenant for life, when remarks are made in his presence in disparagement of his title; and in Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68, that admissions of the life tenant are not evidence against the remainderman, since they are not privies in estate. See note on "Admissibility of Declarations in Disparagement of Title" to Phillips v. Laughlin, 2 Ann. Cas. 5.

¹⁹ Fall v. Fall, 100 Me. 98, 60 Atl. 718; 3 Phillips on Evidence, C. & H. Notes, 266; Keener v. Kauffman, 16 Md. 296; Dorsey v. Dorsey's Heirs, 3 Har. & J. (Md.) 410, 6 Am. Dec. 506. In Jackson v. Cary, 16 Johns. (N. Y.) 302, 410, Spencer, C. J., says: "Parol proof has never been admitted to destroy or take away a title": Wharton on Evidence, § 1156; Phillips v.

Laughlin 99 Me. 26, 105 Am. St. Rep. 253, 2 Ann. Cas. 1, 58 Atl. 64.

²⁰ Fall v. Fall, *supra*. In Phillips v. Laughlin, 99 Me. 26, 105 Am. St. Rep. 253, 2 Ann. Cas. 1, 58 Atl. 64, Wiswell, C. J., after a review and an analysis of a wide range of authorities cited, makes a carefully limited generalization, namely, "that such declarations against interest (namely, of a person while in possession of land) in regard to the nature, character, or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in the deed, or in regard to any matter concerning the physical condition or use of the property, which must be, from the nature of things, proved by parol, are admissible." But in the same case it was also held that "it is not competent to prove declarations made out of court by the predecessor in title of a party to an action in court, to the effect that a deed which appears to be sufficient in all respects, which is duly recorded, and which a purchaser has been led to rely upon as one of the necessary links in its chain of title, from the very fact of its being recorded, is not what it and the record of it purport to be."

§ 242 (243). Admissions of ancestor against heir—Devisor against devisee—Testator against executor—Intestate against administrator—Assured against beneficiary—Beneficiary against beneficiary.—The principle under discussion has often been applied in the admissions of the declarations of ancestors as against their heirs.²¹ When we speak of declarations they must, of course, be relevant declarations.²² Such declarations have been admitted to prove the contents of a *lost deed*;²³ to establish a *boundary*;²⁴ a *gift*;²⁵ to show that the ancestor had made a *parol contract to sell*, if such evidence would have been admissible against him while living.²⁶ Stating the rule more broadly, it has been held that whenever the admissions of an ancestor would be admissible against him, if living, they are admissible against an heir claiming under

²¹ Pittman v. Pittman, 124 Ala. 306, 27 South. 242; Russell v. Webb, 96 Ark. 190, 131 S. W. 456; McFadden v. Ellmaker, 52 Cal. 348; Studstill v. Willeox, 94 Ga. 690, 20 S. E. 120; Lewis v. Adams, 61 Ga. 559; Rust v. Mansfield, 25 Ill. 336; Vannice v. Dungan, 41 Ind. App. 27, 83 N. E. 250; Wallis v. Lohring, 134 Ind. 447, 34 N. E. 231; Davis v. Melson, 66 Iowa, 715, 24 N. W. 526; Boatner v. Scott, 1 Rob. (La.) 546; Wentworth v. Wentworth, 71 Me. 72; Cross v. Her, 103 Md. 592, 64 Atl. 33; Plimpton v. Chamberlain, 4 Gray (Mass.), 320; Chipman v. Thompson, Walk. Ch. (Mich.) 405; Benson v. Raymond, 142 Mich. 357, 368, 105 N. W. 870, 108 N. W. 660; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018; Graham v. Busby, 34 Miss. 272; Long v. McDow, 87 Mo. 197; Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; Midmer v. Midmer's Exrs., 26 N. J. Eq. 299; New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. Supp. 899; Foote v. Beecher, 78 N. Y. 155; Baird v. Slaight, 55 Hun, 603, 8 N. Y. Supp. 603; Spaulding v.

Hallenbeck, 35 N. Y. 204; Gibney v. Marchay, 34 N. Y. 301; Tipton v. Ross, 10 Ohio, 273; Hunt's Appeal, 100 Pa. 590; Ruedas v. O'Shea (Tex. Civ. App.), 127 S. W. 891; Woody v. Schaaf, 106 Va. 799, 56 S. E. 807; Doe v. Pettett, 5 Barn. & Ald. 223, 106 Eng. Reprint, 1174. See note on "Declarations of Intestate as to Advancements" to Elliott v. Western Coal etc. Co., 17 Ann. Cas. 886.

²² Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; Russell v. Amlot, 132 App. Div. 584, 116 N. Y. Supp. 1080; Ex parte Yown, 17 S. C. 532.

²³ Allen's Lessee v. Parish, 3 Ohio, 107.

²⁴ Jackson v. McCall, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; Marion v. Hoyt, 72 Ga. 117; Flagg v. Mason, 141 Mass. 64, 6 N. E. 702. See notes to Curtis v. Aaronson, 60 Am. Rep. 589, and to Coate v. Speer, 15 Am. Dec. 628.

²⁵ Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. 506.

²⁶ Chadwick v. Fonner, 69 N. Y. 404.

him by descent, and are receivable in evidence against him in the same manner as they would have been receivable against the ancestor.²⁷ Confusion is sometimes created by not sufficiently discriminating between declarations against interest, and those made by one in privity of estate. In the first case, the evidence is admissible, without privity of estate, and hence declarations must be not only against interest, but the declarant must be dead, while in the case of declarations by one in privity of estate, the declarations are admissible, whether the declarant be alive or dead.²⁸ The court receives declarations of a deceased person against his interest, because of the likelihood of their being true, of their general freedom from any reasonable probability of fraud, and because they cannot be set up or proven until the death of the party making them.²⁹ Whenever the admissions of one having or claiming title to real estate would thus be competent against him, they are competent against persons subsequently deriving title through or from him. The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession unless they were true. The regard which one so situated would have to his own interest is considered sufficient security against falsehood.³⁰ In an important case referred to in the notes hereto³¹ these admissions by ancestor against heir are thoroughly discussed, and confirm the propositions here stated. With respect to such admissions generally, it has been well said that courts of justice lend a very unwilling ear to statements of what dead men have said, and that evidence of admissions and declarations is not as a rule the most satisfactory; verbal statements are liable to be misstated or distorted, and in cases of the statements of deceased per-

²⁷ 1 Greenl. Ev., § 189; Davis v. Melson, 66 Iowa, 715, 24 N. W. 526.

²⁸ Papendick v. Bridgwater, 5 El. & Bl. 166.

²⁹ Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189.

³⁰ Chadwick v. Fonner, *supra*.

³¹ New York Water Co. v. Crów, 110 App. Div. 32, 96 N. Y. 899.

sons they are liable to abuse.³² In the same manner the admissions of a *devisor* are competent against the devisee,³³ those of an *intestate* against his administrator and those of a *testator* against his executor.³⁴ Thus, in an action by an administrator against the widow of his intestate for the conversion of property, declarations of the intestate that the property was not his are admissible for the defendant.³⁵ So the admission of a testator that his tenant was to pay no rent are admissible against his executor.³⁶ The declaration of a testator with regard to the consideration in a conveyance to him from his mother, which was challenged as a trust deed, was held admissible in Connecticut, where the code contains the provision that declarations by a decedent relative to the matter in issue are admissible in actions against his representatives.³⁷ A trustee in insolvency is privy with the bankrupt, and admissions by the bankrupt (since deceased) concerning his estate while he was yet the owner are competent evidence in the federal courts.³⁸ The declarations of a *deceased person*, not a part of the *res gestae*, are not competent to

³² *Dangerfield v. Hope*, 157 Ill. App. 63; *Tousey v. Hastings*, 194 N. Y. 79, 86 N. E. 831; *Miller v. Hill*, 64 Misc. Rep. 199, 118 N. Y. Supp. 63. "Evidence of alleged admissions by a deceased person should be received with great caution, as such evidence is the most dangerous that can be admitted and the most liable to abuse": *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071.

³³ *Hale v. Monroe*, 28 Md. 98; *Miller v. Hill*, *supra*; *Broadrup v. Wodman*, 27 Ohio St. 553.

³⁴ *Broadus v. James*, 13 Cal. App. 464, 110 Pac. 158; *Stoddard v. Newhall*, 1 Cal. App. 111, 81 Pac. 666; *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985; *Mueller v. Rebhan*, 94 Ill. 142; *Slade v. Leonard*, 75 Ind. 171; *Childs v. Jordan*, 106 Mass. 321; *Page v. Hazleton*, 74 N. H. 252, 66 Atl.

1049; *Woody v. Schaaf*, 106 Va. 799, 56 S. E. 807; *Smith v. Au Gres*, 150 Fed. 257, 9 L. R. A., N. S., 876, 80 C. C. A. 145. For a fuller discussion of declarations by testators, see §§ 479-482, et seq., *post*.

³⁵ *Fellows v. Smith*, 130 Mass. 378.

³⁶ *Cox v. Baird*, 11 N. J. L. 105, 19 Am. Dec. 386.

³⁷ *Mooney v. Mooney*, 80 Conn. 446, 68 Atl. 985.

³⁸ *Smith v. Au Gres Township*, 150 Fed. 257, 9 L. R. A., N. S., 876, 80 C. C. A. 145. The statutes in Michigan exclude the testimony of one who has acted as an agent for one party to a transaction, where the other party has since deceased, relative to any matter equally within the knowledge of such other party, and it was sought in this case to exclude the testimony on that ground.

show whether the property in question was given as a gift or as an advancement, as the deceased, while alive, would in no way be affected by the determination of the question.³⁹ A somewhat analogous question has arisen in cases where the declarations of a deceased person were offered by defendants in actions for *wrongful death*, and in some instances such declarations have been received.⁴⁰ Each case must, however, be examined, so that the student may not, under the generalization, confound *res gestae* with independent declarations.⁴¹ It is a little difficult to regard the representative of a decedent as a privy except the chose in action is accepted as property, and the courts incline to this view, seeing that the form of the action was unknown to the common law. It is generally recognized the representative takes the place which the decedent would have filled in a direct action for personal injury, and there need be no doubt, in such case, his statement could be used against him. In the Georgia case noted the court, speak-

³⁹ *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N. E. 946.

⁴⁰ *Hughes v. President etc. of Delaware etc. Canal Co.*, 176 Pa. 254, 35 Atl. 190; *Georgia R. R. etc. Co. v. Fitzgerald*, 108 Ga. 507, 49 L. R. A. 175, 34 S. E. 316. See *Tiffany, Death by Wrongful Act*, § 194. *Thompson*, section 7738, gives this further reference. Thus, an admission in the case of one subsequently deceased that an accident was caused by his own fault or negligence is admissible against his administrator in an action for damages caused by his death, under the Ohio practice: *Helman v. Pittsburg etc. R. Co.*, 58 Ohio St. 400, 41 L. R. A. 860, 11 Am. & Eng. R. Cas., N. S., 641, 50 N. E. 986; *Bond Hill v. Atkinson*, 16 Ohio C. C. 470. See note on "Declarations or Written Statements Made by Insured Previous to Death as Evidence of Suicide" to *Clemens v. Royal Neighbors*, 8 Ann. Cas. 1114.

⁴¹ In the one case the evidence might be used as part of the *res gestae*, but when it is offered against the representative of the party decedent, it rests upon the foundation of privy referred to, entirely distinct from other consideration. In *Sullivan v. Henry Guth & Co.*, 148 Ill. App. 538, for causing the death of plaintiff's decedent in which the verdict was for defendant, it was argued that statements of the deceased made in the hospital, where he was taken after he was hurt, should have been received in evidence as part of the *res gestae* and that the court erred in excluding them. The court of appeal properly held there was no error in excluding them. But those statements would, on the authority of the Georgia case cited in note 40, *supra*, have been admissible if offered against the plaintiff.

ing of the widow suing, said that even were she not a privy in law with him, this evidence was admissible under the rule that "self-disserving" declarations made by a deceased person having peculiar opportunities to know the truth as to the matter under investigation may be proved even in cases between third parties, none of whom claim under or through him.⁴² Thompson says:⁴³ "These admissions against interest, *though admissible, are not conclusive.*"⁴⁴ Thus, it has been held that the declaration of a *person mortally injured* that he *did not blame any one but himself*, should *not be regarded as conclusive* as to whether or not he exercised *ordinary care*, as the statement may have been intended as *self-censure* for not exercising a higher degree of care than the law requires."⁴⁵ It has been held that there is no such privity of interest between an *insured person* and his beneficiary as to admit the declarations of the former in actions on life insurance policies.⁴⁶ This general statement, however, must not be accepted without question and inquiry into each case on its own facts as to the extent of the influence of *res gestae* and the defense of fraud. Cases are frequently cited with the bald assertion that the statements of the assured are evidence against the beneficiary, and search will reveal that in such cases the testimony was received on one or the other

⁴² Georgia R. R. etc. Co. v. Fitzgerald, *supra*. See Field v. Boynton, 33 Ga. 239; 1 Whart. Ev., § 226 et seq.; 5 Am. & Eng. Ency. of Law, 1st ed., 366, and cases cited.

⁴³ 6 Thomp. Neg., § 7738.

⁴⁴ Camden & R. Co. v. Williams, 61 N. J. L. 646, 40 Atl. 634; S. C., 11 Am. & Eng. R. Cas., N. S., 600.

⁴⁵ Gulf & R. Co. v. Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246.

⁴⁶ Sutcliffe v. Iowa State Traveling Men's Assn., 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Henn v. Metropolitan

L. Ins. Co., 67 N. J. L. 310, 51 Atl. 689; Swift v. Massachusetts Mut. L. Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522; Union Cent. Life Ins. Co. v. Cheever, 36 Ohio St. 201, 38 Am. Rep. 573; Herman v. Fidelity Mut. L. Assn., 151 Pa. 17, 24 Atl. 1064; Thompson v. Security Trust etc. Co., 63 S. C. 290, 41 S. E. 464; Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; Thies v. Kentucky Mut. Ins. Co., 13 Tex. Civ. App. 280, 35 S. W. 676; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Rawson v. Milwaukee etc. Ins. Co., 115 Wis. 641, 92 N. W. 378.

of those grounds.⁴⁷ In a well-known New York case,⁴⁸ a creditor of the assured sued the insurance company which defended on the ground of fraud in the procurement of the policy. Testimony was offered of applications by the assured to thirty-six different insurance companies, by which he secured \$282,000 of insurance upon his life, and of his letters and telegrams to relations and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide. This testimony was all held admissible, as also were statements that he intended suicide after insuring his life "to make his children happy." Conceding that there was no privity between the assured and the creditor who had a vested interest in the policy, the court very properly held all the evidence to be fairly within the *res gestae* and the rule permitting proof of the actual transaction involved in the issue.⁴⁹ Again, in considering such cases the nature of the

⁴⁷ *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Manhattan L. Ins. Co. v. Myers*, 109 Ky. 372, 59 S. W. 30; *Steinhausen v. Preferred Mut. Acc. Assn.*, 59 Hun, 336, 13 N. Y. Supp. 36; *Fidelity etc. Assn. v. Winn*, 96 Tenn. 224, 33 S. W. 1045. In dealing with a case of conspiracy on the part of the assured to which the beneficiary was not a party, the supreme court of the United States said in *Connecticut etc. Ins. Co. v. Hillmon*, 188 U. S. 208, 47 L. Ed. 446, 23 Sup. Ct. Rep. 294: "Under the circumstances, we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though she was not alleged to be a party to the conspiracy, upon the theory that any fraudulent conduct on the part of the insured in procur-

ing the policy, or in procuring the dead body of another to impersonate himself, was binding upon her. It is well settled that the fraud of the insurer's agent in the procurement of the policy is binding upon the principal: *Millville Mut. M. & Fire Ins. Co. v. Collerd*, 38 N. J. L. 480; *National Life Ins. Co. of U. S. v. Minch*, 53 N. Y. 144; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. C. C. 277, Fed. Cas. No. 10,498; *Burruss v. National Life Assn.*, 96 Va. 543, 32 S. E. 49."

⁴⁸ *Smith v. National Ben. Soc.*, 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197.

⁴⁹ In another case—*Hews v. Equitable Life Assur. Soc.*, 143 Fed. 850, 74 C. C. A. 676—the fraud is thus alluded to in the syllabus, which says: "Where a policy payable to insured's wife was alleged to have been procured by fraudu-

interest of the beneficiary must be taken into consideration. The fact whether his claim is under the usual life policy, or that he is the beneficiary of a certificate in a benevolent association, plays an important part in determining the effect of the assured's declarations. In a Washington case, the insurer offered to show by the declarations of the assured made after the issue of the certificate that his answers to some of the questions propounded in the application were untrue to his knowledge, at the time they were made. This evidence was excluded upon the apparent ground that upon the issue of such certificate, the beneficiary therein acquired a vested interest, which could not be divested by the acts of the member upon whose life the benefit depended. That such is the nature of the interest of the beneficiary in an ordinary life insurance policy is established by the great weight of authority, but, as to beneficiary certificates of the nature of the one in controversy in that case, a like weight of authority has established the doctrine, that the interests of the beneficiary before the death of the member is a mere expectancy, which may be changed at any time by the action of the assured. "Upon reason and authority, the beneficiary certificate should be presumed to be within the control of the member. This being so, nearly all the cases hold that his declarations

lent misstatements with reference to his health and habits, insured's previous admissions concerning his diseased condition and habits of intemperance were not objectionable as hearsay as against such beneficiary, as she could occupy no better position than the insured. Where insured, in his application for a policy issued in November, 1903, stated that he had 'never' had any serious illness, nor been intemperate, evidence of declarations made by him, the earliest of which was in 1896, that he then had diabetes, with which disease he continued to suffer up to the time of the application, and disclosing habits of

intemperance, were not objectionable for remoteness." While in the opinion we find, "The policy sued on was procured by him and upon his representations, and was subject to the consequence of his knowledge of their falsity; and his declarations were evidential against her, because, upon the issue as to whether he had fraudulently procured the policy (upon which depended its legal existence) any evidence was admissible that would have been competent if that issue had arisen in a suit to which he, instead of his appointee, had been a party."

after the certificate is issued may be introduced in evidence against the beneficiary. If he had the control of the certificate, he was the one interested therein, and, under well-settled rules, his declarations would be competent testimony, and, if against his interest, would be available to affect them. This rule is sufficiently established by section 325 of Bicknell on Mutual Benefit Societies, and cases therein cited. It follows that the appellant had the right to put in evidence the declarations of the assured after the issue of the beneficiary certificate, and that the refusal of his offer to do so was error."⁵⁰ The rule is that declarations and admissions of the assured, made prior to the application, and so remote as to be disconnected with any act or fact showing his then condition of health, are incompetent, as substantive proof to contradict the statements made in the application, as against a third party, who is the beneficiary; but where there is independent proof tending to show falsity of the statements in the application, the evidence of the prior declarations of the assured is admissible to show his knowledge of the falsity of his answer.⁵¹ When the assured, the holder of a benefit certificate, made, during the year preceding his obtaining it, statements concerning his health to certain of his fellow-workmen, it was held such statements were admissible.⁵² As between various beneficiaries there can be no privity to warrant statements of one being admissible against another, except there is proof of agency or acquiescence.⁵³

§ 243 (244). Admissions—Landlord and tenant—Remainderman and tenant for life—Owner in fee and tenant for years—Mortgagor and mortgagee.—A similar relation of privity exists between landlord and tenant. Thus, the parol declarations of a party showing a deed of real estate held by him to be void for fraud are admissible in evi-

⁵⁰ Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500, 41 Pac. 882.

⁵² McGowan v. Supreme Court etc. Foresters, 104 Wis. 173, 80 N. W. 603.

⁵¹ Bac. Ben. Soc., § 460.

⁵³ Fey v. I. O. etc. Soc., 120 Wis. 353, 98 N. W. 206.

dence in an action of ejectment against his tenant, where such declarations were made while in possession of the property.⁵⁴ When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant, immediately or remotely; and the *succeeding tenant* is as much affected by the acts and acknowledgments of his predecessor as though they were his own.⁵⁵ When one has erected a house upon the land of another, and has conveyed it to a third person, and when, in a suit by such third person to recover possession, the defendant claims to hold as tenant of the land owner, admissions by the latter, as to title, are admissible against the defendant.⁵⁶ But the declarations of the tenant are not admissible to affect the title of the landlord, unless such declarations are brought to the *notice* of the landlord in such a way as to tend to establish a reputation of the tenancy. With such notice they might go to show a repudiation of his tenancy and a setting up of adverse possession and claim.⁵⁷ Nor is the *remainderman* affected by the declarations of the tenant for life, as there is no privity between them, for a privity in estate is a successor to the same estate, not to a different estate in the same property; and the statements of the *tenant for years* are not admissible against the owner in fee.⁵⁸ The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee, and are evidence only in so far as they affect the estate mortgaged, and are limited in point of time to those declarations made before the signature of the mortgage.⁵⁹ In an action of

⁵⁴ Jackson v. Myers, 11 Wend. (N. Y.) 533; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Cox v. Winston, 3 Met. (Ky.) 577.

⁵⁵ Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Crease v. Barrett, 1 Crompt. M. & R. 919, 5 Tyr. 458, 4 L. J. Ex. 297. See note to Smith v. Newman, 53 L. R. A. 949, 950.

⁵⁶ Collins v. Taylor, 101 Me. 542, 64 Atl. 946.

⁵⁷ Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549; Scholes v. Chadwick, 2 Moody & R. 507; Papendick v. Bridgewater, 5 El. & B. 166, 119 Eng. Reprint, 443; Tickle v. Brown, 4 Ad. & E. 378, 111 Eng. Reprint, 826; Hanley v. Erskine, 19 Ill. 265.

⁵⁸ Hill v. Roderick, 4 Watts & S. (Pa.) 221; Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68.

⁵⁹ Foote v. Beecher, 78 N. Y. 155, 7 Abb. N. C. (N. Y.) 358; Sherman

replevin, where the defendant bases his title and right of possession of the property upon the foreclosure of a chattel mortgage, the admissions, declarations and statements of the mortgagor at a time subsequent to the execution of the mortgage are not admissible for the purpose of impeaching the mortgage or showing that the same was without consideration, or that he did not have the legal right to mortgage the same at the time of the execution of the mortgage.⁶⁰

§ 244 (245). Admissions by former owners of personal property—Under mortgages and pledges.—The same principle is often applied respecting the admissions of former owners of personal property. The relevant admissions or declarations of the assignor, vendor or holder of personal property, made before the sale, assignment or other disposal of his interest, are evidence against his *vendee*, *assignee* or other person claiming under him, immediately or remotely, either by act and operation of law, or by the acts of the parties.⁶¹ And his declarations with regard to his

County Bank v. McDonald, 57 Kan. 358, 46 Pac. 703; Hunt v. Haven, 56 N. H. 87; Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013; White v. Wheaton, 16 Conn. 530; Lang v. Metzger, 206 Ill. 475, 69 N. E. 493; Hayden v. McIlvain, 4 Bibb (7 Ky.), 57; Carson v. White, 6 Gill (Md.), 17; Thompson v. Longan, 42 Mo. App. 146; Newgass v. Auburn Loan Co., 81 App. Div. 411, 80 N. Y. Supp. 778; Jarvis v. Vanderbilt, 116 N. C. 147, 21 S. E. 302; Hoffman v. Lee, 3 Watts (Pa.), 352; Taylor v. Heriot, 4 Desaus. (S. C.) 227.

⁶⁰ First Nat. Bank of Enid v. Yoe-man, 17 Okl. 613, 90 Pac. 412. In the case of Silva v. Serpa, reported in 86 Cal. 241, 24 Pac. 1013, the supreme court of California say: "On suit in foreclosure, it is error to admit evidence of the mortgagor's declara-

tions, made after the execution of the mortgage, that it was given without consideration, and only for the purpose of putting the property beyond the reach of his wife, with whom he was having difficulty."

⁶¹ Elmore v. Fitzpatrick, 56 Ala. 400; Guion Mercantile Co. v. Campbell, 91 Ark. 240, 121 S. W. 164; Smith v. Goethe, 159 Cal. 628, 115 Pac. 223; Doughty v. McMillan, 92 Ga. 818, 19 S. E. 59; First Nat. Bank of Monmouth v. Strang, 138 Ill. 347, 27 N. E. 903; Durham v. Shannon, 116 Ind. 403, 9 Am. St. Rep. 860, 19 N. E. 190; Kitchell v. Hodgen, 78 Kan. 551, 97 Pac. 369; Gentry v. McMinnis, 3 Dana (Ky.), 382; White v. Chadbourne, 41 Me. 149; Walker v. Marseilles, 70 Miss. 283, 12 South. 211; Burgess v. Quimby, 21 Mo. 508; Renshaw v. The Pawnee, 19 Mo. 532;

rights and liabilities are in like manner evidence against anyone coming into his place after such declarations are made, or *representing him* in respect to such rights and liabilities.⁶² The admissions of those giving and taking chattel securities seem to be regulated on the same principle. The admissions of the mortgagor of chattels (who retains the possession), as well as of the pledgor (who parts with it) before the mortgage is signed or pledge consummated, are always competent, as also are the mortgagee's while he remains the mortgagee, while those made subsequently do not avail.⁶³ There is, however, a marked divergence in the authorities upon this subject, which is headed by New York decisions and to which attention is drawn later on.⁶⁴ There have been many cases in which the declarations of the *vendor* of chattels in possession, admitting that he had parted with his title or that there were defects in his title, have been received against a purchaser

Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; *White v. Chouteau*, 10 Barb. (N. Y.) 202; *Parker v. Fenwick*, 147 N. C. 525, 61 S. E. 378; *Johnson v. Patterson*, 9 N. C. 183, 11 Am. Dec. 756; *Ritchy v. Martin*, *Wright* (Ohio), 441; *Caldwell v. Gamble*, 4 Watts (Pa.), 292; *Crawley v. Tucker*, 4 Rich. (S. C.) 560; *Drennon v. Smith*, 3 Head (40 Tenn.), 389; *Smith v. Gillum*, 80 Tex. 120, 15 S. W. 794; *O'Brien v. Hilburn*, 22 Tex. 616; *Alger v. Andrews*, 47 Vt. 238; *Givens v. Manns*, 6 Munf. (Va.) 191; *Crothers v. Crothers*, 40 W. Va. 169, 20 S. E. 927; *Wustland v. Potterfield*, 9 W. Va. 438; *Fay v. Rankin*, 47 Wis. 400, 2 N. W. 562.

⁶² *Horton v. Smith*, 8 Ala. 75. 42 Am. Dec. 628, and note; *Levy v. Holberg*, 67 Miss. 526, 7 South. 431; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, and note. See, also, notes to *Paige v. Cagwin*, 42 Am. Dec. 80, and *Horton v. Smith*, 42 Am. Dec. 631. See § 245, *post*.

⁶³ *Gauss v. Doyle*, 46 Ark. 122; *Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969; *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394; *Fowler Co. v. McDonnell*, 100 Iowa, 536, 69 N. W. 873; *Fuqua v. Bogard*, 22 Ky. Law Rep. 1910, 62 S. W. 480; *Beedy v. Macomber*, 47 Me. 451; *Krementz v. Howard*, 109 Mich. 466, 67 N. W. 526; *Kinna v. Smith*, 3 N. J. Eq. 14; *Scott v. Llano County Bank*, 99 Tex. 221, 89 S. W. 749; *Mower v. McCarthy*, 79 Vt. 142, 118 Am. St. Rep. 942, 7 L. R. A., N. S., 418, 64 Atl. 578; *Davis v. Buchanan*, 73 Vt. 67, 50 Atl. 545; *Donaldson v. Johnson*, 2 Pinn. (Wis.) 482, 2 Chand. 160; *W. B. Grimes Dry-Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524, 17 Sup. Ct. Rep. 158. In New York the cases follow *Paige v. Cagwin*, 7 Hill (N. Y.), 361, 42 Am. Dec. 68, (see § 246, *post*), and do not admit such declarations.

⁶⁴ See § 246, *post*.

from him. Such declarations have been received on the ground that such a privity existed between the seller and the buyer that the latter stands in the situation of the former and is chargeable with the same admissions which might have been offered against him.⁶⁵ And with regard to these, logically the conflict referred to applies as well. From the United States supreme court case referred to in the note⁶⁶ we take the headnote relating to the subject. It says: "Evidence of the declarations of the trustee in several assignments executed by a bank president, that the earlier assignment was made to secure the bank generally for his assignor's liability to it, is admissible as against those claiming under the subsequent assignments, which were made for the purpose of enabling the trustee 'to pay himself for any paper' on which he was liable with such assignor." Mr. Justice Holmes made this pregnant utterance which will have a powerful influence on the consideration of the conflict: "In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay, where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines." The trustee, in the case referred to, one Martindale, was appointed by the president of a bank, one Cross, who had misused its funds. Cross thereafter shot himself and the receiver of the bank claimed the proceeds of the property of which Martindale was the trustee. Martindale's statements that the funds of which he was trustee were to secure Cross' liability to the bank he had defrauded were offered in evidence and objected to. Martindale him-

⁶⁵ Horton v. Smith, 8 Ala. 73, 42 Am. Dec. 628; Vennum v. Thompson, 38 Ill. 143; Bunberry v. Brett, 18 Ind. 343; McLanathan v. Patten, 39 Me. 142; Bond v. Fitzpatrick, 4 Gray (Mass.), 89; Fellows v. Smith, 130 Mass. 378; Walker v. Marseilles, 70 Miss. 283, 12 South. 211; Coale v. Harrington, 7 Har. & J. (Md.) 147; Guy v. Hall, 3 Murph. (7 N. C.) 150; Johnson v. Patterson, 2 Hawks (9 N.

C.), 183, 11 Am. Dec. 756; Land v. Bee, 2 Rich. (S. C.) 168; Fourth Nat. Bank v. Albaugh, 188 U. S. 734, 47 L. Ed. 673, 23 Sup. Ct. Rep. 450; Bowie v. Hunter, Fed. Cas. No. 1731, 4 Cranch C. C. 699. On this general subject see extended note to Paige v. Cagwin, 42 Am. Dec. 80, and cases cited in note *supra*.

⁶⁶ Fourth Nat. Bank v. Albaugh, *supra*.

self also testified. The court said: "If ever a declaration not made under oath is to be admitted against any other than the person making it, it should be admitted in this case. The declaration was obviously against interest. It was the only evidence in the nature of things that could be had, when Martindale haltingly denied the fact upon the stand. If we were to take it very nicely, it simply did away with a qualification engrafted by Martindale upon his testimony that the instrument was security for the bank, and made it easier to accept the principal fact without the qualification. . . . The interest of Martindale continued, the appellants claim through it, and we are of opinion that, under the circumstances, admissions by Martindale contrary to that interest properly were let in. Cases of admissions by a trustee having no interest in the suit may stand on different ground." This case is specially referred to as marking the expression of the broad view the court took of the necessity for relaxing in such cases the strict rules against hearsay. There are instances in which the declarations of former owners of personal property have been held inadmissible on the ground that they were still living and might be produced in court.⁶⁷ The cases supporting that view are mostly New York decisions, which follow the principle laid down in the leading dissenting case;⁶⁸ and in one of them the distinction between the rule as applied to real and personal property is made plain. The court in that case⁶⁹ said: "The rule seems to be settled, that a party who can call a witness shall not be permitted to prove his declarations. A former owner of real estate, through whom the title has passed, is said to be an exception; his admissions against the title while he was in possession may be shown. That rule the

⁶⁷ *Coit v. Howd*, 1 Gray (Mass.), 547; *Whitaker v. Brown*, 8 Wend. (N. Y.) 490. As to admissibility of declarations against title by former owner as against those claiming under him, as affected by fact that declarant is living and available as witness,

see note to *Abbott v. Walker*, 26 L. R. A., N. S., 814.

⁶⁸ *Paige v. Cagwin*, *supra*. See § 246, *post*.

⁶⁹ *Bristol v. Dann*, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122.

judge at the circuit court applied to this case, by permitting the defendants to give evidence of Rogers' admissions while he owned or possessed the note. This was going further in favor of the defendants than they had a right to ask." But such cases seem to be based upon a misapprehension of the principle which make these declarations competent, which is the privity of the person against whom they are offered with the declarant. Their admissibility by no means depends upon the principle involved in that exception to hearsay by which the declarations against interest of persons since deceased are admitted.⁷⁰ In an old but authoritative decision,⁷¹ where it was urged that the admission could not be proved except by the maker of it, if living, the court said: "The declarations of a person, while in the possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him. The general principle is conceded; but with this qualification, that when the person whose acknowledgment is relied on is alive and a competent witness, that then he must be examined; that his declarations cannot be received. I have examined all the cases, and cannot perceive a trace of any such exception. In most cases it is true the party was dead, and this is usually the case in fact, for it is the declarations of an ancestor that are most commonly offered in evidence. It has in no case, however, been made a subject of inquiry whether the person was dead or alive, a competent witness or otherwise, and this surely would have been the case had any such qualification of the general rule existed. The reason of the rule is at war with the exception. The point falls within the well-established principle that although a man's declarations are not evidence for him, they are strong evidence against him. The principle is founded on

⁷⁰ *Guy v. Hall*, 3 Murph. (7 N. C.) 150; *Gibblehouse v. Stong*, 3 Rawle (Pa.), 437; *Haddan v. Mills*, 4 Car. & P. 486; *Crayton v. Collins*, 2 McCord (S. C.), 457; *Snelgrove v. Mar-*

tin, 2 McCord (S. C.), 241. As to declarations of this character, see § 323 et seq., *post*.

⁷¹ *Gibblehouse v. Stong*, *supra*.

a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest. It is not conclusive, but is unquestionable evidence, entitled to some weight against himself, and those who claim under him."⁷²

§ 245 (246). **Same—Real and personal property.**—Before proceeding to consider those cases headed by the New York decision referred to, it is necessary to mention certain qualifications which apply both to real and personal property. It is to be observed that the rule does not admit the declarations of the seller in such cases, unless the person against whom the declaration is offered does in fact hold title under him.⁷³ And of course admissions are not to be received as to the title of either real or personal property if made *after the sale*, as the vendor cannot disparage a title with which he has already parted,⁷⁴ unless, as we have

⁷² Bassler v. Niesly, 2 Serg. & R. (Pa.) 352; Giblehouse v. Stong, *supra*, in which Rogers, J., said: "Suppose this declaration had been in writing, can the maker of it, by a subsequent conveyance, prevent the party in whose favor the declaration was made, from giving it in evidence against the party who claims under him? And where is the difference between written and parol testimony, except in the certainty; and particularly in cases of personal property, which may pass by parol, and to which the principle also applies? Can it be that the party is forced to rely upon the testimony of the maker of it who it may be has assigned for the purpose of getting rid of his own admissions? If the defendant must examine the maker of it they must hear their witness and cannot afterward discredit him. They will, in fact, be utterly precluded from the testimony by the act of the maker of it, and that

this cannot be done is decided in Long v. Bailie, Indorsee of Buchanan, 4 Serg. & R. 222. The defendant acquires an interest in testimony, of which he cannot be deprived by the act either of a witness or a party."

⁷³ Watson v. Williams, 1 Harp. (S. C.) 447.

⁷⁴ Horton v. Smith, 8 Ala. 73, 42 Am. Dec. 628, and note; Walden v. Purvis, 73 Cal. 518, 15 Pac. 91; Garlich v. Bowers, 66 Cal. 122, 4 Pac. 1138; Bunker v. Green, 48 Ill. 243; Miner v. Phillips, 42 Ill. 123; Keystone Mfg. Co. v. Johnson, 50 Iowa, 142; Roberts v. Medbery, 132 Mass. 100; Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868; Lewis v. Rice, 61 Mich. 97, 27 N. W. 867; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7, 8; Farmers' Loan & Trust Co. v. Montgomery, 30 Neb. 33, 46 N. W. 214; Sanford v. Ellithorp, 95 N. Y. 48; Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180; Lee v. Huntoon, 1

already seen in the case of the sale of real estate, the seller remains in possession,⁷⁵ or unless the declaration is made in presence of the transferee,⁷⁶ or unless there is other evidence tending to show *collusion* or a combination to defraud.⁷⁷ But where it is claimed that there is concert or collusion between the vendor and vendee to defraud creditors, the subsequent declarations of the vendor are not admissible against the vendee on that ground, "unless the alleged common purpose to defraud is first established by independent evidence and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestae*."⁷⁸ The rule also renders the declarations of assignors,⁷⁹ grantors,⁸⁰ devisors,⁸¹ and others through whom title is claimed⁸² incompetent, if made

Hoff. Ch. (N. Y.) 447; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. 596; *McLaughlin v. McLaughlin*, 91 Pa. 462; *Downs v. Belden*, 46 Vt. 674; *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407. See note to *Horton v. Smith*, 42 Am. Dec. 632. As to declarations of former owners of land, see note to *Cadwalader v. Price*, 134 Am. St. Rep. 612.

⁷⁵ *Marsh v. Hampton*, 5 Jones (50 N. C.), 382; *Gregory v. Frothingham*, 1 Nev. 253; *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785; *Gidney v. Logan*, 79 N. C. 214; *Piedmont Sav. Bank v. Levy*, 138 N. C. 274, 3 Ann. Cas. 785, 50 S. E. 657; *Selsby v. Redlon*, 19 Wis. 17. See note to *Horton v. Smith*, 42 Am. Dec. 633; also, § 241, *ante*.

⁷⁶ *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286.

⁷⁷ *Waterbury v. Sturtevant*, 18 Wend. (N. Y.) 353; *Neal v. Peden*, 1 Head (Tenn.), 546; *Cuyler v. McCartney*, 33 Barb. (N. Y.) 165; *O'Neil v. Glover*, 5 Gray (Mass.), 144; *Souder v. Schechterly*, 91 Pa. 83; *Boyd v. Jones*, 60 Mo. 454;

Hartman v. Diller, 62 Pa. 37; *Price v. Junkin*, 4 Watts (Pa.), 85, 28 Am. Dec. 685. See note to *Horton v. Smith*, 42 Am. Dec. 633.

⁷⁸ *Winchester v. Creary*, 116 U. S. 161, 29 L. Ed. 591, 6 Sup. Ct. Rep. 369; *Holbrook v. Holbrook*, 113 Mass. 74; *Hirschfeld v. Williamson*, 18 Nev. 66, 1 Pac. 201.

⁷⁹ *Alger v. Andrews*, 47 Vt. 238; *Myers v. Kinzie*, 26 Ill. 36; *Wynne v. Glidewell*, 17 Ind. 446; *Heywood v. Reed*, 4 Gray (Mass.), 574; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Maddox v. Atlantic & N. C. Ry. Co.*, 115 N. C. 624, 20 S. E. 190.

⁸⁰ *Alexander v. Caldwell*, 55 Ala. 517; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *McFadden v. Ellmaker*, 52 Cal. 348; *State v. Vale Mills*, 63 N. H. 4; *Hale v. Rich*, 48 Vt. 217; *Dodge v. Freedman's Trust Co.*, 93 U. S. 379, 23 L. Ed. 920.

⁸¹ *Mueller v. Rebhan*, 94 Ill. 142; *McSweeney v. McMillen*, 96 Ind. 298; *Wentworth v. Wentworth*, 71 Me. 72.

⁸² *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735 (declarations of a former deceased administrator); *Pick-*

after the title or interest in the property in question *has passed* from them. And as to personal property, there is an overwhelming weight of authority that declarations of a vendor after the sale and possession has passed, are inadmissible to affect the sale.⁸³ To this statement of the rule there are practically few exceptions, though there are cases in which statements made to or in the presence of the vendee may become relevant on other grounds such as acquiescence or estoppel;⁸⁴ and such statements may also become relevant for the cross-examination of the declarant if the proper predicate has been laid to contradict him so as to make the testimony admissible as impeaching evidence.⁸⁵

§ 246 (247). Same—Strict rules in some jurisdictions.—

We have now to consider the modifications of the rule making admissible the declarations of previous owners in disparagement. In some jurisdictions a much stricter rule

ering v. Reynolds, 119 Mass. 111 (suit between an occupier of land and a creditor).

⁸³ McCormick v. Joseph, 77 Ala. 236; Smith v. Hamlet, 43 Ark. 320; Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110; Smith v. Haire, 58 Ga. 446; Milling v. Hillenbrand, 156 Ill. 310, 40 N. E. 941; Campbell v. Coon, 51 Ind. 76; Urdangen v. Doner, 122 Iowa, 533, 98 N. W. 317; Scheble v. Jordan, 30 Kan. 353, 1 Pac. 121; Gatliff v. Rose, 8 B. Mon. (Ky.) 629; Ford v. Mills, 46 La. Ann. 331, 14 South. 845; Dennison v. Benner, 41 Me. 332; Cooke v. Cooke, 29 Md. 538; Kimball v. Leland, 110 Mass. 325; Vyn v. Keppel, 108 Mich. 244, 65 N. W. 966; Allen v. Knutson, 96 Minn. 340, 104 N. W. 963; Glaucke v. Gerlich, 91 Minn. 282, 98 N. W. 94; Ferriday v. Selser, 4 How. (Miss.) 560; Stewart v. Thomas, 35 Mo. 202; Williams v. Eikenbury, 25 Neb. 721, 13 Am. St. Rep. 517, 41 N. W. 770;

Perley v. Forman, 7 Nev. 309; Tabor v. Van Tassell, 86 N. Y. 642; Williams v. Clayton, 29 N. C. 442; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Woods v. Fautrot, 14 Okl. 171, 77 Pac. 346; Pringle v. Pringle, 59 Pa. 281; Kittles v. Kittles, 4 Rich. (S. C.) 422; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917; Holmark v. Molin, 5 Cold. (Tenn.) 482; Crawford v. Hord, 40 Tex. Civ. App. 352, 89 S. W. 1097; Bradford v. Taylor, 74 Tex. 175, 12 S. W. 20; Murray v. Chadwick, 52 Vt. 293; Givens v. Manns, 6 Munf. (Va.) 191; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Toms v. Whitmore, 6 Wyo. 220, 44 Pac. 56; Clements v. Nicholson, 6 Wall. (U. S.) 299, 18 L. Ed. 786.

⁸⁴ See §§ 275-289, *post*; Peck v. Crouse, 46 Barb. (N. Y.) 151.

⁸⁵ Fiske v. Small, 25 Me. 453; Bruce v. Bruce (Tex. Civ. App.), 89 S. W. 435.

prevails with respect to the admission of the declarations of a former owner of chattels to impeach the title of the purchaser. For example, in the state of New York the rule has prevailed since the decision of the court in the leading case,⁸⁶ that the declarations of a vendor of chattels or of a prior holder of negotiable paper are not admissible against a subsequent purchaser for value, unless they are made by the real party in interest or by one through whom the party claims as a privy by representation, as in cases of bankruptcy, death and others of a similar character. The authorities holding this view maintain that where a person becomes a purchaser of a chose in action or a chattel for a valuable consideration, his rights are independent of the assignor and beyond his control; that although it may be necessary to found his title on a transfer, yet the mere proof of such transfer is evidence of his right, and that possession alone is *prima facie* evidence of title, and the rights of the possessor do not necessarily depend on the title of the person by whom the delivery was made or from whom the possession was obtained.⁸⁷ But in the early New York cases the declarations of the former owner are held admissible against those who hold under him in a *representative capacity*, as administrators and assignees in bankruptcy,⁸⁸ as well as in those cases where the transaction relates to real estate.⁸⁹ This conflict, however, calls for more than a mere acquiescence in the fact that the leading New York decision has made a new path for itself and

⁸⁶ *Paige v. Cagwin*, 7 Hill (N. Y.), 361, 42 Am. Dec. 68, and note.

⁸⁷ *Paige v. Cagwin*, 7 Hill (N. Y.), 361, 42 Am. Dec. 68, and note; *Truax v. Slater*, 86 N. Y. 630. The same rule has been indorsed by the federal supreme court: *Dodge v. Freedman's Trust Co.*, 93 U. S. 379, 23 L. Ed. 920. In Alabama such declarations are rejected unless part of the *res gestae* explaining the possession: *Nelson v. Iverson*, 17 Ala. 216; *Hadden v. Powell*, 17 Ala. 314; *Price v. Branch*,

Bank, 17 Ala. 374; *Thompson v. Ma-whinney*, 17 Ala. 362, 52 Am. Dec. 176; *Weaver v. Yeatmans*, 15 Ala. 539.

⁸⁸ *Brown v. Mailler*, 12 N. Y. 118; *Hackney v. Vrooman*, 62 Barb. (N. Y.) 650; *Von Sachs v. Kretz*, 72 N. Y. 548; *Smith v. Sergeant*, 67 Barb. (N. Y.) 243; *Clews v. Kehr*, 90 N. Y. 633.

⁸⁹ *Chadwick v. Fonner*, 69 N. Y. 404.

for most of the subsequent decisions in that state. In the first place, it was not generally accepted in New York, for we find Chancellor Walworth⁹⁰ saying: "Indeed, the supreme court of this state has gone still further, and has held that the admissions of a former owner of personal property, or of a chose in action, even if made before he parted with his title, are not evidence as against his vendee."⁹¹ And it is said in a note to the last mentioned case, that the doctrine of these cases was directly sanctioned by the court for the correction of errors, in December, 1844, in the case of *Paige v. Cagwin*. I agree with Mr. Justice Bronson, however, that the rejection of the admissions of the former owner of personal property, or of choses in action, other than negotiable securities, made by such owner before he parted with his interest in the property, was a departure from a well-established principle of the law of evidence. And if it is hereafter to be followed, it must be upon the ground that the question is no longer open to discussion in the courts of this state." And as we have just pointed out, the earlier cases are not in accord with it. It is, however, supported in the United States supreme court. Mr. Justice Hunt⁹² said: "Evidence of this character (declarations of one who was the holder of a chattel or promissory note made during his tenure as holder) was given by each party, and admitted, notwithstanding the objection of the other. No principle can be found to justify the admission of this evidence. It has long been settled that the declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the state of New York in the case of *Paige v. Cagwin*⁹³ and is now admitted to be sound doctrine; and that the party is since deceased makes no difference,⁹⁴ or

⁹⁰ In *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105.

⁹¹ *Beach v. Wise*, 1 Hill (N. Y.), 612; *Stark v. Boswell*, 6 Hill (N. Y.), 405, 41 Am. Dec. 752.

⁹² In *Dodge v. Freedman's Sav. Trust Co.*, *supra*.

⁹³ *Paige v. Cagwin*, *supra*.

⁹⁴ *Beach v. Wise*, 1 Hill (N. Y.), 612.

that the transfer is made after maturity.⁹⁵ The same is true of the declarations of a mortgagee,⁹⁶ or of the assignor of a judgment,⁹⁷ or of an indorser,⁹⁸ or of a judgment debtor.⁹⁹ And this is the latest United States supreme court decision on the subject. Reverting now to the leading case, it will be seen that Senator Lott had such pronounced views upon the question, that in his erudite opinion, which contains an exhaustive analysis of all the important decisions, he was not content with declaring that the general rule is that declarations of the vendor of a chattel, or of a prior holder of a note, are admissible against a subsequent purchaser for value only where the declarations are made by the real party in interest, or by one through whom the plaintiff claims as a privy by representation, as in cases of bankruptcy, death, and the like, and that such a rule was not only consistent with the general principles of evidence, but was necessary for the protection of private rights, but that the exclusionary rule should preferably be applied to declarations affecting real estate. He says: "It was said, I am aware, by Mr. Justice Bronson, in¹⁰⁰ a case like the one under consideration, that if it were an original question, he should be unable to see any solid distinction between cases relating to real property, where the declarations of the former owner are constantly admitted, and those relating to choses in action, and other personal property; and he put his judgment on the sole ground that the point had been adjudged against the defendant in that case by those who had gone before him in the court. I admit that there is no solid distinction in principle between the cases referred to by the learned judge; but I by no means admit that the rule as applicable to personal estate should be altered. On the contrary, it appears to be an anomaly in our law, if, by the rules of evidence titles to real

⁹⁵ *Paige v. Cagwin*, *supra*.

⁹⁹ *Legg v. Olney*, 1 Denio (N. Y.),

⁹⁶ *Earl v. Clute*, 2 Abb. Ct. App. 202.

Dec. 1.

¹⁰⁰ *Beach v. Wise*, 1 Hill (N. Y.),

⁹⁷ *Tousley v. Barry*, 16 N. Y. 497. 612.

⁹⁸ *Ireland v. Kip*, Anth. N. P. (N.

Y.) 142.

estate can be made to depend on the mere declaration of a prior owner, when every contract for the sale of land is required to be in writing, and title can only be conveyed by deed. There would in my judgment be much more propriety in excluding such declarations as affecting real estate, than in admitting them as to personal property. But I do not concede that such declarations are now admissible to affect the title to lands, although they may be admitted to explain the character of a possession."¹ The opinion of the text-writer can be of little avail to mediate when the expression of opinion is as strong as that pointed out, and if the case in question may be read as stopping at the proposition that such declarations are only admissible when made by the real party in interest, there need be little difficulty in bringing it into line with the others. In so far, however, as it asserts that the rights of the purchaser are independent of the assignor and beyond his control, and that although it may be necessary to found a title on a transfer, the mere proof of the transfer is evidence of the right, we feel that the respect due to the decision is impaired by the reasons given in support of it, and that even with the support of the United States supreme court decisions referred to, it cannot be regarded as finally settling

¹ The learned Senator Lott, in *Paige v. Cagwin*, *supra*, cited *Jackson v. Shearman*, 6 Johns. (N. Y.) 19, saying: "The acknowledgements of a party are generally a dangerous species of evidence, and although good to support a tenancy, or to satisfy doubts in case of possession, they ought not to be received as evidence of title." Instead of extending this species of evidence, I think it safer and more conducive to the advancement of justice that it should be confined to such cases only where, by the settled rules of law, it is declared to be admissible. The remarks of Greenleaf as to this species of evidence are deserving of great consideration. He says:

"With respect to all verbal admissions, it may be observed, that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say":

1 Greenl. Ev., § 233.

an admittedly difficult and intricate controversy. In Vermont, for a short time, the same ruling was in existence; but it was practically disregarded, and finally the supreme court removed it from the list of authorities.²

§ 247 (248). **Same—Declarations of former owners of choses in action.**—We have not made previous reference to the one exception to the general rule which is unchallenged. On well-known grounds the declarations of a former owner of negotiable paper are not admissible against one who purchased for value before due.³ But with this exception the same general principle stated in a former section governs in respect to choses in action; and the declarations of the assignor made while he is owner are admissible against the assignee and those claiming under him. This has often been illustrated in the case of negotiable paper transferred after it became due,⁴ where the declarations of former owners have been received to show *payment* or rights of *setoff*.⁵ In a suit against the maker of a promissory note

² *Hines v. Soule*, 14 Vt. 99; overruled by *Alger v. Andrews*, 47 Vt. 238.

³ *Roe v. Jerome*, 18 Conn. 138; *Williams v. Judy*, 3 Gilm. (8 Ill.) 282, 44 Am. Dec. 699; *Produce Ex. Trust Co. v. Bieberbach*, 177 Mass. 137, 58 N. E. 162; *Brown v. McGraw*, 12 Smedes & M. (Miss.) 267; *Blanejour v. Tutt*, 32 Mo. 576; *Mitchell v. Baldwin*, 88 App. Div. 265, 84 N. Y. Supp. 1043; *Smith v. Schanck*, 18 Barb. (N. Y.) 344; *Smith v. Di Wornitz, R. & M.* 212, 21 Eng. Com. L. 735; *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379, 23 L. Ed. 920.

⁴ *Roe v. Jerome*, 18 Conn. 138; *Hanchett v. Kimbark*, 118 Ill. 121, 7 N. E. 491; *Blount v. Riley*, 3 Ind. 471; *Eaton v. Corson*, 59 Me. 510; *Sears v. Moore*, 171 Mass. 514, 50 N. E. 1027; *Robb v. Schmidt*, 35 Mo. 290; *Scammon v. Scammon*, 33 N.

H. 52; *Reed v. Vancleve*, 27 N. J. L. 352, 72 Am. Dec. 369; *Hollister v. Reznor*, 9 Ohio St. 1; *Collger v. Francis*, 2 Baxt. (Tenn.) 422; *Ellis v. Watkins*, 73 Vt. 371, 50 Atl. 1105. It must be noted that the cases following *Paige v. Cagwin*, *supra*, are the exception to this rule.

⁵ *Reed v. Vancleve*, 3 Dutch. (27 N. J. L.) 352, 72 Am. Dec. 369. That the declarations of the holder of a dishonored note, made while such, are competent evidence in an action brought by a subsequent holder, to prove that the note had been paid to him, or that he took it up and paid it for the benefit of any prior parties to it, and has no claim upon it, cannot admit of a doubt: *Bayley on Bills*, 502, 503; *Pocock v. Billings, Ry. & M.* 127. 4 Bing. 269, 9 Moore, 499, 1 Car. & P. 230; *Story on Bills*, 220; *Ch. Bills*, 650; 1 Greenl. Ev., §§ 190, 191.

by one who took it when overdue, the declarations of a prior holder, made while he held the note, after it was due, are admissible in evidence to show payment to such prior holder, or any right of setoff which the maker had against him. But such declarations, made by such holder before he took the note, are inadmissible. So such declarations, made by such holder after assigning the note to one from whom the plaintiff since took it, are inadmissible, unless such assignment was conditioned to be void upon the payment to the assignee of a less sum than the amount due on the note, in which case such declarations are admissible in evidence for the defendant to the extent of the interest remaining in such prior holder.⁶ So also such declarations have been received to show *want of consideration or want of title*,⁷ and *other defenses*.⁸ It seems unnecessary to say that such statements made after the assignor has parted with his title and interest are incompetent as against the transferee.⁹ As between *consignor* and *consignee*, where goods have been delivered to the carrier as the consignee's agent, the admissions of the con-

⁶ This extract is from the excellent syllabus to *Bond v. Fitzpatrick*, 4 Gray (Mass.), 89.

⁷ *Coster v. Symons*, 1 Car. & P. 148; *Snelgrove v. Martin*, 2 McCord (S. C.), 241; *Haddan v. Mills*, 4 Car. & P. 486; *Dolan v. Kehr*, 9 Mo. App. 351.

⁸ *Kent v. Lowen*, 1 Camp. 177; *Kane v. Torbit*, 23 Ill. App. 311; *Hanchett v. Kimbark*, 118 Ill. 121, 7 N. E. 491.

⁹ *Carmichael v. Brooks*, 9 Port. (Ala.) 330; *Patton v. Gee*, 36 Ark. 506; *First Nat. Bank of Oakland v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *National Bank of Athens v. Athens Ex. Bank*, 110 Ga. 692, 36 S. E. 265; *Thorp v. Goewey*, 85 Ill. 611; *Schmidt v. Packard*, 132 Ind. 398, 31 N. E. 944; *Scott v. Hall*, 6 B. Mon. (Ky.) 285; *Dowty v. Sullivan*, 19

La. Ann. 448; *Norton v. Heywood*, 20 Me. 359; *Whittier v. Vose*, 16 Me. 403; *Noxon v. De Wolf*, 10 Gray (Mass.), 343; *Eyer mann v. Piron*, 151 Mo. 107, 52 S. W. 229; *Piper v. Neylon*, 81 Neb. 481, 116 N. W. 159; *Commercial Nat. Bank v. Brill*, 37 Neb. 626, 56 N. W. 382; *Forsaith v. Stickney*, 16 N. H. 575; *Pearce v. Strickler*, 9 N. M. 467, 54 Pac. 748; *Wagner v. Grimm*, 169 N. Y. 421, 62 N. E. 569; *Maslon v. Sprickerhoff*, 50 Misc. Rep. 644, 98 N. Y. Supp. 618; *Maddox v. Atlantic etc. R. Co.*, 115 N. C. 624, 20 S. E. 190; *Andrews v. Campbell*, 36 Ohio St. 361; *Camp v. Walker*, 5 Watts (Pa.), 482; *De Bruhl v. Patterson*, 12 Rich. (S. C.) 363; *Goodson v. Johnson*, 35 Tex. 622; *Leland v. Farnham*, 25 Vt. 553; *Welch v. Town of Sugar Creek*, 28 Wis. 618.

signor after such delivery would in no way bind the consignee in an action by him against the carrier;¹⁰ and the same rule applies to donor and donee when the gift has been accomplished.¹¹

§ 248 (249). Declarations of persons having a joint interest—Partners.—"Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts."¹² In a suit by or against several persons who are proved to have a joint interest in the decision, a declaration made by one of them, while engaged in the joint business, concerning a material fact within his knowledge, is evidence against him and against all who are parties with him in the suit.¹³ This principle is often illustrated in respect to the declarations of *partners*.

¹⁰ *Bank of Irwin v. American Express Co.*, 127 Iowa, 1, 102 N. W. 107.

¹¹ *Walden v. Purvis*, 73 Cal. 518, 15 Pac. 91; *Cornett v. Fain*, 33 Ga. 219; *Dixon v. Labry*, 16 Ky. Law Rep. 522, 29 S. W. 21; *Moore v. Fingar*, 131 App. Div. 399, 115 N. Y. Supp. 1035; *Hicks v. Forrest*, 41 N. C. 528. In *Kelly v. Beers*, 194 N. Y. 60, 86 N. E. 985, one Mrs. Beers changed a deposit standing in her name, so as to make it payable to her "or Sarah E. Kelly, her daughter, or survivor." After making it, Mrs. Beers made a codicil to her will, assuming to dispose of the deposit, treating it as subject to her testamentary disposition, and the court held that that was not effective to revoke her prior intention and the acts already consummated. Judge Werner, in writing the opinion, says: "I see no difference in this respect between a case of consummated gift of a deposit and one of a trust in and of such a deposit, as protected from

subsequent declarations and acts: *Mabie v. Bailey*, 95 N. Y. 206; *Seheps v. Bowery Savings Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26; *Robinson v. Appleby*, 69 App. Div. 509, 75 N. Y. Supp. 1; affirmed, 173 N. Y. 626, 66 N. E. 1115."

¹² Reynolds' Stephen Ev., art. 17,

¹³ *Dean v. Ross*, 105 Cal. 227, 38 Pac. 912; *McCullough Bros. v. Sawtell*, 134 Ga. 512, 68 S. E. 89; *Walling v. Rosevelt*, 16 N. J. L. 41; *Armstrong v. Farrar*, 8 Mo. 627; *Hurst v. Robinson*, 13 Mo. 82, 53 Am. Dec. 134; *Irby v. Brigham*, 9 Humph. (Tenn.) 750; *Fourth Nat. Bank v. Alpaugh*, 107 Fed. 819, 46 C. C. A. 655; *Rex v. Hardwick*, 11 East, 589, 103 Eng. Reprint, 1133; Steph. Ev., art. 17; 1 Greenl. Ev., § 172. As to admissions of partner, see note to *Vanderhurst v. De Witt*, 20 L. R. A. 595-599. See, also, the Canadian cases: *Taylor v. Cook*, 11 P. R. 60; *Lee v. MacDonald*, 60 S. 130; *Bernard v. Walker*, 2 E. & A. 121.

Thus, if the action is against partners to recover money alleged to have been obtained by false representations, the statements of either partner, made during the partnership relative to and tending to establish the cause of the action, are admissible against both;¹⁴ and *entries in the partnership books* made by one partner during the continuance of partnership are admissible against both.¹⁵ Admissions of one partner are admissible against all to prove the execution of a promissory note;¹⁶ the *genuineness* of such note;¹⁷ the existence of other forms of *indebtedness*;¹⁸ the *financial condition* of the firm;¹⁹ the *payment* of money;²⁰ the *ownership* of goods in the possession of the firm;²¹ the authority of an *agent*;²² that a note made in the firm name was given on *credit of the firm* and not on individual credit;²³ that due notice had been given of the *dishonor* of a bill;²⁴ that the partners are liable as *garnishees*;²⁵ in an action by an insurance company to recover moneys paid on fraudulent proofs of loss that one *partner had set a fire*;²⁶ and the cause of an accident.²⁷ So statements of accounts by a partner in the ordinary transaction of the firm's business are admissible.²⁸ And, always assuming the preliminary proof of the joint purpose or interest, the statements of a conspirator are evidence against his co-conspirator;²⁹ and those of one of several joint lessees in relation to the joint property.³⁰ Although one partner is

¹⁴ *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104.

¹⁵ *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

¹⁶ *Adams v. Brownson*, 1 Tyler (Vt.), 452.

¹⁷ *Henslee v. Cannefax*, 49 Mo. 295.

¹⁸ *Corps v. Robinson*, Fed. Cas. No. 3252, 2 Wash. C. C. 388.

¹⁹ *Doremus v. McCormick*, 7 Gill (Md.), 49.

²⁰ *Munson v. Wickwire*, 21 Conn. 513.

²¹ *Humes v. O'Bryan*, 74 Ala. 64.

²² *Odiorne v. Maxey*, 15 Mass. 39.

²³ *Hurd v. Haggerty*, 24 Ill. 171.

²⁴ *Myers v. Standart*, 11 Ohio St. 29.

²⁵ *Anderson v. Wanzer*, 6 Miss. 587, 35 Am. Dec. 170.

²⁶ *Western Assurance Co. v. Towle*, 65 Wis. 247, 26 N. W. 104.

²⁷ *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

²⁸ *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Jones v. O'Farrel*, 1 Nev. 354.

²⁹ *Commonwealth v. Donnelly*, 40 Pa. Super. Ct. 116.

³⁰ *Miller v. Mathias*, 145 Ill. App. 465.

shown to be *hostile* to another, such admissions may be received, although, of course, this hostility may affect the question of *credibility*.³¹ The admissions of one partner are not received against another on the ground that they are parties to the record, but on the ground that they are identified in interest, and that *each is agent for the other*, and that the acts and declarations of one during the existence of the partnership, while transacting its business and within the scope of the business, are evidence against the others.³² The declarations of a *dormant* partner, relating to the partnership business, are admissible against his copartners,³³ and those of a *deceased* partner are admis-

³¹ *Jemison v. Minor*, 34 Ala. 33; *Talbot v. Wilkins*, 31 Ark. 411; *Munson v. Wickwire*, 21 Conn. 513; *Drumright v. Philpot*, 16 Ga. 424, 50 Am. Dec. 738; *Hurd v. Haggerty*, 24 Ill. 171; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519, 3 N. E. 151; *Wiley v. Griswold*, 41 Iowa, 375; *Boyce v. Watson*, 3 J. J. Marsh. (Ky.) 498; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Harryman v. Roberts*, 52 Md. 64, 20 Am. Law Reg., N. S., 373; *Collett v. Smith*, 143 Mass. 473, 10 N. E. 173; *Burgan v. Lyell*, 2 Mich. 102, 55 Am. Dec. 53; *Faler v. Jordan*, 44 Miss. 283; *Cady v. Kyle*, 47 Mo. 346; *Webster v. Stearns*, 44 N. H. 498; *Gulick v. Gulick*, 14 N. J. L. 578; *Fogerty v. Jordan*, 2 Rob. (N. Y.) 319; *Hilton v. McDowell*, 87 N. C. 364; *Western Assurance Co. v. Towle*, 65 Wis. 247, 26 N. W. 104; *Corps v. Robinson*, Fed. Cas. No. 3252, 2 Wash. C. C. 388; *Wood v. Braddick*, 1 Taunt. 104, 127 Eng. Reprint, 771; *Rapp v. Latham*, 2 Barn. & Ald. 795, 106 Eng. Reprint, 555.

³² *Fail v. McArthur*, 31 Ala. 26; *Dennis v. Kolm*, 131 Cal. 91, 63 Pac. 141; *Munson v. Wickwire*, 21 Conn. 513; *Perry v. Butt*, 14 Ga. 699; *Low v. Arnstein*, 73 Ill. App. 215;

Hickman v. Reineking, 6 Blackf. (Ind.) 387; *Wiley v. Griswold*, 41 Iowa, 375; *Rudy v. Katz*, 23 Ky. Law Rep. 1697, 66 S. W. 18; *Allen v. May*, 11 La. Ann. 627; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Wells v. Turner*, 16 Md. 133; *Nickerson v. Russell*, 172 Mass. 584, 53 N. E. 141; *Towle v. Dunham*, 84 Mich. 268, 47 N. W. 683; *Slipp v. Hartley*, 50 Minn. 118, 36 Am. St. Rep. 629, 52 N. W. 386; *Lea v. Guice*, 13 Smale & M. (Miss.) 656; *Evers v. Life Assn. of America*, 59 Mo. 429; *Webster v. Stearns*, 44 N. H. 498; *Gulick v. Gulick*, 14 N. J. L. 578; *First Nat. Bank of Albuquerque v. Lesser*, 9 N. M. 604, 58 Pac. 345; *Randall v. Bank of America*, 161 N. Y. 632, 57 N. E. 1122; *Tapp v. Dibrell*, 134 N. C. 546, 47 S. E. 51; *Brown Chemical Co. v. Atkinson*, 91 N. C. 389; *Benninger v. Hess*, 41 Ohio St. 64; *American F. Ins. Co. v. Stuart* (Tex. Civ. App.), 38 S. W. 395; *Merrill v. O'Bryan*, 48 Wash. 415, 93 Pac. 917; *Muench v. Heine-mann*, 119 Wis. 441, 96 N. W. 800; *Hester v. Smith*, 5 Wyo. 291, 40 Pac. 310; *Garrett v. Woodward*, 10 Fed. Cas. No. 5253, 2 Cranch C. C. 190.

³³ *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. (Ill.) 15; *Weed v. Kel-*

sible against his survivors.³⁴ There appears to exist some doubt as to the admissibility of statements concerning past transactions, but we cannot see any reason for it. If the matter was within the scope of the partnership and the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm. But it has been held that where members of a firm were sued upon a contract made by one of their number outside the scope of the partnership business and without the knowledge of the others, admissions made by the signatory at a time other than the execution of the contract were inadmissible.³⁵ And where one partner, after having given a note in his own name, said it was for the partnership, such admission was held not to bind the firm.³⁶ It is true, from the very constitution of a partnership, a presumption arises, that each partner is an authorized agent for the rest, in contracts relating to the subject matter of the partnership. But this relationship does not deprive either party of the liberty of making contracts for himself in similar matters. Thus, if A and B constitute a firm to merchandise goods, either of them, unless it is forbidden in the articles, is at liberty to enter into the same business, at the same place, on his own account. The legal presumption is, that when a person purchases a thing, he purchases it for himself. In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use.³⁷ So where a member of a partnership bought a mule, ostensibly for himself, and when it was sent home he said it was for the firm, his declaration so made after the purchase was not of itself competent to bind them. It is a general rule of the law of

logg, Fed. Cas. No. 17,345, 6 McLean (U. S.), 44.

³⁴ Doremus v. McCormick, 7 Gill (Md.), 49; Klock v. Beekman, 18 Hun (N. Y.), 502. As to declarations of a surviving partner, see McElroy v. Ludlum, 32 N. J. Eq. 828.

³⁵ Taft v. Church, 162 Mass. 527, 39 N. E. 283.

³⁶ Thorn v. Smith, 21 Wend. (N. Y.) 365; Atwood v. Brooks (Tex. App.), 16 S. W. 535.

³⁷ Swann v. Steele, 7 East, 210, 103 Eng. Reprint, 80.

evidence that the acknowledgment of one joint contractor or partner is evidence against all the rest, and sufficient to bind them. The principle, upon which such evidence is admissible, is the community of interest between the party making the admissions and the party to be affected by them, and the presumption that the former would not make an acknowledgment against his own interest.³⁸ Where, therefore, it appears that it was the interest of the party making the admission to throw the burden of the contract on the firm, his acknowledgment could not be received when the rule of interest in the cause excluded the witness.³⁹ But where an accident occurred on the premises of the firm, an admission as to its cause by one of the partners was properly held admissible against the others.⁴⁰

§ 249 (250). **Same—Statutes of limitations as affecting admissions of partners.**—In considering the effect on other partners of admissions of payments by one partner which result in removing the bar of the statutes of limitation as to that partner, the question of the agency which is the basis of that particular form of liability is of first importance; and the solution lies in stripping the proposition to the bare statement of the authority, express or implied, with which the declarant was invested at the time of the declaration. The discussion is limited to admissions made after dissolution. Prior to it, and whether the admission be regarded as a new contract or an extension of an old one, there need be no question of the partner's ability to charge his copartners with the act which bars the statute. But after dissolution, the agency and its cessation, or rather the exact time of the determination of the agency, regulates the period when such admissions or payments which operate as admissions become, as to the other partners, ineffectual. The rule formerly prevailed in England and was adopted in some states in this country, that a debt might be revived against the other partners

³⁸ 2 Star. on Ev. 26, 538.

⁴⁰ Muench v. Heinemaun, 119 Wis.

³⁹ White v. Gibson, 33 N. C. 283.

441, 96 N. W. 800.

by a payment by one, which was held to constitute an admission of the debt. This was held even after the statute of limitations had run and after the dissolution of the partnership had taken place.⁴¹ This view rested upon the theory that the statute of limitations is founded upon a *presumption of payment* of the debt after the statutory period, and that this presumption was sufficiently rebutted by an acknowledgment or admission of the debt by one of the joint debtors.⁴² Another theory is that the statute of limitations is not founded on the presumption of payment, but that it rests on grounds of *public policy*;—that it is a *statute of repose* intended to prevent the prosecution of stale demands, and that the debt can only be revived by a new promise. It is further urged that after the dissolution of the partnership, although each partner has authority to dispose of the partnership property, and to collect and pay partnership debts and to settle partnership affairs, yet he *cannot be presumed to be the agent* of the others to bind them by a new contract, and that the admission or new promise can bind no one but himself.⁴³ This is the view which is now sustained by the weight of authority, and which has now been adopted by statute in England and in some of the states of this country.⁴⁴ In England

⁴¹ Beardsley v. Hall, 36 Conn. 270, 4 Am. Rep. 74; Bissell v. Adams, 35 Conn. 299; Warner v. Allee, 1 Del. (Ch.) 49; Shepley v. Waterhouse, 22 Me. 497; Buxton v. Edwards, 134 Mass. 567; Bridge v. Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358; Merritt v. Day, 38 N. J. L. 32, 20 Am. Rep. 362; Geddes v. Simpson, 2 Bay (S. C.), 533; Wheelock v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163; Garland v. Agee, 7 Leigh (Va.), 362; Whitcomb v. Whiting, 2 Doug. 652, 99 Eng. Reprint, 413; Wood v. Braddick, 1 Taunt. 104, 127 Eng. Reprint, 771. See note to Chardon v. Oliphant, 6 Am. Dec. 574-576.

⁴² On the general subject of this section, see valuable discussion in 1

Smith's Lead. Cas. 982 et seq. See, also, cases last cited.

⁴³ See extended notes to Chardon v. Oliphant, 6 Am. Dec. 574-575; Gilmore v. Ham, 40 Am. St. Rep. 566, and Kerper v. Wood, 15 L. R. A. 656. See cases next cited.

⁴⁴ See the statutes of the jurisdiction. See, also, Myatts v. Bell, 41 Ala. 222; Lowther v. Chappell, 8 Ala. 353, 42 Am. Dec. 364; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Dickerson v. Turner, 12 Ind. 223; Steele v. Souder, 20 Kan. 39; Walsh v. Cane, 4 La. Ann. 533; Faulkner v. Bailey, 123 Mass. 588; Briscoe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553;

to-day the law stands that when there are two or more co-contractors or codebtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any co-contractor, no such co-contractor or codebtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors, or codebtors, executors or administrators.⁴⁵ Commenting on this statute the leading text-writer on the subject says: "The above statute, it will be observed, has materially altered the law as regards the effect of acknowledgments and part payments. An acknowledgment by an agent being now sufficient to affect his principal, acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm; and notwithstanding section 14 (of the statute referred to) a part payment by a partner will probably be regarded as a part payment by the firm. But after a dissolution a part payment by a continuing or a surviving partner will not prevent a retired partner, or the executors of a deceased partner, from availing themselves of the statute; and the same is true of an acknowledgment. If, however, payments or acknowledgments are made by the continuing or surviving partner, on behalf of and as agent for the late partner or his executors, the case would be different."⁴⁶ In this country not only

Rogers v. Anderson, 40 Mich. 290; Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491; Exeter Bank v. Sullivan, 6 N. H. 124; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Palmer v. Dodge, 4 Ohio St. 21, 36, 62 Am. Dec. 271; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694; Reppert v. Colvin, 48 Pa. 248; Muse v. Donelson, 2 Humph. (Tenn.) 166, 36 Am. Dec. 309; Bailey v. Corliss, 51 Vt. 366; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; Clementson v. Williams, 8 Cranch (U. S.), 72, 3 L. Ed. 491.

⁴⁵ The Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, § 14.

⁴⁶ Lindley on Partnership, 7th ed., 295. From the same valuable work is taken the following excerpt of Tucker v. Tucker, L. R. [1894] 3 Ch. Div. 429, affirming L. R. [1894] 1 Ch. Div. 724: "A partner retired in 1883, and a deed of dissolution was executed, whereby it was provided that the retirement should not be made known for a year, and then that advertisement of the dissolution should be optional; that the assets should be taken over by the con-

do some of the states follow the modern English practice, but the code states specially protect the partners on a dissolution. The following is typical of their provisions:⁴⁷ "A partner authorized to act in liquidation, may indorse, in the name of the firm, promissory notes, or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm, by an acknowledgment, when an action is barred under the provisions of the Code of Civil Procedure." It has been held in some cases that an admission of one partner may suspend the running of the statute or prolong the time as against the rest, but that it cannot revive their liability after it has been once extinguished.⁴⁸ That is to say, that assuming the statute had not run to completion at the date of the dissolution, a payment by one who was a member of the dissolved partnership makes the statute begin *de novo* from the date of the payment. In support of this there has been advanced much cogent argument. Beasley, C. J.,

tinuing partners; that they should pay the partnership debts, and indemnify the retiring partner against them, and pay him a certain sum by instalments; that so long as any money remained due to the retiring partner, he should have power to call in the whole amount due to him, and thereupon be entitled to collect the book debts, to enter on the premises, and to carry on the business on his own account. At the time of the partner's retirement the firm owed a debt bearing interest; the retirement was not advertised, and the business was carried on in the old name, and the continuing partners continued as before to pay interest on the debt by cheque drawn in the name of the firm until 1891. Under these circumstances, the court held that the continuing partners in paying this interest on the debt acted as agents

for the retired partner, and that such payment prevented the Statute of Limitation from running in his favor." *Watson v. Woodman*, L. R. 20 Eq. 721, is a case of a retired partner availing himself of the statute against the continuing partner's admission. The case of *Wilson v. Waugh*, 101 Pa. 233, is very similar to *Tucker v. Tucker*, *supra*.

⁴⁷ Cal. Civ. Code, § 2462.

⁴⁸ *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Silman v. Silman*, 2 Hill (S. C.), 416; *Goudy v. Gillam*, 6 Rich. (S. C.) 28; *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526; *Walton v. Robinson*, 5 Ired. (27 N. C.) 341; *Ellicott v. Nichols*, 7 Gill (Md.), 85, 48 Am. Dec. 546; *Emmons v. Overton*, 18 B. Mon. (Ky.) 643; *Burr v. Williams*, 20 Ark. 171; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47.

says:⁴⁹ "Granting that a payment made by one of the makers of a joint note, given by several, is, on the ground of an implied agency, the act of all, it seems a necessary consequence, that the fact that such makers were partners when they issued the paper can have no modifying effect. The obvious reason is, that the agency in question arises, not out of the incidents of the copartnership, but from the relations created by the joint indebtedness. If partners have ceased to be such by the act of dissolution, and can no longer bind each other in that capacity, they are still joint debtors, and, from that connection, they are the agents of each other in making payments, and renewing the promise to pay, so as to avoid the effect of the statute of limitations. This is the logical result of the adoption of the principle upon which the decision in *Whitcomb v. Whiting* (cited in the notes) is founded; and, accordingly, it will be found that such principle is repudiated in all those decisions which hold that one partner, after the dissolution of the copartnership, cannot, in any respect, affect his copartners by a part payment of a joint obligation. To consistently vindicate the theorem that a partner cannot thus extend, with respect to time, the contracts of the expired firm, the establishment of two propositions is absolutely essential: First, that such act does not appertain to the power incident to the settlement of the business of the partnership; and, second, that from the existence of the joint indebtedness, a right does not arise, in either of the joint debtors, to arrest, by his sole act, the running of the statute of limitations." And, on the other hand, the arguments against it are powerful and persuasive, and represent the preferable conclusion. The three earliest New York cases on the subject abound with sound reasons for the distinction.⁵⁰ In *Shoemaker v. Benedict*, one of the

⁴⁹ In *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep. 362. To the same effect are *Bissell v. Adams*, 35 Conn. 299; *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378.

⁵⁰ *Van Keuren v. Parmelee*, 2 Const. 523; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Dunham v. Dodge*, 10 Barb. (N. Y.) 566. The decision in *Van Keuren v. Parmelee* recognizes as law: 1st.

cases referred to, Allen, J., pointed out that partial payments, and not a promise, as in *Van Keuren v. Parmelee*, also cited in the notes, were relied upon to take the case out of the statute. "But partial payments are only available as facts from which an admission of the existence of the entire debt, and a present liability to pay may be inferred. As a fact, by itself, a payment only proves the existence of the debt, to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases, it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money, as interest, it would be such an admission, in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is, that it is a deliberate act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is, nevertheless, only reliable as evidence of a *promise*, or from which a promise may be implied. Any other evidence which establishes such promise would be equally efficacious, and most assuredly, a deliberate written acknowledgment of the existence of a debt and promise to pay, is of as high a character as evidence of a partial payment, to defeat the statute of limitations. In either case, the question is, as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the debt is renewed; and without a promise, express or implied, it is not renewed. The question still recurs, Who is authorized to

That the action is, substantially, though not in form, upon the new promise, and that such promise is not a mere continuation of the original promise, but a new contract springing out of and supported by the original consideration; 2d. That to continue or renew the debt, there must be an express promise to pay, or an acknowledgment of the existence of the debt, with the admission or recognition of an existing liability to pay

it, from which a new promise may be inferred; 3d. That such acknowledgment or promise, to take a debt out of the statute, must be made by the party to be charged, or by some person authorized by him; and 4th. That there is no mutual agency between joint debtors, by reason of the joint contract, which will authorize one to act for and to bind the others, in a manner to vary or extend their liability.

make such promise? If one joint debtor could bind his codebtors to a new contract, by implication, as by a payment of a part of a debt for which they were jointly liable, he could do it directly, by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly, which cannot be done directly. If one debtor could bind his codebtors by an unconditional promise, he could by a conditional promise, and a man might find himself a party to a contract to the condition of which he would be a stranger." On the point of time when the payment is made the same learned judge said: "That a promise made, while the statute of limitations is running, is to be construed and acted upon in the same manner as if made after the statute has attached, is decided.⁵¹ And, in principle, I see not why a promise made before the statute has attached to a debt should be obligatory, when made by one of several joint debtors, when it would not be obligatory, if made after the action was barred. The statute operates upon the remedy; the debt always exists. An action brought, after the lapse of six years, upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required to make the promise before, as after the six years have elapsed. Can it be said that one of several debtors can, on the last day of the sixth year, by a payment, small or large, or by a new promise, either express or implied, so affect the rights of his codebtors, as to continue their liability for another space of six years, without their knowledge or assent, or any authority from them, save that to be implied from the fact that they are at the time jointly liable upon the same contract, and yet, that on the very next day, without any act of the parties, such authority ceases to exist? If so, I am unable to discover upon what principle. And may the debt be thus revived, from six years to six years, through

⁵¹ *Dean v. Hewit*, 5 Wend. (N. Y.) 257; *Tompkins v. Brown*, 1 Denio (N. Y.), 247.

all time, or if not, what limit is put to the authority? If any agency is created, it continues until revoked." In another New York case,⁵² it was held that one of two joint contractors could not be deprived of a defense by the admission of the other; that one had not power to increase or extend the liability of the other beyond the terms of the contract. "To hold," concludes Allen, J., referring to the case last cited, "that one joint debtor could by his acts deprive his codebtors of a defense under the statute of limitations, and could renew and extend his liability by a new contract, would be directly inconsistent with the principles decided in this case." If it be true that neither member of a dissolved partnership has the power to renew a promissory note or other evidence of indebtedness so as to bind his copartners, then, upon the same principle, every acknowledgment, new promise, or partial payment, made by one of the late copartners ought to be equally unavailing to prevent the running of the statute of limitations, or to revive a debt already barred thereby, for surely to give such an effect to an acknowledgment or promise made by one of the partners is to permit him to renew the firm indebtedness, and what he cannot do directly he ought not to be able to accomplish indirectly.⁵³ Now, the doctrine seems well settled by authority, that an acknowledgment is to be considered, not as a continuation of the old promise, but as evidence of a new promise; and therefore, it is alone this new promise which takes the debt out of the statute. This new promise is a new contract—nothing more, nothing less; and it is a contract to pay a pre-existing debt, which of itself does not bind the party, because by force of the law it was extinguished. Hence, is not the acknowledgment, in essence and in law, the creation of a new contract, which gives the creditor a new cause of action, and not simply the enforcement of the old one? It, therefore, seems clear, both upon principle and authority, that after

⁵² *Lewis v. Woodworth*, 2 N. Y. 512, 51 Am. Dec. 319.

⁵³ Note to *Gilmore v. Ham*, 142 N. Y. 1, 40 Am. St. Rep. 554, 36 N. E. 826.

the relation of partners has ceased to exist, one of the partners cannot, upon the ground of mutual agency, bind the others by such contract.⁵⁴ These views forbid both the renewal of a debt after it is completely barred by the statute and the continuation of the time within which the statute will operate where the new promise, acknowledgment, or partial payment takes place before the bar of the statute has already been final.⁵⁵ The weight of modern authority sustains the view that *after* actual *dissolution* neither partner can be deemed the agent of the others to the extent of binding them to pay a debt by any payment or promise which he may make.⁵⁶

⁵⁴ Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491.

⁵⁵ Hackley v. Patrick, 3 Johns. (N. Y.) 536; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694; Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Ellicott v. Nichols, 7 Gill (Md.), 85, 48 Am. Dec. 546; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Muse v. Donelson, 2 Humph. (Tenn.) 166, 36 Am. Dec. 309.

⁵⁶ Myatts v. Bell, 41 Ala. 222; Curry v. White, 51 Cal. 530; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Brewster v. Hardeman, Dud. (Ga.) 138; Green v. Baird, 53 Ill. App. 211; Lefavpur v. Yandes, 2 Blackf. (Ind.) 240; Carroll v. Gayarre, 15 La. Ann. 671; Sigler v. Platt, 16 Mich. 206; Leithauser v. Baumeister, 47 Minn. 151, 28 Am. St. Rep. 336, 49 N. W. 660; Kelley v. Sanborn, 9 N. H. 46; Pickett v. Leonard, 34 N. Y. 175; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Kerper v. Wood, 48 Ohio

St. 613, 15 L. R. A. 656, 29 N. E. 501; Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Steele v. Jennings, 1 McMull. (S. C.) 297; Muse v. Donelson, 2 Humph. (Tenn.) 166, 36 Am. Dec. 309; Haddock v. Crocheron, 32 Tex. 276, 5 Am. Rep. 244; Carlton v. Coffin et al., 27 Vt. 496; Conrad v. Buck, 21 W. Va. 396; Cronkhite v. Herrin, 15 Fed. 888; Watson v. Woodman, L. R. 20 Eq. Cas. 721. See note to 1 Smith Lead. Cas. 1022, and cases. In some cases the question of notice of the dissolution to the payee has been held material: Clement v. Clement, 69 Wis. 599, 2 Am. St. Rep. 760, 35 N. W. 17; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Kenniston v. Avery, 16 N. H. 117; Buxton v. Edwards, 134 Mass. 567; Davison v. Sherburne, 57 Minn. 355, 47 Am. St. Rep. 618, 59 N. W. 316. In a recent case (Somerville v. Missouri Glass Co., 144 Mo. App. 463, 129 S. W. 474), the question of an admission arose singularly as between the partners. One retired from the firm leaving with his late partners certain patented lamps for sale and furnishing others from time to time. Ultimately an account was rendered by the continuing partner showing an indebtedness by him. Upon being

§ 250 (251). **Admissions after dissolution of partnership.**—From the preceding section will have been gathered the present attitude of the courts, fortified by modern decisions, toward admissions made by a partner after dissolution. While it is clear that the admissions of one partner are binding upon the others so far as his statements are necessary to the proper winding up of the partnership affairs and so far as made while he is acting as agent for that purpose,⁵⁷ yet there has been much conflict of opinion upon the question whether admissions of one partner respecting former transactions, made after the dissolution, are admissible against the copartners. As we have already seen, under the early English doctrine the powers of a partner to bind the firm by admissions or even by new promises were not limited to the duration of the partnership.⁵⁸ But in this country the tendency of the authorities has been to *restrict the power* within much narrower limits and to deny the power of one partner to charge his copartners by his admissions, after dissolution, as to past transactions.⁵⁹ In most of the American cases

sued by the retiring partner he claimed the benefit of the statute as from the time the goods were delivered for sale. The retiring partner claimed that it ran only from the time the account was rendered: Knowles v. Rome Tribune Co., 127 Ga. 90, 56 S. E. 109; Carder v. Primm, 52 Mo. App. 102; Cole v. Baker, 16 S. D. 1, 91 N. W. 324. It was held that the statute ran only from the time the admission of the amount owing was made by the account referred to.

⁵⁷ Reppert v. Colvin, 48 Pa. 248; Ide v. Ingraham, 5 Gray (Mass.), 106.

⁵⁸ Phil. Ev., 3d ed., p. 379. On this general subject see extended note to Gilmore v. Ham, 40 Am. St. Rep. 554; and to Burdett v. Greer, 15 Ann. Cas. 938. See § 249, *ante*.

⁵⁹ Cochran v. Cunningham, 16 Ala. 448, 50 Am. Dec. 186; Curry v.

White, 51 Cal. 530; Burns v. McKenzie, 23 Cal. 101; Cooper v. Wood, 1 Colo. App. 101, 27 Pac. 884; Brewster v. Hardeman, Dud. (Ga.) 138; Peoria Scrap Iron Co. v. Cohen, 113 Ill. App. 30; Winslow v. Newlan, 45 Ill. 145; Conkey v. Barbour, 22 Ind. 196; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Conery v. Hayes, 19 La. Ann. 325; Buard v. Lemee, 12 Rob. (La.) 243; Ward v. Howell, 5 Har. & J. (Md.) 60; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Pennoyer v. David, 8 Mich. 407; First Nat. Bank of Shakopee v. Strait, 65 Minn. 162, 67 N. W. 987; Maxey v. Strong, 53 Miss. 280; Dowzelot v. Rawlings, 58 Mo. 75; Brady v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Williams v. Manning, 41 How. Pr. (N. Y.) 454; Pringle v. Leverich, 97 N. Y. 181, 49 Am. Rep. 522; Hackley v. Patrick, 3 Johns. (N. Y.) 536;

where the declarations of one partner have been received against other partners, such declarations related to transactions occurring during the existence of the partnership which established the amount, nature or continued existence of the claim, but did not create a new liability.⁶⁰ Many of the cases on this subject have related to the adjustments of accounts by one partner after the dissolution of the partnership. In such cases the statements may be admitted as part of the *res gestae*, but by the weight of authority when the admission, made after the dissolution, is not part of some act which the person is authorized to do, it is not admissible as against any person except himself.⁶¹ It needs the citation of no authority that such admissions are evidence against the person making them. When the admission of one partner is sought to be used against the representatives of a deceased partner who deny such admission, they are not concluded by it, and are entitled to every defense which their answer will allow to be made under it.⁶²

§ 251 (252). Partnership to be proved before admissions are received.—The necessary foundation to charge one partner with the admission of another is proof of the

Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. Supp. 132; Flanagan v. Champion, 2 N. J. Eq. 51; Detrick v. McLean, 112 N. C. 840, 17 S. E. 165; Wilson v. Waugh, 101 Pa. 233; Hogg v. Orgill, 34 Pa. 344; Crumless v. Sturgess, 6 Heisk. (Tenn.) 190; Burdett v. Greer, 63 W. Va. 515, 129 Am. St. Rep. 1014, 15 Ann. Cas. 935, 15 L. R. A., N. S., 1019, 60 S. E. 497; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. Ed. 736.

⁶⁰ Austin v. Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Taylor v. Hillyer, 3 Blackf. (Ind.) 433, 26 Am. Dec. 430; Hinkley v. Gilligan, 34 Me. 101; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Buxton v. Edwards, 134 Mass. 567; Rich v. Flanders, 39

N. H. 304; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Fripp v. Williams, 14 S. C. 502; Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611.

⁶¹ Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Kerper v. Wood, 48 Ohio St. 613, 15 L. R. A. 656, 29 N. E. 501; Lefavour v. Yandes, 2 Blackf. (Ind.) 240; Story v. Barrell, 2 Conn. 665; Pennoyer v. David, 8 Mich. 407. See, also, cases last cited.

⁶² McElroy v. Ludlum, 32 N. J. Eq. 828. The surviving partner and the legal representatives of a deceased partner were joined as defendants; the former made admissions which the latter repudiated.

partnership. It is very clear that before one partner can be charged with the admission of another, the partnership relation must be shown—and that by other evidence than the admission itself. A *prima facie* case of copartnership must be established by the means best available, either direct, as where in a bankruptcy proceeding the members of the firm filed a proof of debt setting forth the names of the members,⁶³ or by some facts of corroboration or ratification which may be sufficient to launch the case. The admission *per se* can be received only to affect the person making it.⁶⁴ It is for the judge to determine whether there is *prima facie* evidence of the copartnership upon which the jury could be asked to find the fact.⁶⁵ But the “existence of the partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations and conduct of the parties, or by the act of one and the declarations or conduct of others.”⁶⁶ And since it must

⁶³ *In re Henschel*, 114 Fed. 968.

⁶⁴ *Whitney v. Ferris*, 10 Johns. (N. Y.) 66; *Robbins v. Willard*, 6 Pick. (Mass.) 464; *Winchester v. Whitney*, 138 Mass. 549; *Evans v. Corriell*, 1 G. Greene (Iowa), 25; *Hahn v. St. Clair Sav. etc. Co.*, 50 Ill. 456; *Degan v. Singer*, 41 Ill. 28; *Gardner v. Northwestern Mfg. Co.*, 52 Ill. 367; *Hodges v. Moore*, 46 Fla. 598, 35 South. 13; *Cowan v. Kinney*, 33 Ohio St. 422; *Edgell v. Macqueen*, 8 Mo. App. 71. Thus in *Stringfellow v. Montgomery*, 57 Tex. 349, the only evidence against the defendants as joint contractors was the admission of one of them that he had made the contract as agent for the other. The court very readily denominated it as mere hearsay and not evidence.

⁶⁵ *Hilton v. McDowell*, 87 N. C. 364; *Dennis v. Kolm*, 131 Cal. 91, 63 Pac. 141; *Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379.

⁶⁶ *Cross v. Langley*, 50 Ala. 8; *Campbell v. Hastings*, 29 Ark. 512; *Berry v. Lathrop*, 24 Ark. 12; *Dennis v. Kohm*, 131 Cal. 91, 63 Pac. 141; *Iron Works v. Buse*, 4 Br. Col. 419; *Drumwright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Boswell v. Blackman*, 12 Ga. 591; *Bartlett v. Wilcox*, 68 Ill. App. 142; *Barcroft v. Harworth*, 29 Iowa, 462; *Holmes v. Budd*, 11 Iowa, 186; *Jennings v. Estes*, 16 Me. 323; *Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206; *Smith v. Collins*, 115 Mass. 388; *Allecott v. Strong*, 9 Cush. (Mass.) 323; *Armstrong v. Potter*, 103 Mich. 409, 61 N. W. 657; *Slipp v. Hartley*, 50 Minn. 118, 36 Am. St. Rep. 629, 52 N. W. 386; *Bank of Osceola v. Outhwaite*, 50 Mo. App. 124; *McCann v. McDonald*, 7 Neb. 305; *Converse v. Shambaugh*, 4 Neb. 376; *Mershon v. Hobensack*, 22 N. J. L. 372; *Flanagin v. Champion*, 2 N. J. Eq. 51; *Davidson v. Hutchins*, 1 Hilt. (N. Y.) 123; *Henry v. Willard*, 73 N. C. 35; *McFadyen v. Har-*

often happen that the admissions of only one partner can be proved at a time, his declarations may be received when a partnership is alleged without proof of the partnership at that time, but it is the duty of the judge to instruct the jury that admissions can only bind the party making them, unless the partnership is also proved;⁶⁷ and here, as in other cases, the order of the testimony is within the discretion of the judge.⁶⁸

§ 252 (253). Admissions by joint contractors not partners.—Closely allied to the *status* of copartners is that of joint contractors and those jointly liable on some specific obligation, with this main distinction, that while the admissions of partners extend to all of the ramifications of the partnership concern, that of joint contractors, and in that term are included all jointly liable upon an obligation, is limited to such statements made concerning an existing obligation on the part of the declarant and the others referred to by him. It has been sometimes held that in the case of mere joint contracts, where there is no partnership relation, neither joint contractor is to be presumed to be the agent of the other to charge him by admissions, and that in such cases the admissions of one are not admissible against the others.⁶⁹ But by the prevailing rule at common law the admissions of one of several persons jointly interested in the subject matter relating to such subject were admissible against the others.⁷⁰ Thus, the admissions of

rington, 67 N. C. 29; Reed v. Kremer, 111 Pa. 482, 56 Am. St. Rep. 295, 5 Atl. 237; Slaymaker v. Gundacker, 10 Serg. & R. (Pa.) 75. Such declarations are received where partners are sued also as conspirators: Work v. McCoy, 87 Iowa, 217, 54 N. W. 140; Parsons, Part., 3d ed., p. 204, and cases there cited. As to proof against one of declarations of another, to show partnership, see note to Vanderhurst v. De Witt, in 20 L. R. A. 595.

⁶⁷ Jennings v. Estes, 16 Me. 323.

⁶⁸ Hilton v. McDowell, 87 N. C. 364; Lea v. Guice, 21 Miss. 656.

⁶⁹ Lewis v. Woodworth, 2 N. Y. 512, 51 Am. Dec. 319; Wallis v. Randall, 81 N. Y. 164 (in this case the admission was seven years later than the agreement).

⁷⁰ Camp v. Dill, 27 Ala. 553; Rotan v. Nichols, 22 Ark. 244; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Bacon v.

one co-obligor upon a bond have been received against the other;⁷¹ and the admissions of one *joint maker* of a promissory *note* against the other maker have also been held competent.⁷² The same is true of joint grantors,⁷³ joint purchasers of personal property,⁷⁴ and joint covenantors.⁷⁵ The *quantum* of interest of the declarant does not affect the extent of its application. It is the fact of joint interest, not the size of the fractional part, that governs. It will not do to say that the admissions of one partner, or joint debtor, are to have more or less influence on his codefendants, in proportion to his interest in the subject matter of

Green, 36 Fla. 325, 18 South. 870; Tillinghast v. Nourse, 14 Ga. 641; Miller v. Mathias, 145 Ill. App. 465; Thomas v. Mosher, 128 Ill. App. 479; Chapel v. Washburn, 11 Ind. 393; State v. Hogan, 3 La. Ann. 714; Davis v. Keene, 23 Me. 69; Lowe v. Boteler, 4 Har. & M. (Md.) 346, 1 Am. Dec. 410; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; Smith v. Collins, 115 Mass. 388; Martin v. Root, 17 Mass. 222; Frye v. Barker, 4 Pick. (Mass.) 382; Mathews v. Phelps, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; St. Louis Paint Mfg. Co. v. Mephram, 30 Mo. App. 15; Baker v. Union Stock etc. Bank, 63 Neb. 801, 93 Am. St. Rep. 484, 89 N. W. 269; Lee v. Lamprey, 43 N. H. 13; Walling v. Rosevelt, 16 N. J. L. 41; Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318; Miller v. Harris, 117 App. Div. 395, 102 N. Y. Supp. 604; Shirk v. Brookfield, 77 N. Y. App. Div. 295, 79 N. Y. Supp. 225; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Bell v. Coiel, 2 Hill Eq. (S. C.) 108, 27 Am. Dec. 448; Knight v. Houghtalling, 85 N. C. 17; Souder v. Schechterly, 91 Pa. 83; Costello v. Cave, 2 Hill (S. C.), 528, 27 Am. Dec. 404; Bowman v. Rector (Tenn. Ch. App.), 59 S. W. 389; Hardy v. De Leon, 5 Tex. 211;

Bank of United States v. Lyman, 20 Vt. 666, Fed. Cas. No. 924; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Dickinson v. Clarke, 5 W. Va. 280; National Bank v. Cotton, 53 Wis. 31, 9 N. W. 926; Howard v. Cobb, 3 Day, 309, 12 Fed. Cas. No. 6755; Crosse v. Bedingfield, 5 Jur. 836, 10 L. J. Ch. 219, 12 Sim. 35, 59 Eng. Reprint, 1043 (bond); Burleigh v. Stott, 8 Barn. & C. 36, 108 Eng. Reprint, 956; Perham v. Raynal, 2 Bing. 306, 130 Eng. Reprint, 323.

⁷¹ Crosse v. Bedingford, 12 Sim. 35, 59 Eng. Reprint, 1043.

⁷² Camp v. Dill, 27 Ala. 553; Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Barrick v. Austin, 21 Barb. (N. Y.) 241; Iglehart v. Jernegan, 16 Ill. 513; Cooper v. Hockung Valley Nat. Bank, 21 Ind. App. 358, 36 Am. St. Rep. 365, 50 N. E. 775; Brown v. Munger, 16 Vt. 12; Martin v. Root, 17 Mass. 222. In the case of Nye v. Grubbs, 8 Smedes & M. (Miss.) 643, the testimony tendered was that of one maker in favor of the other.

⁷³ Jackson v. Vail, 7 Wend. (N. Y.) 125.

⁷⁴ Rotan v. Nichols, 22 Ark. 244.

⁷⁵ Walling v. Rosevelt, 16 N. J. L. 41.

the joint contract. If he is liable to the plaintiff to the same extent that his codefendants are, the extent to which they are bound by his admissions cannot be measured or graduated by the quantity of his interest in the contract.⁷⁶ The parties must be before the court; that is to say, the admissions made by a joint debtor or contractor cannot be used unless he is a party to the suit.⁷⁷ Where a party has been named in a complaint as a party defendant but not served, his admissions against the defendants who have been served are hearsay and inadmissible.⁷⁸ And the admission of one party, whether he be a party to the record or not, is not competent to establish the fact of such joint interest with other parties to the suit. *That* fact must first be made by independent testimony; and until that is done, such admissions could only be evidence against the party making them.⁷⁹ It is clear that the admissions of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the *interest* is a *subsisting* one at the time of the admission.⁸⁰ And when the joint contract is severed by the death of one of the contractors, the subsequent admissions of the survivor as to past events do not bind the representatives of the deceased.⁸¹ But where one of the joint contractors became bankrupt and was not joined as a party, that reason being alleged, it has been held his admissions were admissible.⁸²

⁷⁶ Walling v. Roosevelt, 16 N. J. L. 41.

⁷⁷ Abel v. Forgue, 1 Root (Conn.), 502; Hamlin v. Fitch, Kirb. (Conn.), 174. Citing Hemings v. Robinson, 4 Barnes, 436, 94 Eng. Reprint, 992; Dickinson v. Clarke, 5 W. Va. 280.

⁷⁸ Derby v. Rounds, 53 Cal. 659; Griswold v. Burroughs, 60 Hun, 558, 15 N. Y. Supp. 314. There was formerly some doubt about this, as appears by the reference in Dickinson v. Clarke, *supra*, to 1 Greenl. Ev., §§ 172-174.

⁷⁹ Dickinson v. Clarke, *supra*.

⁸⁰ Blakeney v. Ferguson, 14 Ark. 640.

⁸¹ Atkins v. Tredgold, 2 Barn. & C. 23, 107 Eng. Reprint, 291; Fordham v. Wallis, 10 Hare, 217, 68 Eng. Reprint, 905; Slaymaker v. Gundacker, 10 Serg. & R. (Pa.) 75.

⁸² Howard v. Cobb, Fed. Cas. No. 6755, 3 Day, 309, cited in Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147.

§ 252a (253). **Admissions by coparties.**—The mere fact, however, of parties without joint interest being codefendants or coplaintiffs does not render the statements of one admissible against the other. The admission of one defendant is not evidence against a plaintiff pursuing another defendant on independent grounds.⁸³ While such admissions are evidence against the party himself, they cannot be used against those who have been joined with him, but not as joint contractors, as plaintiff or defendant, as the case may be.⁸⁴ There are, however, cases where although the parties joined are not partners or joint contractors, they yet have a common interest in the subject matter, and the effect of their admissions is treated in the next section.

§ 253 (254). **Declarations by persons having a mere community of interest.**—The difference between joint

⁸³ *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183.

⁸⁴ *Brown v. Fowler*, 133 Ala. 310, 32 South. 584; *Lewis v. Lee Co.*, 66 Ala. 480; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *Starr Burying Ground Assn. v. North Lane Cemetery Assn.*, 77 Conn. 83, 58 Atl. 467; *Kiser v. Dannenberg*, 88 Ga. 541, 15 S. E. 17; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Coldren L. Co. v. Royal*, 140 Iowa, 381, 118 N. W. 426; *Rogers v. Suttle*, 19 Ill. App. 163; *Hayes v. Burkam*, 67 Ind. 359; *Smith v. Meiser*, 11 Ind. App. 468, 38 N. E. 1092; *Connors v. Chingren*, 111 Iowa, 437, 82 N. W. 934; *Boynton v. Hardin*, 9 Kan. App. 166, 58 Pac. 1007; *Illinois C. R. Co. v. Houchins*, 121 Ky. 526, 123 Am. St. Rep. 205, 1 L. R. A., N. S., 375; 28 Ky. Law Rep. 499, 89 S. W. 530; *Milton v. Hunter*, 13 Bush (Ky.), 163; *Trask v. Chase*, 107 Me. 127, 77 Atl. 698; *Rosseau v. Deschenes*, 203 Mass. 261, 89 N. E. 391; *Williams v. City of Taunton*, 125 Mass.

34; *Hubbell v. Bissell*, 2 Allen (Mass.), 196; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576; *Enders v. Richards*, 33 Mo. 598; *Mathewson v. Eureka Powder Works*, 44 N. H. 289; *Whaples v. Fahys*, 109 App. Div. 594, 96 N. Y. Supp. 323; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105; *Tredwell v. Graham*, 88 N. C. 208; *Peebles v. Peebles*, 63 N. C. 656; *Stevenson v. Ebervale Coal Co.*, 201 Pa. 112, 88 Am. St. Rep. 805, 50 Atl. 818; *Sunday v. Dietrich*, 16 Pa. Super. 640; *Continental Ins. Co. v. Delpeuch*, 82 Pa. 225; *Blackstock v. Long*, 19 Pa. 340; *De Bruhl v. Patterson*, 12 Rich. (S. C.) 363; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Bruce v. Laing* (Tex. Civ. App.), 64 S. W. 1019; *Shelburn v. McCrocklin* (Tex. Civ. App.), 42 S. W. 329; *Dickinson v. Clarke*, 5 W. Va. 280; *Johnston v. Hamburger*, 13 Wis. 175; *Dexter v. Arnold*, 7 Fed. Cas. No. 3859, 2 Sum. 152.

interest and community of interest is so marked that the necessity for discussing the effect of admissions by those who are not jointly interested would need some apology, if there had not been in olden times a sound reason—or at all events a reason—for it. In the days when parties were not competent witnesses it is easy to account for the high value of admissions, and the struggle to introduce them into evidence; but now that these disabilities have been removed, the law is perfectly well settled. The mere fact that several persons have a *common interest*, as contradistinguished from a joint interest, in the subject matter involved in the suit does not render their admissions competent against each other.⁸⁵ Such is the modern law, and its soundness is beyond question. Illustrations are given for the reason stated in opening this section; for although this is now practically a universal proposition, the authorities on the law as it was might have a tendency to mislead. This is specially so with regard to rights under wills. There may be many legatees and devisees, but although they derive their benefit from a common source—the testator—they clearly have no rights based on the benefit of

⁸⁵ Dean v. Ross, 105 Cal. 227, 38 Pac. 912; Chappell v. John, 45 Colo. 45, 132 Am. St. Rep. 134, 16 Ann. Cas. 854, 99 Pac. 44; Kiser v. Dannenberg, 88 Ga. 541, 15 S. E. 17; Snyder v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Pierce v. Goldsberry, 35 Ind. 317; McCormick Harvesting Mach. Co. v. Perkins, 135 Iowa, 64, 110 N. W. 15; Louisville Gas Co. v. Kentucky Heating Co., 142 Ky. 253, 134 S. W. 205; Weber v. Coussy, 12 La. Ann. 534; Eakle v. Clarke, 30 Md. 322; Osborne v. Bell, 62 Mich. 214, 28 N. W. 841; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Coxe v. Whitney, 9 Mo. 531; Burnham v. Sweatt, 16 N. H. 418; Finelite v. Sonberg, 75 N. Y. App. Div. 455, 78 N. Y. Supp. 338; Daugherty v. Taylor, 140 N. C. 446, 53 S. E. 296; Belding v. Archer, 131

N. C. 287, 42 S. E. 800; Martin v. Adams, 29 S. C. 597, 6 S. E. 860; Thurman v. Blankenship, 79 Tex. 171, 15 S. W. 387; Birkman v. Farenthold, 52 Tex. Civ. App. 335, 114 S. W. 428; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287; Forney v. Ferrell, 4 W. Va. 729; Hudkins v. Crim, 64 W. Va. 225, 61 S. E. 166; Stamnes v. Milwaukee etc. R. Co., 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62; Hyman v. Wheeler, 29 Fed. 347, 15 Morr. Min. Rep. 519; Hollingsworth v. Shakeshaft, 14 Beav. 492, 21 L. J. Ch. 722, 51 Eng. Reprint, 375. There is no such joint interest between garnishee and debtor as would make the admissions of one evidence against the other: Enos v. Tuttle, 3 Conn. 247.

each other. They have an interest in common, in that each does receive benefit from the same source, and it needs no elaboration to show that that is the extent of it. For example, the admissions of an *executor* or of an *administrator* are not admissible against the heirs or devisees,⁸⁶ or against his coexecutor or coadministrator,⁸⁷ or against a subsequent administrator *de bonis non*.⁸⁸ Admissions are received on the principle that they are statements against the interest of the party. The administrator or executor as such has no such legal interest in the estate that he ought to be allowed to prejudice its interests by statements to third persons. In a legal sense, it is to him personally a matter of indifference whether claims are allowed or disallowed, or whether the assets are distributed among creditors or among heirs and next of kin.⁸⁹ And the rule is the same although the administrator is also one of the heirs of the estate, as in that capacity he has no such joint interest with the other heirs as to charge them by his admissions.⁹⁰ Of course, statements of an executor or administrator, made while representing an estate and attending to its business, may be admitted when they constitute a part of the *res gestae*.⁹¹ And so as between legatees and devisees. The supreme court of Pennsylvania

⁸⁶ *Crandall v. Gallup*, 12 Conn. 565; *Marshall v. Adams*, 11 Ill. 37; *Dent v. Dent*, 3 Gill (Md.), 482; *Mangun v. Webster*, 7 Gill (Md.), 78; *Fellows v. Fellows*, 37 N. H. 75; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Osgood v. Pres. etc. of Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. 1045. For admission against administrator, see *Heywood v. Heywood*, 10 Allen (Mass.), 105.

⁸⁷ *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Fox v. Waters*, 12 Ad. & E. 43, 113 Eng. Reprint, 727; *Walkup v. Pratt*, 5 Har. & J. (Md.) 51; *Potter v. Greene*, 51 Hun (N. Y.),

6, 3 N. Y. Supp. 605; *Bruyn v. Russell*, 52 Hun (N. Y.), 17, 4 N. Y. Supp. 784.

⁸⁸ *Pease v. Phelps*, 10 Conn. 62. Although both in *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735, and *Lashlee v. Jacobs*, 9 Humph. (Tenn.) 718, the contrary is directly held.

⁸⁹ *Hueston v. Hueston*, 2 Ohio St. 488; *Jones v. Jones*, 21 N. H. 219; *Church v. Howard*, 79 N. Y. 415.

⁹⁰ *Hueston v. Hueston*, 2 Ohio St. 488; *Church v. Howard*, 79 N. Y. 415.

⁹¹ *Whiton v. Snyder*, 88 N. Y. 299; *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282, and note.

in an early contested will case said: "Margaret King was a principal devisee in the will, which gave her the whole estate (except a few legacies to a small amount) for her life; after her death one-half was to go to her relations, and one-half to the relatives of the testator. . . . Granting that she is so much a party to the suit, that her confessions might be evidence against herself, these confessions are not the confessions of the others, who have a separate interest. It is not like the case of joint partners, where the confession of one may be used against both. We are now to establish a general principle to govern all cases of this kind. It happens that Margaret King has a large interest under this will. But if her declarations are evidence, so also must be the declarations of a legatee, who takes but five dollars, or any other sum. The *quantum* of interest will make no difference."⁹² And later that court, per Woodward, J., said: "The general rule of law consonant with reason is, that one person is not to be prejudiced by the unauthorized declarations of another. The exceptions to this rule are found in those cases where there is a joint interest or privity of design between several. In such case each is presumed to speak for the whole; but where there is neither joint interest nor combination, where each claims independently of the other, though under a common instrument, the words of one no more than his acts can bind the other. The interests of these devisees and legatees under the will are several and joint; and hence the three who impeach it were bound, on principle, to produce evidence that was competent against all the rest."⁹³ In a Massachusetts case, where the issue was whether the will of the deceased was procured by fraud and undue influence, and whether the testator was ignorant of its contents, it was held that the admissions of the executor and legatees could not be received, although parties to the record, to the prejudice of

⁹² Tilghman, C. J., in *Nussear v. Arnold*, 13 Serg. & R. (Pa.) 323.

⁹³ *Clark v. Morrison*, 25 Pa. 453. See, also, *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691.

other legatees or devisees; that there was no such relation of privity or joint interest as to render the statements admissible. "Devisees or legatees have not that joint interest in the will which will make the admissions of one admissible against the other legatees. . . . Admitting for the present that any interest in a will obtained by undue influence cannot be held by third parties, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions." Both on reason and authority the rule as laid down in the Pennsylvania and Massachusetts cases referred to is right and in consonance with the modern decisions in other states.⁹⁴ The same rule applies as to the admission of one of several legatees as to the insanity of the testator.⁹⁵ In Kentucky, however, there are rulings admitting such statements with what appears to be an objectionable qualification. The courts there have said: "It would, in our opinion, be more consistent with principle and analogy to allow the admission of a fact by one of several legatees or devisees, evidently against his interest, to be evidence, entitled to the effect not of an admission by all of his associates in interest but of the simple circum-

⁹⁴ *Carpenter's Appeal*, 74 Conn. 431, 51 Atl. 126; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Hayes v. Burkam*, 67 Ind. 359; *Casad v. Ripley*, 145 Iowa, 544, 124 N. W. 196; *Hertrich v. Hertrich*, 114 Iowa, 643, 89 Am. St. Rep. 389, 87 N. W. 689; *Britton v. Worcester County*, 123 Mass. 309; *Shailer v. Bumstead*, 99 Mass. 112; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Prewett v. Coopwood*, 30 Miss. 369; *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *Schierbaum v. Schemme*, 157

Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *Thompson v. Thompson*, 13 Ohio St. 356; *Boyd v. Eby*, 8 Watts (Pa.), 66; *Hauberger v. Root*, 6 Watts & S. (Pa.) 431; *In re Myer's Will*, 184 N. Y. 54, 76 N. E. 920; *Whaples v. Fahys*, 109 App. Div. 594, 96 N. Y. Supp. 323.

⁹⁵ *McMillan v. McDill*, 110 Ill. 47. See note on "Admissibility of Declaration of Legatee or Devisee on Issue of Undue Influence" to *In re Hewitt*, 21 Ann. Cas. 50.

stance that a party interested admitted what he probably would not have done had he not believed it to be true. And this fact, though not entitled to the effect of an admission by all concerned in a common interest under the will, may nevertheless tend legitimately to a presumption against all of them (in a degree corresponding with all the circumstances) that the thing admitted may be true. Such parties, like co-obligors, have a common interest in the same question, and must stand or fall together. They are thus consolidated by their testator and by their own act in claiming under this will."⁹⁶ While the opinion of such judges as Robertson, C. J., Lindsay, C. J., and Burnam, J., are entitled to great respect, their adoption of the rule referred to founded mainly on *stare decisis*, and incidentally on the possibility of an admission by one of many legatees tending to a presumption against all that the thing admitted may be true, is opposed to the great preponderance of authority founded on a better appreciation of the principle underlying the exclusion. The admissions of an *heir* are not admissible to prove a claim against the executor or administrator,⁹⁷ unless he is the only heir interested upon that side of the action.⁹⁸ The admissions of one *tenant in common* are not evidence against another.⁹⁹ Thus it was held that the evidence which a part owner of a vessel had given in a former suit as to the extent and cost of the repairs put upon the vessel was not admissible against the other part owners.¹⁰⁰ Nor is there any such joint

⁹⁶ *Gibson v. Sutton*, 24 Ky. Law Rep. 868, 70 S. W. 188; *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399; *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324; *Milton v. Hunter*, 13 Bush (Ky.), 163.

⁹⁷ *Roberts v. Trawick*, 13 Ala. 68; *Bovard v. Wallace*, 4 Serg. & R. (Pa.) 499; *Dietrich v. Dietrich*, 4 Watts (Pa.), 167 and note; *Boyd v. Eby*, 8 Watts (Pa.), 66; *Hauberg v. Root*, 6 Watts & S. (Pa.) 431; *Blake's Exrs. v. Quash's Exr.*, 3 McCord (S. C.), 340.

⁹⁸ *Nussear v. Arnold*, 13 Serg. & R. (Pa.) 323.

⁹⁹ *Stephens v. Barnwell*, 154 Ala. 124, 45 South. 233; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Lane v. Doty*, 4 Barb. (N. Y.) 530; *Corning v. Troy Iron etc. Factory*, 39 Barb. (N. Y.) 311; *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Freeman on Cotenancy*, §§ 169-172.

¹⁰⁰ *The New Orleans*, 106 U. S. 13, 27 L. Ed. 96, 1 Sup. Ct. Rep. 90.

interest or privity among the members of a board of public officers,¹ nor among several *indorsers* of a promissory note,² nor between a trustee and a *cestui que trust*,³ or trustees and their colleagues,⁴ as to make the admission of one evidence against all. The same rule holds as to the admissions of a *devisee*;⁵ and an heir cannot bind the other heirs at law by any admissions or statements he may make.⁶ But where the ownership of property is proved to be joint, and all the owners are coparties, the admission of one who was a joint owner at the time is competent against the others on the basis of the implied agency.⁷ Out of an abundance of caution we add that these propositions are stated on the basis that the admissions were not part of the *res gestae*, and of no agency being established between the parties or any assent by them, either direct or otherwise, when made in the presence of their coparties.⁸

§ 254 (255). Declarations by wrongdoers—Conspiracy.

There is, in general, no such joint interest between wrongdoers in actions for negligence, trespass or other torts that the declaration of one defendant is an admission against the others. Thus trover of a horse was laid by one against Wolf and Crafts, and Wolf admitted the plaintiff's title

¹ Lockwood v. Smith, 5 Day (Conn.), 309.

² Slaymaker v. Gundacker, 10 Serg. & R. (Pa.) 75.

³ Bragg v. Geddes, 93 Ill. 39, 5 Morr. Min. Rep. 624; Eitelgeorge v. Mutual House etc. Assn., 69 Mo. 52. See, also, Mason v. Poulson, 40 Md. 355 (admission of administrator).

⁴ Salado College v. Davis, 47 Tex. 131; Walker v. Dunspaugh, 20 N. Y. 170.

⁵ O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105.

⁶ Stitzel v. Miller, 250 Ill. 72, Ann. Cas. 1912B, 412, 34 L. R. A., N. S., 1004, 95 N. E. 53.

⁷ Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; State v. Reading's Tenants, 1 Harr. (Del.) 23; Ozment v. Anglin, 60 Ga. 242; Black v. Lamb, 12 N. J. Eq. 108; Jackson v. McVey, 18 Johns. (N. Y.) 330; Irby v. Brigham, 9 Humph. (Tenn.) 750; Whitaker v. Thayer (Tex. Civ. App.), 123 S. W. 1137; Tuttle v. Turner, 28 Tex. 759; Peters v. Nolan Coal Co., 61 W. Va. 392, 9 L. R. A., N. S., 989, 56 S. E. 735.

⁸ Arkansas Valley Trust Co. v. McIlroy, 97 Ark. 160, 31 L. R. A., N. S., 1020, 133 S. W. 816; Crippen v. Morse, 49 N. Y. 63; Charleston Livestock Co. v. Collins, 79 S. C. 383, 60 S. E. 944.

while Crafts denied it. A verdict was given for the plaintiff and exception taken by Crafts to the admission of the declarations of Wolf in regard to the ownership of the property in controversy was sustained. As the case was presented upon the evidence, the plaintiff had not shown any title in himself at any time, by any competent evidence, as against Crafts. The admissions of Wolf were competent evidence against him; but as against Crafts, it was necessary that the plaintiff should go further, and show, at least, that at some previous period he was the owner of the horse. "The declarations of Wolf do not prove that fact, except against himself. The question is not upon the admission of the declarations of Wolf to qualify his title, or explain his possession; but upon the competency and sufficiency of such declarations to show affirmatively a title at any former period in the plaintiff. In the view we take of this question, such declarations are only competent to rebut a title set up by or under the person making them, and not as affirmative evidence of title in the person who is thus stated to be the owner, as against a third party who denies that the plaintiff was ever the owner of the property."⁹ But in such cases, if the declaration or act forms a part of the *res gestae*, it is admissible on grounds elsewhere discussed, not only as an admission affecting the declarant, but as substantive evidence.¹⁰ So where several persons having a common

⁹ *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487; *Edgerton v. Wolf*, 6 Gray (Mass.), 453; *Morse v. Royal*, 12 Ves. 362, 33 Eng. Reprint, 134. On the subject of this section, see note to *People v. McQuade*, 1 L. R. A. 273. This rule has been extended even to the case of joint trespassers (*Rex v. Inhabitants of Hardwick*, 11 East, 584, 103 Eng. Reprint, 1129), not, it is true, that the admissions of one defendant will prove the others to be trespassers; but if they be established to be cotrespassers, by other

competent testimony, the declarations of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object: *Walling v. Rosevelt*, 16 N. J. L. 41.

¹⁰ *Carpenter v. Selden*, 5 Sand. (N. Y.) 77; *Wilson v. O'Day*, 5 Daly (N. Y.), 354; *North v. Miles*, 1 Camp. 389; *Bowsher v. Calley*, 1 Camp. 391; *Rex v. Hardwick*, 11 East, 585, 103 Eng. Reprint, 1129; *Powell v. Hodgetts*, 2 Car. & P. 432.

motive are associated for the same illegal purpose, an act or declaration of one of the parties in reference to the common object, and forming part of the *res gestae*, is admissible against the other;¹¹ and where several *jointly* attempt to accomplish a *fraud*, the declarations of one of them, made during the progress and in the prosecution of the joint undertaking or accompanying and explaining acts done in furtherance of it, are evidence against the others.¹² Thus in an action by a woman for indecent *assault*, the defendant may introduce evidence of statements by the plaintiff's husband tending to show that the action was brought to carry out a scheme contrived by them for extorting money. But the combination must be clearly proved to render such evidence admissible.¹³ It is on the same principle that, when a *conspiracy* is shown, the acts and declarations of each conspirator in furtherance of the common object are admissible against the others.¹⁴ But in such cases it must first be proved by other evidence that a conspiracy existed at the time the declarations were

¹¹ *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383; *Clinton v. Estes*, 20 Ark. 216; *State v. Grady*, 34 Conn. 118; *Lasher v. Littell*, 202 Ill. 551, 67 N. E. 372; *State v. Nash*, 7 Iowa, 347; *Oldham v. Bentley*, 6 B. Mon. (Ky.) 428; *State v. Hogan*, 3 La. Ann. 714; *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *Commonwealth v. Brown*, 14 Gray (Mass.), 419; *People v. Pitcher*, 15 Mich. 397; *Mask v. State*, 32 Miss. 405; *State v. Ross*, 29 Mo. 32; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110, 115, and note; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *State v. Thibau*, 30 Vt. 100; *American Fur Co. v. United States*, 2 Pet. (U. S.) 358, 7 L. Ed. 450; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132, 19 L. Ed. 106; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Wiborg v. United States*, 163 U. S. 632, 657, 41

L. Ed. 289, 16 Sup. Ct. Rep. 1127, 1197.

¹² *Connors v. Chingren*, 111 Iowa, 437, 82 N. W. 934; *Lee v. Lamprey*, 43 N. H. 13; *Patton v. Freeman*, 1 N. J. L. 113; *Apthorp v. Comstock*, 2 Paige Ch. (N. Y.) 482; *Jackson v. Summerville*, 13 Pa. 359; *Peterson v. Speer*, 29 Pa. 478; *Scott v. Baker*, 37 Pa. 330; *Jenne v. Joslyn*, 41 Vt. 478.

¹³ *Mawich v. Elsey*, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

¹⁴ *Clinton v. Estes*, 20 Ark. 216; *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446; *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340; *Commonwealth v. Crowninshield*, 10 Pick. (Mass.) 497; *Lynes v. State*, 36 Miss. 617; *State v. Ross*, 29 Mo. 32; *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545.

made.¹⁵ The mere declarations of one of the alleged conspirators are not competent for this purpose, unless they form a part of the *res gestae*.¹⁶ But in such cases something is left to the *discretion of the court as to the order of the testimony*.¹⁷ Even if a conspiracy is shown *aliunde*, the declarations of one conspirator are not admissible against the others, if made after the common design is accomplished or abandoned.¹⁸ The common fraudulent design may be shown by subsequent participation in the fraud and its fruits with the knowledge of the facts; and where there is proof of a *common design* to defraud, the declarations of one participant are admissible against the other, although made in his absence.¹⁹

§ 255 (256). Declarations of agents.—The principle on which the declarations, acts or representations of an agent, within the scope of his authority and the execution of his agency, are permitted to be proved is, that they are considered and treated as the declarations, acts and representations of his principal, and constitute pertinent and legitimate evidence. What is so done, by an agent, is done by the principal through him, as his mere instrument. So, whatever is said by an agent, either in making a contract for his principal, or at the time and accompanying the per-

¹⁵ Aughey v. Windrem, 137 Iowa, 315, 114 N. W. 1047; Davis v. Keene, 23 Me. 69; Hellman v. Somerville, 212 Mo. 415, 111 S. W. 30; Tuttle v. Turner, 28 Tex. 759.

¹⁶ Metcalfe v. Conner, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340; Burke v. Miller, 7 Cush. (Mass.) 547; Benford v. Sanner, 40 Pa. 9, 80 Am. Dec. 545. As to admissibility of declarations of co-conspirators as *res gestae*, see note to Ohio etc. R. Co. v. Stein, 19 L. R. A. 745.

¹⁷ People v. Compton, 123 Cal. 403, 56 Pac. 44; State v. Thompson, 69 Conn. 720, 38 Atl. 868; State v. Bolden, 109 La. 484, 33 South. 571;

Commonwealth v. Rogers, 181 Mass. 184, 63 N. E. 421; Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800; Lawrence v. State, 103 Md. 17, 63 Atl. 96; Wright v. Stewart, 130 Fed. 905.

¹⁸ Clinton v. Estes, 20 Ark. 216; Lynes v. State, 36 Miss. 617; State v. Duncan, 64 Mo. 262; State v. Ross, 29 Mo. 32; Benford v. Sanner, 40 Pa. 9, 80 Am. Dec. 545; Sorenson v. United States, 143 Fed. 820, 74 C. C. A. 468.

¹⁹ Lincoln v. Clafflin, 7 Wall. (U. S.) 132, 19 L. Ed. 106; Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; United States v. Francis, 144 Fed. 520.

formance of any act, within the scope of his authority, having relation to, and connected with, and in the course of, the particular contract or transaction in which he is then engaged, or, in the language of the old writers, *dum fervet opus*, is, in legal effect, said by his principal and admissible in evidence against such principal. It is well to observe the reason for this. It is because such declaration or act was made at the very time of the birth of the contract or transaction, or stood sponsor to it, and is treated, therefore, as the direct act of the principal, constituting a part of the *res gestae*, really an integral part of the whole negotiation, and, as obligatory on the principal as if the act or utterance were solemnly his own; and therefore it is capable of proof in the same way as if it had been the specific utterance, act or representation of the principal. Hence has been deduced the general rule that parties are not chargeable with the declarations of their agents, unless such declarations or statements are made during the transaction of business by the agent for the principal and in relation to such business and while within the scope of the agency; in other words, unless the representations may be deemed a part of the *res gestae*.²⁰

²⁰ *Fleming v. Lunsford*, 163 Ala. 540, 50 South. 921; *Belmont Coal etc. Co. v. Smith*, 74 Ala. 206; *Wilson v. Crittenden County Bank Trust Co.*, 98 Ark. 379, 135 S. W. 885; *Shields v. Smith*, 37 Ark. 47; *Byers v. Fowler*, 14 Ark. 86; *National Bank v. Schirm*, 3 Cal. App. 696, 86 Pac. 981; *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57, 73 Pac. 740; *Mulford v. Rowland*, 45 Colo. 172, 100 Pac. 603; *Edmunds v. Curtis*, 8 Colo. 605, 9 Pac. 793; *Perkins v. Burnet*, 2 Root (Conn.), 30; *Klair v. Philadelphia etc. R. Co. (Del.)*, 78 Atl. 1085; *Main v. Aukam*, 12 App. Cas. (D. C.) 375; *Thomas v. Price*, 56 Fla. 854, 48 South. 262; *Cable Co. v. Walker*, 127 Ga. 65, 56 S. E. 108; *Jones v. Harrell*, 110 Ga. 373, 35 S. E. 690;

Akers v. Kirke, 91 Ga. 590, 18 S. E. 366; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *Prussian Nat. Ins. Co. v. Empire Catering Co.*, 113 Ill. App. 67; *Burns v. Thompson*, 91 Ind. 146; *Kennell v. Boyer*, 144 Iowa, 303, 24 L. R. A., N. S., 488, 122 N. W. 941; *D. M. Osborne & Co. v. Ringland*, 122 Iowa, 329, 98 N. W. 116; *Nicola Bros. Co. v. Hurst*, 30 Ky. Law Rep. 851, 99 S. W. 917; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496; *Barrow v. Brown*, 28 La. Ann. 459; *Heath v. Jaquith*, 68 Me. 433; *Thomas v. Sternheimer*, 29 Md. 268; *Burbank v. Hammond*, 189 Mass. 189, 75 N. E. 102; *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218; *Butters Salt & Lumber Co. v. Vogel*,

This principle has been illustrated by numerous cases from which it appears that one condition of receiving the declarations of one alleged to be an agent is that the *agency* must be *proved aliunde*,²¹ and not by the declarations them-

135 Mich. 381, 97 N. W. 575; Greene v. Dockendorf, 13 Minn. 70; Cook v. Whitfield, 41 Miss. 541; Bergeman v. Indianapolis etc. R. Co., 104 Mo. 77, 15 S. W. 992; Norberg v. Plummer, 58 Neb. 410, 78 N. W. 708; Woods v. Banks, 14 N. H. 101; Callaway v. Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900; Keeler v. Salisbury, 33 N. Y. 648; Holt v. Johnson, 129 N. C. 138, 39 S. E. 796; Patterson v. United Artisans, 43 Or. 333, 72 Pac. 1095; Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. 314, 8 Atl. 794; Moore v. Bettis, 11 Humph. (Tenn.) 67, 53 Am. Dec. 771; Standefer v. Aultman etc. Machinery Co., 34 Tex. Civ. App. 160, 78 S. W. 552; Baldwin v. Doubleday, 59 Vt. 7, 8 Atl. 576; Hayward Rubber Co. v. Dunclee, 30 Vt. 29; Selber v. Spring Brook Trout Farm, 19 Wash. 49, 52 Pac. 238; Gregory v. Loose, 19 Wash. 599, 54 Pac. 33; Baltimore etc. R. Co. v. Christie, 5 W. Va. 325; Fey v. I. O. O. F. Mutual L. Ins. Soc., 120 Wis. 358, 98 N. W. 206; Cliquot v. United States, 3 Wall. (U. S.) 114, 18 L. Ed. 116; Union G. & T. Co. v. Robinson, 79 Fed. 420, 24 C. C. A. 650; Peto v. Hague, 3 Esp. 134. See note on "Admissibility in Evidence of Agents' Declarations or Admissions not Made Contemporaneously With the Occurrence or Transaction" to Havens v. R. I. Suburban Ry. Co., 3 Ann. Cas. 621, and Conklin v. Consolidated R. R. Co., 13 Ann. Cas. 859.

²¹ Clark v. Dunn, 161 Ala. 633, 50 South. 93; Postal Tel. Cable Co. v. Brantley, 107 Ala. 683, 18 South. 321; Union Transp. Co. v. Bassett,

118 Cal. 604, 50 Pac. 754; Mulford v. Rowland, 45 Colo. 172, 100 Pac. 603; Union Coal Co. v. Edman, 16 Colo. 438, 27 Pac. 1060; Russell v. Washington Sav. Bank, 23 App. Cas. (D. C.) 398; Heitman v. Bank, 7 Ga. App. 740, 68 S. E. 51; Blitch v. Central R. R. Co., 76 Ga. 333; Porter v. Robertson, 34 Ill. App. 74; Pease v. Trench, 197 Ill. 101, 64 N. E. 368; Porter v. Robertson, 34 Ill. App. 74; Harrison County v. State Sav. Bank, 127 Iowa, 242, 103 N. W. 121; Donovan v. Driscoll, 116 Iowa, 339, 90 N. W. 60; Chellis v. Coble, 37 Kan. 558, 15 Pac. 505; Baltimore etc. R. Co. v. Clift, 142 Ky. 573, 134 S. W. 917; Bean v. Taylor, 22 Ky. Law Rep. 1665, 61 S. W. 31; Sleeper v. Union Ins. Co., 61 Me. 267; Webster v. Moore, 108 Md. 572, 71 Atl. 466; Atwell v. Miller, 11 Md. 348, 69 Am. Dec. 206; Baker v. Gerrish, 14 Allen (Mass.), 201; Turner v. Phoenix Ins. Co., 55 Mich. 236, 21 N. W. 326; Rodes v. St. Anthony etc. Elevator Co., 49 Minn. 370, 52 N. W. 27; Bernheim v. Hahn, 65 Miss. 459, 4 South. 539; Sills v. Burge, 141 Mo. App. 148, 124 S. W. 605; Hamilton v. Berry, 74 Mo. 176; Carlton v. Patterson, 29 N. H. 580; Callaway v. Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900; Kirchner v. Laughlin, 5 N. M. 365, 23 Pac. 175; Stonehill Wine Co. v. Lupo, 110 N. Y. Supp. 408; Wickham v. Lehigh Valley R. Co., 85 N. Y. App. Div. 182, 83 N. Y. Supp. 146; McCormick v. Williams, 152 N. C. 638, 68 S. E. 138; Reimers v. Pierson, 58 Or. 86, 113 Pac. 436; Mattis v. Hosmer, 37 Or. 523, 62 Pac. 17, 632; Haunan v. Greenfield, 36 Or.

selves;²² and, unless and until the agency is so proven and the declarations, acts or admissions of the agent come within the rule laid down, the evidence is not admissible. Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of

97, 58 Pac. 888; Myerstown Bank v. Roessler, 186 Pa. 431, 40 Atl. 963; Mims v. Western Union Tel. Co., 82 S. C. 247, 64 S. E. 236; Behrens Lumber Co. v. Lager, 26 S. D. 160, Ann. Cas. 1913A, 1128, 128 N. W. 698; Autrey v. Linn (Tex. Civ. App.), 138 S. W. 197; Blain v. Pacific Express Co., 69 Tex. 74, 6 S. W. 679; Meyers v. San Pedro etc. R. Co., 36 Utah, 307, 104 Pac. 736; Nelson v. Southern Pac. Co., 15 Utah, 325, 49 Pac. 644; Trout v. Norfolk etc. R. Co., 107 Va. 576, 17 L. R. A., N. S., 702, 59 S. E. 394; Baltimore etc. R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Blodgett v. Inglis, 63 Wash. 513, Ann. Cas. 1912, D, 622, 115 Pac. 1043; Eastburn v. Norfolk etc. R. Co., 34 W. Va. 681, 12 S. E. 819; Schwalbach v. Chicago etc. R. Co., 73 Wis. 137, 40 N. W. 579; Henderson v. Coleman, 19 Wyo. 183, 115 Pac. 439, 1136; United States v. Boyd, 5 How. (U. S.) 29, 12 L. Ed. 36; Jones v. Shears, 4 Ad. & E. 832, 2 H. & W. 43, 5 L. J. K. B. 153, 6 N. & M. 428, 111 Eng. Reprint, 997; Riley v. St. John, 11 New Brunsw. 78.

²² Montgomery-Moore Mfg. Co. v. Leith, 162 Ala. 246, 50 South. 210; Cohn etc. Lumber Co. v. Robbins, 159 Ala. 289, 48 South. 853; Shields v. Smith, 37 Ark. 47; Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622; Mulford v. Rowland, 45 Colo. 172, 100 Pac. 603; Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173; Fitch v. Chapman, 10 Conn. 8; Barnsville Mfg. Co. v. Love, 3 Penne. (Del.) 569, 52 Atl. 267; Griffin v.

Societe etc., 53 Fla. 801, 44 South. 342; Central of Georgia Ry. Co. v. Americus Const. Co., 133 Ga. 392, 65 S. E. 855; Howell v. Maine & Co., 127 Ga. 574, 56 S. E. 771; Mapp v. Phillips, 32 Ga. 72; Matezenbaugh v. People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; Ohio & M. Ry. Co. v. Stein, 133 Ind. 243, 19 L. R. A. 733, 31 N. E. 180, 32 N. E. 831; Wabash etc. Canal v. Bledsoe, 5 Ind. 133; J. I. Case Threshing Mach. Co. v. Fisher & Aney, 144 Iowa, 45, 122 N. W. 575; Moffitt v. Cressler, 8 Iowa, 122; Johnson v. McLain Inv. Co., 79 Kan. 423, 131 Am. St. Rep. 302, 100 Pac. 52; Holzhauer v. Sheeny, 127 Ky. 28, 31 Ky. Law Rep. 1238, 104 S. W. 1034; Farmer v. Lewis, 1 Bush (Ky.), 66, 89 Am. Dec. 610; Barrow v. Brown, 28 La. Ann. 459; Whittemore v. Wentworth, 76 Me. 20; Fifer v. Clearfield & Cambria Coal & Coke Co., 103 Md. 1, 62 Atl. 1122; City of Baltimore v. Lobe, 90 Md. 310, 45 Atl. 192; Gilmore v. Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; Logan v. Agricultural Soc., 156 Mich. 537, 121 N. W. 485; Hall v. Murdock, 119 Mich. 389, 78 N. W. 329; Hatch v. Squires, 11 Mich. 185; Van Doren v. Bailey, 48 Minn. 305, 51 N. W. 375; Sencerbox v. McGrade, 6 Minn. 484; Dickman v. Williams, 50 Miss. 500; Bergeman v. Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992; Wilson v. Harris, 21 Mont. 374, 54 Pac. 46; Shoemaker v. Commercial Union Assur. Co., 75 Neb. 587, 106 N. W. 316; Batchelder v. Emery, 20 N. H. 165; Yoshimi v. United States

the court.²³ The rule applies in criminal cases as in civil.²⁴ While statements of an agent within the rules laid down are admissible against his principal, they are not evidence as against third parties.²⁵ The *declarations* of the alleged agent are *not competent* to prove such agency, although they are accompanied by acts purporting to be acts of agency. But, of course, such declarations and acts are competent if there is proof of former similar acts or declarations recognized or approved by the principal.²⁶ Before the

Express Co., 78 N. J. L. 281, 73 Atl. 45; Brounfield v. Denton, 72 N. J. L. 235, 61 Atl. 378; Keeler v. Salisbury, 33 N. Y. 648; New York Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364; Brickell v. Camp Mfg. Co., 147 N. C. 118, 60 S. E. 905; Jackson v. American Tel. etc. Co., 139 N. C. 347, 70 L. R. A. 738, 51 S. E. 1015; State v. Dahlquist, 17 N. D. 40, 115 N. W. 81; Sloan v. Sloan, 46 Or. 36, 78 Pac. 893; North Pac. Lumber Co. v. Willamette Steam Mill etc. Mfg. Co., 29 Or. 219, 44 Pac. 286; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229; Robeson v. Schuylkill Nav. Co., 3 Grant Cas. (Pa.) 186; Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 S. E. 232; Moore v. Bettis, 11 Humph. (Tenn.) 67, 53 Am. Dec. 771; Gulf etc. Ry. Co. v. Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767; Meyers v. San Pedro etc. R. Co., 36 Utah, 307, 104 Pac. 736; Taplin & Rowell v. Marcy, 81 Vt. 428, 71 Atl. 72; Douglas Land Co. v. T. W. Thayer Co., 107 Va. 292, 58 S. E. 1101; Adams v. Peterman Mfg. Co., 47 Wash. 484, 92 Pac. 339; Baltimore & O. R. Co. v. Christie, 5 W. Va. 325; Austin v. Austin, 45 Wis. 523; Henderson v. Coleman, 19 Wyo. 183, 115 Pac. 439, 1136; Leeds v. Marine Ins. Co., 15 U. S. (2 Wheat.) 380, 4 L. Ed. 266; Sundry Goods, Wares & Merchandises v. United States, 27 U.

S. (2 Pet.) 358, 7 L. Ed. 450; Kamm v. Rees, 177 Fed. 14, 100 C. C. A. 432; Carroll v. Injector Co., 16 Ont. App. 446. A number of useful illustrations will be found in the note to Johnson v. McLain Invest. Co., 131 Am. St. Rep. 306. See also, note to Blake v. Bremyer, in 35 L. R. A., N. S., 165. See § 251, *ante*.

²³ Learned Letcher Lumber Co. v. Ohatchie Lumber Co., 111 Ala. 453, 17 South. 934; Toledo etc. R. Co. v. Fisher, 13 Ind. 258; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Woodbury v. Larned, 5 Minn. 339; First Unitarian Soc. v. Faulkner, 91 U. S. 415, 23 L. Ed. 283.

²⁴ State v. Dahlquist, 17 N. D. 40, 115 S. W. 81; Cliquot v. United States, 70 U. S. (3 Wall.) 114, 18 L. Ed. 116; Sundry Goods, Wares & Merchandises v. United States, 27 U. S. (2 Pet.) 358, 7 L. Ed. 450.

²⁵ Mann v. Sodakat, 66 Ill. App. 393.

²⁶ Harris Loan Co. v. Elliott & Hatch Book etc. Co., 110 Ga. 302, 34 S. E. 1003; Winch v. Baldwin, 68 Iowa, 764, 28 N. W. 62; Donaldson v. Everhart, 50 Kan. 718, 32 Pac. 405; Manilla v. Houghton, 154 Mass. 465, 28 N. E. 784; Bacon v. Johnson, 56 Mich. 182, 22 N. W. 276; Nations v. Thomas, 25 Tex. Supp. 221; Aetna Ins. Co. v. Northwestern Iron Co., 21 Wis. 458; Winchester Mfg. Co. v.

declarations of an agent can bind the principal, it must be shown, first, that he was an agent; secondly, that such declarations were made in and about a matter over which the agent had authority from the principal to act, and next, that he was acting under and by virtue of his authority as such agent.²⁷ Since the declarations of the agent are not admissible unless they constitute a part of the *res gestae*, they cannot be received, unless they are *contemporaneous* with the acts which they illustrate and of which they form a part.²⁸ The declarations of an agent while acting within the scope of his business and authority are *original evidence*. They are the ultimate fact to be proved and not an admission of some other fact; and the only question is whether the declarations were made and relied upon.²⁹ It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel, in which cases they are, of course, open to explanation or may be shown to be incorrect, like admissions in general. Of this character are numerous cases referred to in an-

Creary, 116 U. S. 161, 6 Sup. Ct. Rep. 369, 29 L. Ed. 591, and cases above cited.

²⁷ Chellis v. Coble, 37 Kan. 558, 15 Pac. 505; Robeson v. Schuylkill Nav. Co., 3 Grant Cas. (Pa.) 186.

²⁸ For numerous illustrations of this principle see §§ 356, 357, *post*, where the subject is again treated under the head of "Res Gestae."

²⁹ 1 Phil. Ev. 381; Smith v. Wallace, 25 Wis. 55; Phenix Mut. Life Ins. Co. v. Clark, 58 N. H. 164. In Texas it has been held that it is not competent to give evidence of the declarations of an agent against his principal when he is a competent witness and is examined in the case. Where such examination is on interrogatories, it would be obviously unfair to deprive him of the opportunity of denying an intended impeachment

of his sworn statements: Weir v. McGee, 25 Tex. Supp. 20. See, also, the Canadian cases: Varrelmann v. Phoenix Brewery Co., 3 B. C. R. 135; Bank of Nova Scotia v. Fish, 24 S. C. R. 709; Shaw v. De Saleberry Nav. Co., 18 U. C. R. 541. See the late cases: River etc. Const. Co. v. Goodwin (Ark.), 151 S. W. 267; Conover v. Harrisburg etc. Coal Co., 161 Ill. App. 74; Reddick v. Young (Ind.), 98 N. E. 813; Duff Const. Co. v. Alford (Ky.), 149 S. W. 943; Tounelle-Martin Realty Co. v. Adams, 135 N. Y. Supp. 556; American Steel etc. Co. v. Copeland (N. C.), 75 S. E. 1002; Needham v. Halverson (N. D.), 135 N. W. 203; Eastman v. Dunn (R. I.), 83 Atl. 1057; Texas Cent. R. Co. v. Dumas (Tex. Civ. App.), 149 S. W. 543.

other section where the declarations of agents and employees contemporaneous with alleged acts of negligence were held admissible as against the principal.³⁰ It is almost unnecessary to cite authority to the proposition that statements made by one before his appointment as agent or after the termination of his agency by revocation or otherwise are not binding upon the principal as admissions of his agent.³¹

§ 256 (257). **Same—Effect of such declarations.**—An agency, like any other fact, may be proved by circumstances and the conduct of the parties, and the relation that had previously existed between them. Whenever there is independent evidence tending to prove an agency, it is competent to prove all the acts of the alleged agent pertaining to the business, as well as his declarations that he was acting as agent in the particular transaction.³² The power of an agent to bind his principal by admissions may be shown by proof of express authority or it may be inferred from the nature of the employment. If a general agent acts within the *apparent* scope of his *authority*, he may bind his principal, although the acts and declarations are in violation of his express orders, unless such orders are known to the other party. Thus where defendants sent a servant to employ a physician to visit a boy who had been injured in their service, directing him to tell the physician they would pay him for the visit, which the servant forgot to mention but employed him generally, it was held, that the physician having attended the boy until he recovered, the defendants were liable to him for the whole bill.³³ Where

³⁰ See § 356 et seq., *post*.

³¹ But where evidence of a deceased agent's statements were admitted, a letter written by him after the termination of his agency on the same subject matter was also admissible to discredit the alleged oral statements: *Turnbull v. O'Hara*, 4 Yeates (Pa.), 446.

³² *Werth v. Ollis*, 61 Mo. App. 401.

³³ *Barber v. Britton*, 26 Vt. 112, 60 Am. Dec. 301; *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531; *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215. See extended note to *Moore v. Bettis*, 53 Am. Dec. 773-778. See, also, § 256a et seq., *post*.

the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him. So long as the agent acts within the scope of his authority, it is as if the principal himself were present, and as he himself would be bound by his admissions, so he is bound by those of his authorized representative. Thus a railroad company, having authorized an agent to account for the baggage of passengers, was held to be bound by his statements regarding the loss made the day after it occurred;³⁴ and so, too, in an action for the amount of the subscription to stock, the defendant alleged that it was stipulated by the agent of the company that his subscription was not to be paid until a certain amount had been subscribed, and it was held that this evidence was admissible.³⁵ If the agent of a horse dealer having power to sell gives a warranty, the principal is bound, although he had given express directions not to warrant.³⁶ Where a broker makes a sale in the usual course of business, his admissions and representations made at the time bind the principal, although contrary to direct instructions.³⁷ The opinion or conclusion of an agent relative to the legal effect of acts and transactions is not binding on his principal unless the latter has authorized his agent to form and express an opinion on his behalf; and when the expressions of the agent are but legal conclusions, they are not admissible.³⁸ A statement by the

³⁴ *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.), 450.

³⁵ *Rinesmith v. People's Freight Ry. Co.*, 90 Pa. 262; and in *Baring v. Clark*, 19 Pick. (Mass.) 220, 226, the court says: "The agent was acting and speaking for the defendant under and within the general scope of his authority; and his confessions are to be taken as if they had been made by the defendant himself": *Columbia Ins. Co. v. Masonheimer*, 76 Pa. 138; *Malecek v. Tower Grove etc. R. R. Co.*, 57 Mo. 17.

³⁶ *Pickering v. Busk*, 15 East, 43, 104 Eng. Reprint, 758.

³⁷ *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Dias v. Chickering*, 64 Md. 348, 54 Am. Rep. 770, 1 Atl. 709; *Higgins v. McCrea*, 116 U. S. 671, 29 L. Ed. 764, 6 Sup. Ct. Rep. 557.

³⁸ *Cook v. Whitfield*, 41 Miss. 541; *Mustain v. Williams*, 7 Ky. Law Rep. 828; *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86.

agent of an insurance company that a claimant is insured is such an opinion, and is incompetent evidence against his principal.³⁹ Cases in which the declarations of agents come within the rules above laid down will be found to contain their own particular instances, and the facts in no two cases are exactly similar. The courts uphold the common-sense rule that in all the ramifications of mercantile practice, negotiation and commerce itself would be paralyzed, if principal alone had to deal with principal alone. Therefore, the evidence of agents duly authorized is admitted, but regulated by rigid rules. Where the agent acts for both parties, his acts are the acts of both, and are properly admissible against either.⁴⁰ Parol declarations of a general agent disclaiming title in his principal to land are inadmissible to prejudice the principal in an action brought by him to recover the land, where the defendant relies on a disseizin and adverse possession.⁴¹ The declarations of an agent authorized to make a contract are incompetent to establish breach of a contract by his principal.⁴² Where the insured in a life policy is also the collecting agent of the company, his receipt for his own premium does not establish the fact that he made payment. He cannot act for his principal and himself, as his interest clashes with his duty in the same transaction.⁴³ The fact that one is authorized to drive another's horse does not constitute that one an agent to make admissions as to the horse's habits.⁴⁴

³⁹ *Fidelity & Casualty Co. v. Haines*, 111 Fed. 337, 49 C. C. A. 379.

⁴⁰ *Ball v. Bank of Alabama*, 8 Ala. 590, 42 Am. Dec. 649; *Cummings v. Putnam*, 19 N. H. 569; *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218; *Morse v. Rathburn*, 49 Mo. 91; *Dicken v. Winters*, 169 Pa. 126, 32 Atl. 289.

⁴¹ *Pejepscot Proprietors v. Nichols*, 8 Me. 362, 23 Am. Dec. 521.

⁴² *Dickman v. Williams*, 50 Miss. 500; *Moore v. Chicago etc. R. R. Co.*, 59 Miss. 243; *Vicksburg & M. R. R. Co. v. McGowan*, 62 Miss. 682, 52 Am. Rep. 205; *Forsee v. Alabama G. S. R. R. Co.*, 63 Miss. 66, 56 Am. Rep. 801; *Memphis & V. R. Co. v. Cocke*, 64 Miss. 713, 2 South. 495.

⁴³ *Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389.

⁴⁴ *Haywood v. Hamm*, 77 Conn. 158, 58 Atl. 695.

§ 256a (257). **Same—Admissions of public agents.**—Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was made or done without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment. But the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government.⁴⁵ Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public.⁴⁶ Briefly, the rule is, that individuals are liable to the extent of the power they have apparently given to their agents; a government is liable only to the extent of the power it has *actually conferred* upon its officers.⁴⁷ Individuals must take notice of the extent of the authority of a person acting in an official capacity, and if they fail to do so, their ignorance of the law will furnish

⁴⁵ Story on Agency, 6th ed., § 307a; Lee v. Munroe, 7 Cranch (U. S.), 366, 3 L. Ed. 373.

⁴⁶ Mayor v. Eschback, 18 Md. 282; Whiteside v. United States, 93 U. S. 247, 23 L. Ed. 882.

⁴⁷ Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423, and note; Pierce v. United States, 1 Ct. of Cl.

270; Grant v. United States, 5 Ct. of Cl. 71; State v. Hays, 52 Mo. 578; Mayor etc. v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; Delafield v. State, 26 Wend. (N. Y.) 192; The Floyd Acceptance, 7 Wall. (U. S.) 666, 19 L. Ed. 169. See note to Moore v. Bettis, 53 Am. Dec. 777, 778.

no excuse for any mistake or wrongful act.⁴⁸ Thus where the statute limits the amount of expenditure, the officers or contractors cannot go beyond it. If they do, the claimant must be deemed to have contracted with them beyond the limit fixed by law at his own risk.⁴⁹

§ 256b (257). Same—Fraud—Death—Special and sub-agents.—While the doctrine applicable to principal and agent excludes from consideration as against the former the acts and declarations of the latter when not engaged in the course of his agency, there are cases where it may not be applicable, such as when the question is one of fraud arising from the agent not dealing advantageously, but in abuse of his relation of trust and confidence, with a person toward whom he holds such relation.⁵⁰ Where the payee of a note fraudulently induced the maker to sign it, statements by the payee's agents as to the circumstances are admissible.⁵¹ The well-established rule that entries, made by one whose duty it is to make them in the regular course of business, are admissible after his death applies in the case of an agent who makes such entries in the course of the business of his principal. Such entries may in many cases be a part of the *res gestae*, but there are also instances where such would not be the case; but, after the death of the agent who made such entries, they are nevertheless admissible. *A fortiori*, when the acts and agreements of the agent are afterward communicated to and ratified by the principal, they are legal evidence.⁵² Memoranda

⁴⁸ *State v. Hays*, *supra*; *Mayor etc. v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *People v. Phoenix Bank*, 24 Wend. (N. Y.) 431, 35 Am. Dec. 634; *Delafield v. State*, 26 Wend. (N. Y.) 192.

⁴⁹ *Curtiss v. United States*, 2 Nott & H. (Ct. of Cl.) 144; *Hull v. Marshall County*, 12 Iowa, 142.

⁵⁰ *Jones v. Jones*, 120 N. Y. 589, 24 N. E. 1016.

⁵¹ *Arnold v. Lane*, 71 Conn. 61, 40 Atl. 921.

⁵² *Hines v. Poole*, 56 Ga. 638; *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 76, 50 S. E. 969; *Missouri K. & T. Ry. Co. v. Byrne*, 3 Ind. Ter. 740, 49 S. W. 41; *McClure v. Pureel*, 3 A. K. Marsh. (Ky.) 61; *Van Rensselaer v. Morris*, 1 Paige Ch. (N. Y.) 13; *Howerton v. Lattimer*, 68 N. C. 370. In the

made by a surveyor as the results of his examinations and calculations or minutes which help to explain such memoranda, made by him in the scope of his employment as a surveyor, under the agreement of both parties to the action, are admissible in evidence after the death of the surveyor.⁵³ The declarations of general agents as well as subagents and special agents must also form part of the *res gestae* to entitle them to admissibility.⁵⁴ The general rule is construed more strictly where the agent's powers are circumscribed, and any stepping over the bounds of his authority is jealously watched by the law, so that utterances outside the cast-iron limits of his delegation shall not prejudice his principal. A large class of cases exists in which special agents charged with the mission of demanding or obtaining something from, or delivering some thing or message to, another, enter, from custom perhaps, into conversation with the person to whom they are sent, and on their return, recount not only the proper reply which should be their legitimate utterance, but also the whole of the conversation from their own standpoint. This conversation, either in

cases decided in Georgia, the courts had to consider the effect of section 3034 of the Civil Code of 1895, providing that declarations of an agent as to the business are not admissible against his principal, unless a part of the negotiation and constituting the *res gestae*, or else the agent be dead. Mr. Justice Cobb in delivering the opinion of the court in *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 76, 50 S. E. 969, said: "The concluding words of the sentence, 'or else the agent be dead,' are to be interpreted in the light of those provisions of the law where the declarations of deceased persons are admitted in evidence; that is, if, under established rules, the declarations of a deceased person would be admissible in evi-

dence, then under the code such declaration would be none the less admissible because the deceased was occupying the relation of an agent at the time the declaration was made. If the declaration was one made by an entry in the regular course of business, but still not a part of the principal transaction, and therefore not admissible as part of the *res gestae*, such declaration would be admissible, if at the time it was offered it was shown that the agent was dead."

⁵³ *Walker v. Curtis*, 116 Mass. 98.

⁵⁴ *Butters Salt & Lumber Co. v. Vogel*, 135 Mich. 381, 97 N. W. 757; *Bowman v. Lickey*, 86 Mo. App. 47; *Demeritt v. Meserve*, 39 N. H. 521; *Anderson v. Broad*, 2 E. D. Smith (N. Y.), 530.

reality or as related, the party to the future action is anxious to give in evidence, while the courts are equally anxious to exclude all but what was within the circle of authority. The rule as to special agencies may be expressed that the messenger's or carrier's agency is limited to the delivery of his message or goods.⁵⁵

§ 256c (257). **Same—Admissions of architects and building contractors—Brokers and factors—Carriers and their officers and agents.**—Conversations between the contractor and the architect who is put in charge of the work are generally admissible in actions against the owner for the price of the work. The architect is the agent of the owner, and his directions in regard to the manner of doing the work and as to the materials to be used, and in many other respects may become admissible in evidence.⁵⁶ The authority of a broker or factor to perform all things usual in the business on which he is employed cannot be limited by any secret order from his principal, and in actions arising out of such transactions, evidence may be given of declarations of the broker concerning that which he is dealing about. Statements as to the validity of a note sold, as to whether a sale and delivery of merchandise at a future time was a gambling transaction or not, entries by loan agents of loan transactions, are all admissible against the principal.⁵⁷ One who has neither actual nor constructive possession, but is authorized to sell, is a mere broker; and his declarations are not admissible to affect the title of his principal.⁵⁸ The rules applicable to the admissions and

⁵⁵ Gainesville Midland Ry. v. Jackson, 1 Ga. App. 632, 57 S. E. 1007; Rowe v. Canney, 139 Mass. 41, 29 N. E. 219; Manila v. Houghton, 154 Mass. 465, 28 N. E. 784; Folsom v. Batchelder, 22 N. H. 47; Hinson v. Walker, 65 Tex. 103.

⁵⁶ Hudspeth v. Allen, 26 Ind. 165; Wright v. Reusens, 60 Hun, 585, 15 N. Y. Supp. 504, 590, 133 N. Y. 298, 31 N. E. 215; State v.

King, 64 W. Va. 546, 610, 63 S. E. 468, 495.

⁵⁷ Lobdell v. Baker, 42 Mass. (1 Met.) 193, 35 Am. Dec. 358; General Convention of Congregational Ministers v. Torkelson, 73 Minn. 401, 76 N. W. 215; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; Cassard v. Hinman, 19 N. Y. Super. Ct. 8.

⁵⁸ Pier v. Duff, 63 Pa. 59.

declarations of officers and other agents of common carriers are the same as those applying to the agents of other persons and corporations.⁵⁹

§ 256d (257). **Same—Admissions of deputy sheriffs—Employees and servants—Masters, pilots and captains of boats.**—In all official acts the deputy may bind the sheriff, and in the regular discharge of official duty the acts of the deputy are the acts of the sheriff. Declarations, therefore, of the deputy are, with the same limitations as in other cases of agency, admissible in evidence in actions against the sheriff.⁶⁰ But the admissions of an under-sheriff, or of a deputy revenue collector, in the absence of proof of special authorization, are not admissible to bind his prin-

⁵⁹ *Home Ice Factory v. Howell's Min. Co.*, 157 Ala. 603, 48 South. 117; *Choctaw O. & G. Ry. Co. v. Rolfe*, 76 Ark. 220, 88 S. W. 870; *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 111 Am. St. Rep. 129, 2 L. R. A., N. S., 1072, 7 Ann. Cas. 531, 39 South. 838; *Hematite Min. Co. v. East Tennessee V. & G. Ry. Co.*, 92 Ga. 268, 18 S. E. 24; *Hodgerson v. St. Louis etc. R. Co.*, 160 Ill. 430, 43 N. E. 614; *Chicago etc. R. R. Co. v. Wolecott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; *Carpenter v. Chicago etc. Ry. Co.*, 126 Iowa, 94, 101 N. W. 758; *Atchison etc. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. 71; *McLeod v. Ginther's Admr.*, 80 Ky. 399; *Rowe v. Baltimore etc. R. Co.*, 82 Md. 493, 33 Atl. 761; *Wellington v. Boston etc. R. R.*, 158 Mass. 185, 33 N. E. 393; *Grand Trunk R. Co. v. Nichol*, 18 Mich. 170; *Doyle v. St. Paul etc. Ry. Co.*, 42 Minn. 79, 43 N. W. 787; *Wells v. Alabama G. S. R. Co.*, 67 Miss. 24, 6 South. 737; *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744; *Meyer v. Virginia & T. R. Co.*, 16

Nev. 341; *Huebner v. Erie R. Co.*, 69 N. J. L. 327, 55 Atl. 273; *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 82 Am. St. Rep. 691, 54 L. R. A. 592, 60 N. E. 32; *Porter v. Richmond & D. R. Co.*, 97 N. C. 46, 2 S. E. 374; *Baltimore & Ohio Employees' Relief Assn. v. Post*, 122 Pa. 579, 9 Am. St. Rep. 147, 2 L. R. A. 44, 15 Atl. 885; *Lipsecomb v. South Bound R. Co.*, 65 S. C. 148, 43 S. E. 388; *Western Union Tel. Co. v. Barefoot*, 97 Tex. 159, 64 L. R. A. 491, 76 S. W. 914; *Jammison v. Chesapeake & O. Ry. Co.*, 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758; *Eastburn v. Norfolk & W. R. Co.*, 34 W. Va. 681, 12 S. E. 819; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049, 7 Sup. Ct. Rep. 1039; *Chicago etc. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358.

⁶⁰ *Savage v. Balch*, 8 Me. 27; *Tyler v. Ulmer*, 12 Mass. 163; *Terral v. McRae*, 6 Smedes & M. (Miss.) 136; *Mott v. Kip*, 10 Johns. (N. Y.) 478; *State v. Allen*, 27 N. C. 36; *Wheeler v. Hambright*, 9 Serg. & R. (Pa.) 390; *Lyman v. Lull*, 20 Vt. 349.

cipal;⁶¹ and a letter written by the deputy to the plaintiff in execution, after the alleged conversion of the goods taken, is not admissible against the sheriff, the writing of such letter not being an official act on the deputy's part.⁶² No branch of the law of agency is so heavily laden with decisions as that relating to employees or servants in general, although the rule by which the admissibility of their evidence is weighed is the same as that regulating other agents. Difficult questions, however, do arise on every term of the original proposition, and the variation of employment keeps adding to an ever-widening stream of decisions from which the leading as well as the uncommon decisions may be selected for comparison.⁶³ A master when upon a voyage is the general agent of the owners, and they are bound by his acts; and his admissions and declarations as such, within the scope of his authority, both with regard to the ship and to the freight being carried, are evidence against his principal.⁶⁴ The statements of a steamboat captain, made in the discharge of his duty as commander of the vessel, while she is sinking, and he is in search of specific help to lighten her by removing cargo, as to her condition, how and where she was leaking, accompanying his conduct

⁶¹ *Grimshaw v. Paul*, 76 Ill. 164.

⁶² *Barker v. Binninger*, 14 N. Y. 270. The old case of *Somervell v. Hunt*, 3 Har. & McH. (Md.) 113, purporting to decide that in an action against a sheriff for an escape of a runaway negro, an advertisement in a newspaper that such negro had been apprehended and was in custody, purporting to be made by the sheriff, is not evidence, though the deputy sheriff confessed that he had advertised the negro, is not reliable. In that case it was the Calvert county court which made the decision, and on appeal the final decision was rendered on another point.

⁶³ Space does not permit an extended list of illustrations. The reader is referred to the excellent note

to *Johnson v. McLain Invest. Co.*, 131 Am. St. Rep. 306, for cases carefully selected.

⁶⁴ *Bailey v. The New World*, 2 Cal. 370; *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687; *Murphy v. May*, 9 Bush (Ky.), 33; *Price v. Thornton*, 10 Mo. 135; *Rogers v. McCune*, 19 Mo. 557; *Price v. Pewell*, 3 N. Y. 322; *Bigley v. Williams*, 80 Pa. 107; *American S. S. Co. v. Landreth*, 102 Pa. 131, 48 Am. Rep. 196; *Eads v. The H. D. Bacon*, Fed. Cas. No. 4232, 1 Newb. 274; *Dentz v. The Fanwood*, 61 Fed. 523; *Northwestern Union Packet Co. v. Clough*, 87 U. S. (20 Wall.) 528, 22 L. Ed. 406; *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. Ed. 497, 8 Sup. Ct. Rep. 534; *The Maurice*, 135 Fed. 516, 68 C. C. A. 228.

and explanatory of it, are part of the *res gestae*, and competent, and his statements in case of a collision are *a fortiori* evidence against the owners of his vessel, though those of a pilot are not.⁶⁵ But, outside of his agency while in charge of the ship, the statements of the master of a vessel are inadmissible to show who the owner of such vessel in reality is, where such statements are not made in presence of the person sought to be bound.⁶⁶ The declarations or statements, however, of the master of a vessel, who is sailing it under a contract by which the vessel was let to him, are not binding on the owners. The master is owner *pro hac vice*, and he is not the agent of the owners to make statements, declarations or admissions obligatory on them.⁶⁷

§ 257 (258, 259). **Admissions by attorneys.**—In the conduct of litigation it is frequently to the advantage of the parties for their attorneys to make stipulations as to questions of fact or dispensing with proof of certain facts. Duly appointed attorneys are deemed the agents of their clients for the purpose of making such admissions in all matters relating to the progress and trial of the action.⁶⁸

⁶⁵ *Ready v. The Highland Mary*, 20 Mo. 264; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *The Potomac*, 75 U. S. (8 Wall.) 590, 19 L. Ed. 511, affirming judgment, *The Potomac*, 67 U. S. (2 Black) 581, 17 L. Ed. 263.

⁶⁶ *Chambers v. Davis*, 3 Whart. (Pa.) 40.

⁶⁷ *Tucker v. Stimson*, 12 Gray (Mass.), 487.

⁶⁸ *Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461; *Rockwell v. Taylor*, 41 Conn. 55; *Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787; *Ohio etc. R. Co. v. Levy*, 7 Ind. App. 696, 34 N. E. 245; *Cox v. Cline*, 147 Iowa, 353, 126 N. W. 330; *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. 13; *Fletcher v. Chicago etc. R. Co.*, 109 Mich. 363, 67 N. W. 330; *Gray v.*

Minnesota Tribune Co., 81 Minn. 333, 84 N. W. 113; *Anderson v. McPike*, 86 Mo. 293; *Lewis v. Duane*, 69 Hun, 28, 23 N. Y. Supp. 433; *First Nat. Bank v. Miller*, 48 Or. 587, 87 Pac. 892; *Snyder v. Armstrong*, 5 Wkly. Notes Cas. 412; *First Nat. Bank v. Anderson*, 28 S. C. 143, 5 S. E. 343; *Lynchburg Cotton Mills v. Rives*, 112 Va. 137, 70 S. E. 542; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924; *Horseshoe Min. Co. v. Miners' etc. Co.*, 147 Fed. 517, 77 C. C. A. 213. See also the following recent cases: *Abbott v. Lee* (Conn.), 85 Atl. 526; *Shoemaker Co. v. Munsey*, 37 App. D. C. 95; *Logre v. Galveston Electric Co.* (Tex. Civ. App.), 146 S. W. 303.

Statements made before or after employment are of course excluded.⁶⁹ Indeed, any fact, bearing upon the issues involved, admitted by counsel may be the ground of the court's procedure equally as if established by the clearest proof.⁷⁰ When admissions of this character are formally made for the purpose of waiving certain proofs or rules of practice, they are *conclusive* upon the client and cannot be withdrawn. It would operate as a fraud upon the adverse party, if, after he had been thus induced to withhold necessary proofs, he should be compelled to prove the facts which had been admitted, or to submit to defeat.⁷¹ The assumption by an attorney at law, even if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings in courts does not create any presumption of actual authority so to act, but, as in the case of other agents, his acts must be shown to be within the scope of his authority, else they will not bind his principal.⁷² The statements and admissions of an attorney at law in respect of his principal's business are inadmissible against his principal unless it is specially shown that they were authorized or that they were made in the due and orderly conduct of a case for the distinct purpose of dispensing with formal proof of the facts to which they relate.⁷³ During the progress of the trial attorneys stand in the place

⁶⁹ See § 259, *post*.

⁷⁰ *Starke v. Kenan*, 11 Ala. 818; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375; *Lewis v. Sumner*, 13 Met. (Mass.) 269; *Davis v. Territory*, 15 Okl. 462, 82 Pac. 507.

⁷¹ *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Alton v. Gilman-ton*, 2 N. H. 520; *Davies v. Burton*, 4 Car. & P. 166. In the event of a mistake in the admission application may be made to remedy it: See note to *Wallace v. Matthews*, 99 Am. Dec. 480, on "Withdrawal of Admissions."

⁷² *Horseshoe Min. Co. v. Miners' etc. Co.*, 147 Fed. 517, 77 C. C. A. 213; *Stone v. Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028, 19 Sup. Ct. Rep. 747.

⁷³ *Horseshoe Min. Co. v. Miners' etc. Co.*, *supra*; *Saunders v. McCarthy*, 8 Allen (Mass.), 42; *Durnford v. Clarke's Estate*, 3 La. 199; *Treadway v. Souix City & St. P. R. R. Co.*, 40 Iowa, 526; *McGarry v. McGarry*, 9 Pa. Super. Ct. 71; *Wagstaff v. Wilson*, 5 Barn. & Adol. 339, 110 Eng. Reprint, 483. See, also, *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399.

of their clients and may perform the same acts which such clients might perform in person; hence, there is scarcely any limit to the admissions which they may make. Such admissions are not confined to stipulations regarding the facts of the case or to the waiver of proofs. The attorney may, by his express statements during the trial or by his mode of conducting the action, *waive* a part of *the relief* which he might otherwise claim.⁷⁴ And by the constant practice of the courts, parties are precluded from questioning the regularity of the proceedings or the competency of evidence to which they have failed to make timely objection.⁷⁵ But, although the English rule is otherwise, by the clear weight of authority in the United States attorneys have *no implied power to compromise* and settle their clients' claims.⁷⁶ It is essential to the orderly conduct of business in the courts that attorneys who stand in the place of their clients should frequently make formal admissions of the character already mentioned; and, if made in the presence of the court, it is immaterial whether they be *oral or written* or whether they be *express* or plainly *inferred from the conduct* on which the opposite attorney and the court have the right to rely;⁷⁷ and in such cases the admissions and acts of the attorney are to be treated

⁷⁴ Hoyt v. Gelston, 13 Johns. (N. Y.) 139.

⁷⁵ White v. Kibling, 11 Johns. (N. Y.) 128.

⁷⁶ Pickett v. Merchants' Nat. Bank, 32 Ark. 346; Ambrose v. McDonald, 53 Cal. 28; Wetherbee v. Fitch, 117 Ill. 67, 7 N. E. 513; Jones v. Inness, 32 Kan. 177, 4 Pac. 95; Fritchey v. Bosley, 56 Md. 94; Roberts v. Nelson, 22 Mo. App. 28; Mandeville v. Reynolds, 68 N. Y. 528; Moye v. Cogdell, 69 N. C. 93; North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 361; Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42; Roller v. Wooldridge, 46 Tex. 485; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep.

846; Kelly v. Wright, 65 Wis. 236, 26 N. W. 610. In Bonney v. Morrill, 57 Me. 368, the attorneys had compromised an action by consent of their clients. Subsequently one of the clients repudiated the authority of the principal as to one item of the compromise and the court upheld the terms of the original settlement as within the scope of the attorney's power.

⁷⁷ Doe ex dem. Child v. Roe, 1 El. & B. 279, 118 Eng. Reprint, 442; Stracy v. Blake, 1 Mees. & W. 168; Wilson v. Spring, 64 Ill. 14; Loomis v. New York N. H. & H. R. Ry. Co., 159 Mass. 39, 34 N. E. 82.

as those of the client; and are conclusive upon him, unless *fraud* or collusion is shown.⁷⁸ Stipulations in writing made by attorneys out of court dispensing with proof of certain facts are also conclusive upon their clients.⁷⁹ It is a good illustration of the effect given to the admissions of counsel that the courts sometimes grant a *nonsuit* or in the federal courts direct a verdict *upon the opening statement* of the plaintiff's counsel, when such statements are unambiguous in their meaning, and in the opinion of the court clearly show that there should be no recovery.⁸⁰ Where attorneys make *statements* as to facts in controversy *in the presence of their clients* who make no objection, such statements are competent as admissions.⁸¹

§ 257a (258, 259). **Same—Illustrations of efficiency of admissions.**—Attorneys may bind their clients by admitting the *execution of instruments*;⁸² the *amount due on a debt*;⁸³ they may *dismiss* or *discontinue an action*;⁸⁴ consent to a *nonsuit*;⁸⁵ *stipulate* as to the *issues to be tried*;⁸⁶ consent to the entering of *judgment*;⁸⁷ *waive informalities*;⁸⁸ consent to a *reference* or admit all the facts in issue for the

⁷⁸ Colledge v. Horn, 3 Bing. 119, 130 Eng. Reprint, 459; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Wilson v. Spring, 64 Ill. 14. As to admissions made at trial, see note to Wallace v. Matthew, 99 Am. Dec. 480.

⁷⁹ Fowler v. Gilman, 13 Met. (Mass.) 267. As to oral agreement out of court not controverted, see People v. Stephens, 52 N. Y. 306.

⁸⁰ Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Colledge v. Horn, 3 Bing. 119, 130 Eng. Reprint, 459.

⁸¹ Lord v. Bigelow, 124 Mass. 185; Colledge v. Horn, 3 Bing. 119, 130 Eng. Reprint, 459.

⁸² Young v. Wright, 1 Camp. 141; Griffith v. Williams, 1 Term Rep. 710, 99 Eng. Reprint, 1335; Goldie v.

Shuttleworth, 1 Camp. 70; Rutledge v. McLean, 12 U. C. R. 205.

⁸³ Wilson v. Spring, 64 Ill. 14.

⁸⁴ McLeran v. McNamara, 55 Cal. 508; Rogers v. Greenwood, 14 Minn. 333; Davis v. Hall, 90 Mo. 659, 3 S. W. 382; Gaillard v. Smart, 6 Cow. (N. Y.) 385; Barrett v. Third Ave. Ry. Co., 45 N. Y. 628; Schoenberg v. Adler, 105 Wis. 645, 81 N. W. 1055.

⁸⁵ Lynch v. Cowell, 12 L. T. 548.

⁸⁶ Bingham v. Board of Supervisors, 6 Minn. 136; J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946.

⁸⁷ Harniska v. Dolph, 133 Fed. 158, 66 C. C. A. 224.

⁸⁸ Hanson v. Hoitt, 14 N. H. 56; Dubue v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

purpose of determining the questions of law involved.⁸⁹ "The retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of a judgment in favor of his client and after the close of the term of court at which it is rendered, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys."⁹⁰ Where letters were not written by an attorney defending the action with the purpose of dispensing with proof otherwise required of the plaintiff, and there was no evidence that the attorney who wrote them was authorized to make the statements and admissions which they contained, the letters were inadmissible.⁹¹

§ 258 (260). Same—Casual statements—Informal admissions.—It goes without saying that not every admission of an attorney is evidence against his client. Statements made by attorneys out of court and not during the transaction of business within their employment are not admissible against their clients, even though such statements relate to the subject matter in controversy. It would be an intolerable rule, if by mere loose conversations attorneys

⁸⁹ *Stokely v. Robinson*, 34 Pa. 315; *Wade v. Powell*, 31 Ga. 1; *Smith v. Bossard*, 2 McCord Eq. (S. C.) 406; *Tiffany v. Lord*, 40 How. Pr. (N. Y.) 481. Admissions in briefs by attorneys are binding. If the respondent is entitled to a judgment for some amount, and recovers judgment for the whole amount sued for, and appellant insists in his brief that the respondent must recover the whole amount sued for or nothing, the court will not decide whether the judgment was entered for a proper sum: *Moore v. Murdock*, 26 Cal. 514. Where in a personal injury action it was assigned as error that the damages were ex-

cessive and there was an admission in the appellant's brief that the injuries and sufferings testified to were sufficient to entitle appellee to the amount recovered if it could be believed that they occurred, or could possibly have occurred as claimed by him, it was ruled that the assignment was stripped of merit by the admission in the briefs: *Eddy v. Newton* (Tex. Civ. App.), 22 S. W. 533.

⁹⁰ *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723.

⁹¹ *Horseshoe Min. Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213.

were allowed to divest their clients of the rights they are bound to protect.⁹² The statements of an attorney during a conversation held for the purpose of *settling a controversy* are not admissible;⁹³ nor are the statements of an attorney, with whom a demand is left for collection, admissible as to *collateral facts*;⁹⁴ nor do such admissions made in an unauthorized letter to one against whom a suit is contemplated bind the client;⁹⁵ nor even under some circumstances after the suit has been commenced. In an action pending against an express company for the loss of a medical diploma delivered to it for transmission, one of the attorneys for the defendant company applied to the college which had issued the diploma for a duplicate copy to be furnished the plaintiff. The letter contained statements that the diploma had been lost in transmission, and was of some value to its owner. It was offered in evidence by plaintiff as an admission of the defendant company, and was properly excluded. Reese, C. J., said: "It was not written for the purpose of use on the trial, nor in any way giving direction to the procedure or influencing the action of plaintiff, nor was there any statement that the attorney had knowledge of the truth of what plaintiff claimed, nor was it made for the purpose of dispensing with formal proof of the facts claimed by plaintiff to exist. It is said that admissions made by an attorney must be distinct and formal, or such as are termed 'solemn admissions,' made for the express purpose of alleviating the stringency of some rule of practice or of dispensing with the formal

⁹² Rockwell v. Taylor, 41 Conn. 55; Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787; Thomas v. Kinsey, 8 Ga. 421; Treadway v. Sioux City etc. Ry. Co., 40 Iowa, 526; Worley v. Hine-man, 6 Ind. App. 240, 33 N. E. 260; McKeen v. Gammon, 33 Me. 187; Proctor v. Old Colony Ry. Co., 154 Mass. 251, 28 N. E. 13; Saunders v. McCarthy, 8 Allen (Mass.), 42; Angle v. Bilby, 25 Neb. 595, 41 N. W. 397; Hicks v. Naomi Falls Mfg. Co., 138

N. C. 319, 50 S. E. 703; Douglass v. Mitchell, 35 Pa. 440; Petch v. Lyon, 9 Q. B. 147, 115 Eng. Reprint, 1231; Young v. Wright, 1 Camp. 139; Parkins v. Hawkshaw, 2 Stark. 239; Doe v. Richards, 2 Car. & K. 216.

⁹³ Saunders v. McCarthy, 8 Allen (Mass.), 42.

⁹⁴ Underwood v. Hart, 23 Vt. 120.

⁹⁵ Solomon Ry. Co. v. Jones, 34 Kan. 443, 8 Pac. 730.

proof of some fact at the trial.⁹⁶ Other admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. It is difficult to conceive, on principle, any distinction between casual statements made to a third party orally, and such as are contained in a letter like the one presented, where the statement is incidentally made for the purpose of accomplishing a legitimate purpose, not a part of the real litigation."⁹⁷ But in the conduct of the business preparatory to trial, there may be incidental admissions made by counsel waiving the proof of certain facts, although no such intention exists; for example, an attorney gave a notice describing a paper as "a bill which was accepted by said defendant," which was held *prima facie* evidence of acceptance by the defendant.^{97a} But an affidavit for continuance made by the attorney, as to which the party has no knowledge, is not competent as an admission.^{97b}

§ 259 (261). Same—Different actions or trials.—We have hitherto considered only the effect of admissions in the course of litigation confined to one action or suit, but they are not always definitely limited in their operation. The general rule is that the admissions made by an attorney in one action are not admissible in a different action between the same parties.⁹⁸ But where an absolute and unqualified admission is made in a pending cause, whether

⁹⁶ 1 Greenl. Ev., 16th ed., § 186.

⁹⁷ Whiteside v. Adams Express Co., 89 Neb. 430, 131 N. W. 953. See, also, Treadway v. Sioux City & St. P. R. Co., 40 Iowa, 526; Weeks, Attorneys at Law, 2d ed., § 223.

^{97a} Holt v. Squire, Ryan & M. 282; Marshall v. Cliff, 4 Camp. 133; Milward v. Temple, 1 Camp. 375. Admissions in an opening speech in a former trial, admitted: Missouri & K. Tel. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771.

^{97b} Murray v. Chase, 134 Mass. 92.

⁹⁸ Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Moffit v. Wither-
spoon, 10 Ired. (32 N. C.) 185; Miller v. United States, 133 Fed. 337, 351, 66 C. C. A. 399; Harrison's De-
visees v. Baker, 5 Litt. (Ky.) 250; Hicks v. Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703. See extended note to Wallace v. Matthews, 99 Am. Dec. 480, 481, and to Moynahan v. Perkins, 10 Ann. Cas. 1063.

by written stipulation of the attorney or as matter of proof on the hearing, it may be used on a subsequent trial and cannot be retracted, unless by leave of the court on a proper showing of mistake, imposition or surprise.⁹⁹ But mere *informal admissions* made by counsel in one trial are not admissible in a second trial; and admissions by an attorney in the trial of a cause as to the amount of *damages* in case of recovery do not bind his client at a subsequent trial.¹⁰⁰ Some of the cases already cited illustrate the rule that admissions of this character are not confined to the statements or stipulations made by the attorney during the trial of the cause. The admissions may be *before the trial* and may be derived from bills of particulars,¹ or notices, or other documents served during the progress of the cause.² It is hardly necessary to add that the statements of an attorney are not admissible if made *before his employment* commenced or after it has ceased.³ Nor is it to be inferred that an attorney has authority to *compromise* a claim left in his hands for collection by receiving a sum less than its face value.⁴ Whenever the statements of an attorney would be competent as admissions, the statements of his *clerk* acting in his place are also competent.⁵ It some-

⁹⁹ Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739; Moynahan v. Perkins, 36 Colo. 481, 10 Ann. Cas. 1061, 85 Pac. 1132; Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313; Central Branch Union Pac. Ry. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; Owen v. Cawley, 36 N. Y. 600; Truelove v. Burton, 9 Moore, 64. For further discussion as to when admissions may be withdrawn, see, § 274, *post*.

¹⁰⁰ Colledge v. Horn, 3 Bing. 119, 130 Eng. Reprint, 459; Rex v. Coyle, 7 Cox C. C. 74; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Weisbrod v. Chicago etc. Ry. Co., 20 Wis. 419.

¹ Rymer v. Cook, 1 Moody & M. 86, and note.

² Holt v. Squire, Ryan & M. 282.

³ Janeway v. Skerritt, 30 N. J. L. 97.

⁴ Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Repp v. Wiles, 3 Ind. App. 167, 29 N. E. 441.

⁵ Power v. Kent, 1 Cow. (N. Y.) 211; Birbeck v. Stafford, 14 Abb. Pr. (N. Y.) 285, 23 How. Pr. (N. Y.) 236; Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842; Griffiths v. Williams, 1 Term Rep. 710, 99 Eng. Reprint, 1335; Truelove v. Burton, 9 Moore, 64; Taylor v. Williams, 2 Barn. & Adol. 845, 109 Eng. Reprint, 1357; Standage v. Creighton, 5 Car. & P. 406.

times occurs that the statement of an attorney, though incapable of use in one matter against the client as an admission is not wholly worthless, but can be turned to account in another matter to prove the knowledge of the attorney of the fact admitted and thus throw light on subsequent transactions connected with the main issue wherein he is otherwise interested.⁶

§ 260 (262). Admissions of husband and wife.—In the consideration of admissions made by agents which are binding upon the principal, an undue prominence of those made by husband or wife as agent for the other has been unnecessarily given and retained. Whether it is due to the old-time disabilities of women is not for us to discuss. The fact remains that the text-writers have to preserve the classification without questioning the sufficiency of warrant for so doing; and illustrations of the rules affecting such admissions are given which, when analyzed and compared with other illustrations, lead to the result that such admissions are regulated by the same rules which permit admissions of the authorized agent and reject those which are not. A wife is, of course, competent to act as an agent of her husband,⁷ just as the husband may act for the wife;⁸ but there is no presumption of the agency from the mere fact that he is her husband, and the unauthorized acts of the one do not affect the other of them.⁹ The idea seems to have gained

⁶ *Beinert v. Tivoli & Co.*, 62 Misc. Rep. 616, 116 N. Y. Supp. 4.

⁷ *Hunt v. Rhodes Bros. Co.*, 207 Mass. 30, 92 N. E. 1001.

⁸ *Stout v. Perry*, 152 N. C. 312, 136 Am. St. Rep. 826, 67 S. E. 757; *Smith v. Olivarri* (Tex. Civ. App.), 127 S. W. 235; *Wasem v. Raben*, 45 Ind. App. 221, 90 N. E. 636; *Hunt v. Rhodes Bros. Co.*, 207 Mass. 30, 92 N. E. 1001.

⁹ *Wilson v. Shocklee*, 94 Ark. 301, 126 S. W. 832; *Shields v. Coyne*, 148 Iowa, 313, Ann. Cas. 1912C, 905, 29 L. R. A., N. S., 472, 127 N. W. 63; *Young v. Inman*, 146 Iowa, 492, 125

N. W. 177; *Detroit Lumber Co. v. Cleff*, 164 Mich. 276, 128 N. W. 231; *Friedman v. D'Amico*, 123 N. Y. Supp. 953; *Rubnitz v. Roseff*, 122 N. Y. Supp. 241; *Sciolaro v. Asch*, 137 App. Div. 667, 122 N. Y. Supp. 518; *Kruger v. Baumgarten*, 9 Ohio N. P., N. S., 332, 20 Ohio Dec. 434; *Smith v. Olivarri* (Tex. Civ. App.), 127 S. W. 235; *Keith v. Aubrey* (Tex. Civ. App.), 127 S. W. 278; *Rowley v. Shepardson*, 83 Vt. 167, 138 Am. St. Rep. 1078, 74 Atl. 1002; *Drake v. Drake*, 142 Wis. 602, 126 N. W. 19.

ground that the mere fact of the domestic relation imports a general agency. That is not so with husband and wife,¹⁰ any more than it is with parent and child, where the relation of principal and agent must be established as in ordinary cases.¹¹ *A fortiori* brothers and sisters are not each other's agents except authorized.¹² An examination of the accepted propositions on the subject will show that the ordinary principles regulating agency are repeated by merely changing the description of person employed to husband or wife as the case may be. The declarations of the husband may be received against the wife,¹³ or those of the wife may be received against the husband¹⁴ as admis-

¹⁰ *Ellenbogen v. Slocum*, 66 Misc. Rep. 611, 121 N. Y. Supp. 1110.

¹¹ *Buchanan v. Collins*, 42 Ala. 419; *Milwaukee Harvester Co. v. Tymich*, 68 Ark. 225, 58 S. W. 252; *Becker v. Donaldson*, 133 Ga. 864, 67 S. E. 92; *Gainesville Midland Ry. v. Jackson*, 1 Ga. App. 632, 57 S. E. 1007; *Gaines v. State*, 99 Ga. 703, 26 S. E. 760; *Boyd v. Jennings*, 46 Ill. App. 290; *Cochran v. McDowell*, 15 Ill. 10; *Alexandria Bldg. Co. v. McHugh*, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80; *Donovan v. Driscoll*, 116 Iowa, 339, 90 N. W. 60; *Wallingford v. Atkins*, 24 Ky. Law Rep. 1995, 72 S. W. 794; *Berry v. Waring*, 2 Har. & G. (Md.) 103; *Blanchette v. Holyoke St. R. Co.*, 175 Mass. 51, 55 N. E. 481; *Prewett v. Land*, 36 Miss. 495; *Sherlock v. Kimmell*, 75 Mo. 77; *Skidmore v. Johnson*, 70 N. J. L. 674, 57 Atl. 450; *Love v. McClure*, 99 N. C. 290, 6 S. E. 247, 250; *Dosch v. Diem*, 176 Pa. 603, 35 Atl. 207; *Beates v. Retallick*, 23 Pa. 288; *Jungworth v. Chicago etc. R. Co.*, 24 S. D. 342, 123 N. W. 695; *Ward v. Powell* (Tex. Civ. App.), 127 S. W. 851; *Mower v. McCarthy*, 79 Vt. 142, 118 Am. St. Rep. 942, 7 L. R. A., N. S., 418, 64 Atl. 578; *Norfolk etc. R. Co. v. Groseclose*,

88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454.

¹² *Laughlin v. Manson*, 65 Misc. Rep. 492, 120 N. Y. Supp. 110.

¹³ *Brunson v. Brooks*, 68 Ala. 248; *Martin v. Banks*, 89 Ark. 77, 115 S. W. 928; *Fitzgerald v. Brennan*, 57 Conn. 511, 18 Atl. 743; *Virgin v. Dunwody*, 93 Ga. 104, 19 S. E. 84; *Bennett v. Stout*, 98 Ill. 47; *Stanfield v. Stiltz*, 93 Ind. 249; *Chaslavka v. Mechalek*, 124 Iowa, 69, 99 N. W. 154; *Hanson v. Millett*, 55 Me. 184; *Bradford v. Williams*, 2 Md. Ch. 1; *Broderick v. Higginson*, 169 Mass. 482, 61 Am. St. Rep. 296, 48 N. E. 269; *Schweyer v. Jones*, 152 Mich. 241, 115 N. W. 974; *Vermillion v. Parsons*, 107 Mo. App. 192, 80 S. W. 916; *Woodruff v. White*, 25 Neb. 745, 41 N. W. 781; *Deck v. Johnson*, 1 Abb. Dec. (N. Y.) 497, 2 Keyes, 348; *Towles v. Fisher*, 77 N. C. 437; *Thomas v. Butler*, 24 Pa. Sup. Ct. 305; *Leedom v. Leedom*, 160 Pa. 273, 28 Atl. 1024; *McQueen v. Bank*, 20 S. D. 378, 107 N. W. 208; *Clapp v. Engledow*, 82 Tex. 290, 18 S. W. 146; *Pierce v. Pierce*, 66 Vt. 369, 29 Atl. 364; *Swager v. Lehman*, 63 Wis. 399, 23 N. W. 579.

¹⁴ *Svetinich v. Sheean*, 124 Cal. 216, 71 Am. St. Rep. 50, 56 Pac. 1028;

sions when, under the general principles of agency, the declarant is the *agent* of the other party, and the declarations are made by express authority within the scope of such agency, and as a part of the *res gestae*.¹⁵ Of course this rule must be applied with the limitation that the powers of married women to enter into contracts were greatly restricted, and hence they could only appoint agents to act within those limits.¹⁶ But it is well settled that either the husband or the wife may act as the agent of the other, and, within the scope of such agency, may bind the other by admissions or acknowledgments;¹⁷ and the wife may charge the husband by her acts and statements in obtaining those *necessaries* which the husband has neglected or refused to furnish. In such case the agency arises from the marriage relation by operation of law.¹⁸ The law raises the necessary presumption of agency. A wife, by virtue of the marital relation, possesses no original power to bind her husband, by her contracts made on his behalf; and her power for that purpose must, therefore, be derivative. Nevertheless, the law will, in some cases, presume the wife to be the agent of the husband, when no such presumption would exist as to another person; and also will,

Underwood v. Linton, 44 Ind. 72; Chaslavka v. Mechalek, 124 Iowa, 69, 99 N. W. 154; Bray v. Cumming, 5 Mart., N. S. (La.), 252; Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 2 L. R. A. 81, 19 N. E. 390; Burns v. Kirkpatrick, 91 Mich. 364, 30 Am. St. Rep. 485, 51 N. W. 893; Wall v. Coppedge, 15 Mo. 448; Norfolk Nat. Bank v. Wood, 33 Neb. 113, 49 N. W. 958; Horan v. Byrnes, 70 N. H. 531, 49 Atl. 569; Macondray v. Wardle, 26 Barb. (N. Y.) 612, 7 Abb. Pr. 3; May v. Little, 25 N. C. 27, 38 Am. Dec. 707; Gardner's Appeal (Pa.), 8 Atl. 176; Queener v. Morrow, 1 Cold. (Tenn.) 123; Hill v. Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Meek v. Pierce, 19 Wis. 300; Kelly v. Small, 2 Esp. 716.

¹⁵ Rose v. Chapman, 44 Mich. 312, 6 N. W. 681; Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281; Livesley v. Lasalette, 28 Wis. 38; Starns v. Hadnot, 42 La. Ann. 366, 7 South. 672; Van Zandt v. Schuyler, 2 Kan. App. 118, 43 Pac. 295; Wright v. Rambo, 21 Gratt. (Va.) 158; McKnight v. United States, 130 Fed. 659, 65 C. C. A. 37; Emerson v. Blonden, 1 Esp. 142; Anderson v. Saunderson, 2 Stark. 204, Holt, 591; Carey v. Adkins, 4 Camp. 92.

¹⁶ Stew. Hus. & Wife, §§ 84, 85.

¹⁷ Stew. Hus. & Wife, §§ 84, 98.

¹⁸ Stew. Hus. & Wife, §§ 95, 98; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384, and note.

in some cases, imply a larger authority to the wife than to an ordinary agent; and this, perhaps, whether the husband be absent from home or not; and that, in other cases, where he is absent, a presumption would arise that his wife has authority to act in his behalf, which would not exist, if he were at home. But it will be found that in all such cases these inferences are founded on the fact that it is usual and customary to permit the wife to act in such cases. It is a presumption arising from the state of society.¹⁹ "The husband is bound to fulfill the contract of his wife, when it is such an one as wives, according to the usage of the country, commonly make. If the wife should purchase, at a merchant's store, such articles as wives in her rank of life usually purchase, the husband ought to be bound; for it is a fair presumption that she was authorized so to do, by her husband. If, however, she were to purchase a ship or yoke of oxen, no such presumption would arise; for wives do not usually purchase ships or oxen."²⁰ We do not find any adjudged case which sanctions the doctrine that the wife, whether the husband is abroad or at home, is presumed to be the agent of her husband generally, or to be intrusted with any other authority as to his affairs, than that which it is usual and customary to confer upon the wife. It would be not only unreasonable, and, as it respects the husband's interests, unsafe, but it would be going beyond what could fairly be presumed to be his intention, to extend the powers of the wife by implication or presumption further than this principle warrants.²¹ Sometimes there arises what is known as an

¹⁹ Benjamin v. Benjamin, *supra*. Thus in *Anonymous*, 1 Strange, 527, 93 Eng. Reprint, 678, "Pratt, C. J., allowed the wife's declaration that she agreed to pay four shillings per week, for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women."

²⁰ Reeve, Dom. Relations, p. 79. On the same ground, in Church v.

Landers, 10 Wend. (N. Y.) 79, the wife, in the husband's absence, was presumed to have been left an agent for the hiring out of his horses: 2 Cow. Ph. on Ev., 294, n. 298. In Spencer v. Tissue, Addis. (Pa.) 316, a payment to the wife of a debt due to the husband in his absence was held good, for the same reason.

²¹ Benjamin v. Benjamin, *supra*; Sawyer v. Cutting, 23 Vt. 486; Savage

agency enforced by circumstances, and an excellent illustration of that position occurs in an Indiana case.²² The defendant, the maker of a note, was sued by the administrator of the payee, and evidence was given that the payee, who was a wealthy bachelor and the uncle of the maker, on finding that his nephew was stricken with paralysis, often visited him and told him he would never be bothered for payment of the note. When the payee died the note could not be found and the plaintiff sued as on a lost note, and the defense was the forgiving of the debt evidenced by the destruction of the note. The plaintiff sought to introduce statements of the defendant's wife, who was his attendant during his helplessness, and was refused permission by the court and excepted. The appeal court said: "Nor can we agree with appellant's contention that the court below erred in excluding the statement and admissions of the appellee's wife, sought to be introduced in evidence. The ground upon which it is claimed this evidence was competent was that the wife at the time of making the statements was shown to be the agent of her husband. She

v. Davis, 18 Wis. 608; Butts v. Newton, 29 Wis. 632; Shelton v. Pendleton, 18 Conn. 417. The subject of the marital as affecting the agential relation is well summarized in Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481, as follows: The husband is under a legal obligation to furnish the wife with what the law deems necessities, and whatever may be suitable and requisite to enable her to go according to her situation and degree in life; and if he is neglectful, she may contract for such articles, and he will be held liable on the ground of presumed authority. Such contracts are his, not hers. A wife, as such, has no original or inherent power to make any contracts which are obligatory or binding on her husband. No such right flows from the marital relations existing between them. To give her a

power in any case to bind him by her contract made in his behalf, it must be by virtue of a power derived from him and founded on his assent, though such assent may be either precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, it is not by reason of any relation existing between them as husband and wife, but it comes more properly within those principles which, in ordinary cases, govern principal and agent. That the wife has the capacity to be constituted by the husband his agent, and to act as such equally with any other person, has long been an established and undoubted principle.

²² Conner v. Martin, 46 Ind. App. 141, 92 N. E. 3.

was the agent of her husband by force of circumstances, and not by appointment. She was only authorized to transact such business as the circumstances required that she should transact. The admissions and statements sought to be introduced in evidence were entirely outside of the authority conferred upon her by such forced agency." But in other cases the *authority*, express or implied, to make admissions *must be shown* before the declarations of either husband or wife can be received against each other;²³ and although such authority may, as in other cases of agency, be implied from the acts and conduct of the parties or from subsequent ratification, *it cannot be implied from the mere existence of the marriage relation.*²⁴ Thus, in the absence of proof of agency, the declarations of a wife in the lifetime of her husband showing his liability to a debt are inadmissible;²⁵ and a husband's admissions are incompetent to prove that he is agent for his wife in matters concerning her separate property.²⁶ It has been frequently held that, where the husband and wife are joined as parties plaintiff, the admissions of the wife are not competent against the husband although they sue in her right, as for her wages or debts due to her.²⁷ But in this connection it is useful to note that, even in those states where "neither the husband nor wife can be, in any case a witness against the other,"²⁸ the prohibition has been held not to extend to where they are co-

²³ *Edwards v. Tyler*, 141 Ill. 454, 31 N. E. 312; *White v. Town of Portland*, 63 Conn. 18, 26 Atl. 342; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *Price v. Seydel*, 46 Iowa, 696; *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405; *Aldrich v. Earle*, 13 Gray (Mass.), 578; *Eystra v. Capelle*, 61 Mo. 578; *Norfolk Bank v. Wood*, 33 Neb. 113, 49 N. W. 958; *Winans v. Demarest*, 84 N. Y. Supp. 504; *Evans v. Evans*, 155 Pa. 572, 26 Atl. 755; *Livesley v. Lasalette*, 28 Wis. 38.

²⁴ *Butler v. Price*, 115 Mass. 578;

Deck v. Johnson, 1 Abb. Dec. (N. Y.) 497; *Martin v. Rutt*, 127 Pa. 380, 17 Atl. 993. See, also, cases last cited.

²⁵ *May v. Little*, 3 Ired. (25 N. C.) 27, 38 Am. Dec. 707.

²⁶ *Whitescarver v. Bonney*, 9 Iowa, 480.

²⁷ *Denn v. White*, 7 Term Rep. 112, 101 Eng. Reprint, 882; *White v. Holman*, 12 Me. 157; *Turner v. Coe*, 5 Conn. 94; *Jordan v. Hubbard*, 26 Ala. 433; *Lasselle v. Brown*, 8 Blackf. (Ind.) 221.

²⁸ Iowa Code, § 4606.

parties. In such an action, in which the wife was interested in her own right, the Iowa court thus expresses itself: "She is required to give evidence in a suit wherein she is interested in her own right; the issues upon which she is required to testify affect her personally and not as a wife. The fact that her interests in the action are connected with those of the husband does not give him the right to object to her examination. If this be so, she may object to the examination of her husband, and the plaintiff thus would be deprived of the evidence of both. The argument against the right of plaintiff to examine the wife is completely answered by the consideration of the fact that she is called to testify in her own case as to matters affecting her own interests and property. She is not called upon, as contemplated by Revision, section 3983, to be a witness against her husband, but against herself. The spirit of the statute forbids the interpretation put upon it by defendants."²⁹ A later Iowa case contains an interesting discussion on the rights of husband and wife, defendants, to and against each other's testimony. It was sought to set aside the deed under which the defendants claimed, on the ground of the mental incapacity of the grantor. The wife had made admissions in letters, and the husband had made admissions before certain insanity commissioners, and they made cross-objections to the reception of their statements. The court said: "We cannot believe that these declarations must be entirely excluded merely because the setting aside of this deed on the ground of mental incapacity, to which the declarations of both related, would affect the interests of both parties. It would be strange, indeed, if the mere existence of an interest in the validity of the deed, common although not joint, would render inadmissible declarations which, as to each taken separately, would be absolutely conclusive. . . . But, where there is sufficient competent evidence to set aside the deed as to each of the grantees, we see no justice in refusing to give such relief, although some of the evidence admissible as to one may not be admissible

²⁹ *Richards v. Burden*, 31 Iowa, 305.

as to the other.”³⁰ On the same principle it was held that admissions made by a wife without her husband’s knowledge, were not competent evidence of a way by prescription over land owned by them in her right.³¹ It is to be observed, however, that inasmuch as modern *statutes have greatly extended the powers of married women* in respect to the holding of property and the making of contracts, their power to affect such property by admissions has been correspondingly increased; and that, in so far as married women may make contracts and carry on business, their admissions are evidence against themselves.³² In an action by or against the trustee of a married woman, her admissions, like those of any other *cestui que trust*, are admissible,³³ even though her husband is the adverse party.³⁴

§ 261 (263). Same—Power to make admissions—How inferred.—As we have just shown, the general power to make contracts and admissions cannot be inferred from the mere existence of the marital relation, yet the law will more readily presume an agency and sometimes imply a larger authority than if no such relation existed. But these inferences are founded on the fact that the acts are such as are *usual and customary* for the husband or wife to perform under similar circumstances.³⁵ Thus, it has

³⁰ *Chaslayka v. Mechalek*, 124 Iowa, 69, 99 N. W. 154. (The court added: “We are cited to cases in which it has been held that declarations of one of two or more devisees or legatees as to the mental capacity of a testator are not admissible, because they might affect the interests of the other devisees or legatees. But we are not referred to any case similar to the one before us. We might assent to the proposition that if the case for setting aside the will as to Annie Mechalek was made out by evidence of her declarations, but no case was shown for setting aside the deed as to

Frank Mechalek, save by such declarations, then the deed should not be set aside, and *vice versa*.”)

³¹ *McGregor v. Wait*, 10 Gray (Mass.), 72, 69 Am. Dec. 305.

³² *Morrell v. Cawley*, 17 Abb. Pr. (N. Y.) 76; *McLean v. Jagger*, 13 How. Pr. (N. Y.) 494; *Hackman v. Flory*, 16 Pa. 196; *Winter v. Walter*, 37 Pa. 155; *Lasselle v. Brown*, 8 Blackf. (Ind.) 221.

³³ *Taylor, Ev.*, 10th ed., § 766.

³⁴ *Scholey v. Goodman*, 1 Bing. 349, 8 Moore, 350, 1 Car. & P. 36.

³⁵ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; Anonymous,

been held competent to infer the authority of a wife to accept a notice in respect to a particular transaction from the fact that she was seen twice in her husband's office, appearing to conduct his business relating to that transaction and once giving orders to the foreman;³⁶ or from the fact that he was absent from his place of business, and no one else was present to attend to it.³⁷ But in all such cases the admission of the husband or wife must fall *within the scope of the authority* which may be reasonably presumed from the nature of the business and the powers delegated.³⁸ Thus, while a wife carrying on a business for her husband might make admissions with respect to matters connected with the trade, she would have no implied authority to make admissions of an *antecedent contract* for the hire of the shop.³⁹

§ 262 (264). Same—In actions for divorce.—Admissions of husband or wife lose, as a matter of necessity, all suggestion of agency when they are to be used in divorce proceedings, except, of course, when collusion establishes a form of fraudulent agency which destroys their right. Unlike other contracts, the contract of marriage cannot

1 Strange, 527, 93 Eng. Reprint, 678; Church v. Landers, 10 Wend. (N. Y.) 79. See § 260, *ante*.

³⁶ Plummer v. Sells, 3 Nev. & M. 422.

³⁷ Rotch v. Miles, 2 Conn. 638.

³⁸ Pearce v. Smith, 126 Ala. 116, 28 South. 37; Burnett v. Burkhead, 21 Ark. 77, 76 Am. Dec. 358; Coe v. Turner, 5 Conn. 86; Conner v. Martin, 46 Ind. App. 141, 92 N. E. 3; May v. Sturdivant, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; Van Zandt v. Schuyler, 2 Kan. App. 118, 43 Pac. 295; Bonney v. Reardin, 6 Bush (Ky.), 34; White v. Holman, 12 Me. 157; McGregor v. Wait, 10 Gray (Mass.), 72, 69 Am. Dec. 305; Hunt v. Strew, 33 Mich. 85; Pickering v. Pickering, 6 N. H. 120;

Post v. Smith, 54 N. Y. 648; Hughes' Admrs. v. Stokes, 2 N. C. 372; May v. Little, 3 Ired. (25 N. C.) 27, 38 Am. Dec. 707; Thomas v. Hargrave, Wright (Ohio), 595; Murphy v. Hubert, 16 Pa. 50; Queener v. Morrow, 1 Cold. (Tenn.) 123; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281; Sheppard's Exr. v. Starke, 3 Munf. (Va.) 29; Butts v. Newton, 29 Wis. 632; Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666; Meredith v. Footner, 11 Mees. & W. 202, 12 L. J. Ex. 183; Clifford v. Burton, 1 Bing. 199, 1 L. J. C. P. (O. S.) 61, 8 Moore C. P. 16, 25 Rev. Rep. 614, 8 Eng. Com. L. 471.

³⁹ Meredith v. Footner, 11 Mees. & W. 202, 12 L. J. Ex. 183.

be dissolved by the mere consent and agreement of the parties; and in actions for the dissolution of this contract, that is, for divorce, admissions are closely scrutinized. Although the husband and wife are the parties to the record, the *state* is for some purposes *deemed interested* in the proceeding. The contract of marriage is tripartite, the husband, the wife and the state being the parties thereto; and it can neither be entered into nor dissolved except by the consent of and in the manner prescribed by the state. It necessarily follows that no admissions by either party to the contract, however conclusive upon such party, can be conclusive upon the state in a suit for the dissolution of the contract, and that such dissolution cannot safely be decreed unless the admission be corroborated by strong proofs. From an early day such has been the rule of the common law. In England, the one hundred and fifth canon of 1603 prescribed, among other things, "that credit be not given to the sole confession of the parties themselves, however taken upon oath, either within or without the court."⁴⁰ The suit for divorce has been called a triangular proceeding *sui generis*, in which the government occupies the position of a third party.⁴¹ Since the public have an interest

⁴⁰ The canon obviously leaves to a confession some weight as evidence, but what that weight should be is left curiously in doubt by the English cases. Thus, in *Williams v. Williams*, 1 Hagg. 299, Lord Stowell says that a confession is a species of evidence which, though not inadmissible, is to be regarded with great distrust, while in *Mortimer v. Mortimer*, 2 Hagg. 310, the same learned judge announces that a confession ranks high, "I should say highest in the scale of evidence," though in the same case he admits that the rule that confessions alone will not support a charge of adultery is too firmly established to be shaken. In *Harris v. Harris*, 2 Hagg. 376, Dr. Lushington is more intelligible when he says

that a confession perfectly free from all taint of collusion, when confirmed by circumstances and conduct, ranks among the highest species of evidence. Reference is specially made in *Howard v. Howard*, 77 N. J. Eq. 186, 78 Atl. 195, to *Summerbell v. Summerbell*, 37 N. J. Eq. 603. "In that case the opinion of Barker Gummere, Esq., as master, collates and comments upon the cases in a manner so thorough and discriminating as to be of the utmost value. The opinion of the court of appeals affirming the decree advised by him discusses the special facts shown": *Perkins v. Perkins*, 59 N. J. Eq. 515, 46 Atl. 173.

⁴¹ 2 Bish. Mar. & Div., § 231; Nelson, Div. & Sep., § 7. On the subject of this section see extended

in actions for divorce and ought not to be bound by the admissions of one of the parties, it has generally been held that a divorce should not be granted upon the *uncorroborated* admission or confession of a party.⁴² The approved rule of law appears to be that a divorce will not be granted when the admissions of the criminal party constitute the entire basis upon which to rest the conclusion of guilt. Such evidence, it is said, may convince to a moral certainty; but it does not fill the measure of legal proof. That such a standard for legal judgment could not safely be adopted is apparent, when we consider the ease with which the entire case could be simulated by colluding parties. The precedents, therefore, wisely require something more than the naked declarations of the defendant.⁴³ In

note to *Richardson v. Richardson*, 30 Am. Dec. 544.

⁴² *Richardson v. Richardson*, 4 Port. (Ala.) 467, 30 Am. Dec. 538; *Scarborough v. Scarborough*, 54 Ark. 20, 14 S. W. 1098; *Hayes v. Hayes*, 144 Cal. 625, 78 Pac. 19; *Evans v. Evans*, 41 Cal. 103; *Baker v. Baker*, 13 Cal. 87; *Woolfolk v. Woolfolk*, 53 Ga. 661; *Buckholts v. Buckholts*, 24 Ga. 238; *Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196; *Bergen v. Bergen*, 22 Ill. 187; *Scott v. Scott*, 17 Ind. 309; *McCulloch v. McCulloch*, 8 Blackf. (Ind.) 60; *Lyster v. Lyster*, 1 Iowa, 130; *May v. May*, 71 Kan. 317, 80 Pac. 567; *Stibbins v. Stibbins*, 1 Met. (Ky.) 476; *Rodgers v. Rodgers*, 13 Ky. Law Rep. 203; *Mack v. Handy*, 39 La. Ann. 491, 2 South. 181; *Succession of Weigel*, 18 La. Ann. 49; *Billings v. Billings*, 11 Pick. (Mass.) 461; *Holland v. Holland*, 2 Mass. 154; *Baxter v. Baxter*, 1 Mass. 346; *Robinson v. Robinson*, 16 Mich. 79; *Clark v. Clark*, 86 Minn. 249, 90 N. W. 390; *True v. True*, 6 Minn. 458; *Armstrong v. Armstrong*, 32 Miss. 279; *Twyman v. Twyman*, 27 Mo. 383; *White v. White*, 45 N. H.

121; *Howard v. Howard*, 77 N. J. Eq. 186, 78 Atl. 195; *Kloman v. Kloman*, 62 N. J. Eq. 153, 49 Atl. 810; *Perkins v. Perkins*, 59 N. J. Eq. 515, 46 Atl. 173; *Summerbell v. Summerbell*, 37 N. J. Eq. 603; *Jones v. Jones*, 17 N. J. Eq. 351; *Miller v. Miller*, 2 N. J. Eq. 139, 32 Am. Dec. 417; *Devanbagh*, 5 Paige Ch. (N. Y.) 554, 591, 90 N. Y. Supp. 131; *Jewell v. Jewell*, 96 App. Div. 633, 89 N. Y. Supp. 166; *Stewart v. Stewart*, 51 App. Div. 629, 65 N. Y. Supp. 927; *Devanbagh v. Devanbagh*, 5 Paige Cr. (N. Y.) 554, 28 Am. Dec. 443; *Toole v. Toole*, 112 N. C. 152, 34 Am. St. Rep. 479, 16 S. E. 912; *Matchin v. Matchin*, 6 Pa. 332, 47 Am. Dec. 466; *Mathews v. Mathews*, 41 Tex. 331; *Sheffield v. Sheffield*, 3 Tex. 79; *Richardson v. Richardson*, 50 Vt. 119; *Gould v. Gould*, 2 Aikens (Vt.), 180; *Latham v. Latham*, 30 Gratt. (Va.) 307.

⁴³ *Jones v. Jones*, 17 N. J. Eq. 351. The rule has been well given in other words in *Summerbell v. Summerbell*, *supra*: "I take the rule to be that, if the proofs in a cause irrespective of the confession of the criminated party, well nigh demon-

some states this rule is declared by statute. But when admissions or confessions are full, deliberate, free from collusion and corroborated, they can be treated as evidence of a high grade.⁴⁴ On the other hand, if they are obtained by *fraud*, *collusion* or duress, they should be rejected as of no value whatever; and owing to the temptation to collusion, admissions in divorce suits should always be carefully *scrutinized* when there is any reason to suspect that the parties desire a divorce.⁴⁵ Chancellor Kent, in his usual well-considered words, says:⁴⁶ "The party's confession may and does aid other proofs, but the decree must not rest alone, nor perhaps, essentially, on such confessions; for there is great danger of collusion between the parties, or of confessions extorted, or made designedly to furnish means of evidence." These confessions, therefore, are to be received in every case with jealousy, and to be weighed with caution, and to be supported with facts and circumstances tending to demonstrate the charge to the satisfaction of the court. It is apparent that a confession, to be

strate the fact of the adultery charged, but do not entirely satisfy the conscience of the court, the confession may then (if free from suspicion of collusion or duress, or improper influence, or of having been prepared to furnish evidence) be permitted to decide the otherwise doubtful judgment of the court."

⁴⁴ *Evans v. Evans*, 41 Cal. 103; *Baker v. Baker*, 13 Cal. 87; *Burke v. Burke*, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466; *Vance v. Vance*, 8 Me. 132; *Billings v. Billings*, 11 Pick. (Mass.) 461; *Tewksbury v. Tewksbury*, 5 Miss. (4 How.) 109; *Jones v. Jones*, 17 N. J. Eq. 351; *Richardson v. Richardson*, 114 N. Y. Supp. 912; *Stewart v. Stewart*, 51 App. Div. 629, 65 N. Y. Supp. 927; *Sigel v. Sigel*, 20 N. Y. Supp. 377; *Matchin v. Matchin*, 6 Pa. 332, 47 Am. Dec. 466; *Mortimer v. Mortimer*, 2 Hagg. Const. 310; *Stone v. Stone*, 3 Notes of

Cas. 278; *Tucker v. Tucker*, 5 Notes of Cas. 458; *Harris v. Harris*, 2 Hagg. Ecc. 160, 4 Eng. Ecc. 160; *Williams v. Williams*, 1 Hagg. Con. 299, 4 Eng. Ecc. 415; *Robinson v. Robinson*, 1 Swab. & T. 362.

⁴⁵ *Derby v. Derby*, 21 N. J. Eq. 36; *Callender v. Callender*, 53 How. Pr. (N. Y.) 364. It is sometimes held that divorces may be granted on admissions or confessions *alone*, when it is clearly established by the circumstances of the case that there is no collusion: *Johns v. Johns*, 29 Ga. 718; *Robbins v. Robbins*, 100 Mass. 150, 97 Am. Dec. 91; *Matchin v. Matchin*, 6 Pa. 332, 47 Am. Dec. 466; *Billings v. Billings*, 11 Pick. (Mass.) 461; *Williams v. Williams*, L. R. 1 Pro. & D. 29; *Robinson v. Robinson*, 1 Swab. & T. 362; *Tippet v. Tippet*, L. R. 1 Pro. & D. 54.

⁴⁶ *Betts v. Betts*, 1 Johns. Ch. (N. Y.) 197.

entitled to any material weight as evidence of adultery, must not only be shown to be free from collusion, but, when made by the wife, must also be shown to have been made freely, without compulsion or undue influence on the part of the husband, and it must also appear that the husband has not caused it to be prepared as a means of formal proof.⁴⁷ Admissions made by the wife to the husband of incontinency and fraud may be given in evidence by him, but they should be cautiously received and carefully weighed, and ordinarily they will be deemed insufficient of themselves to establish a ground of divorce. Although the testimony of the plaintiff is not directly contradicted, the trial court is not bound to accept his statements as true, if his appearance and manner at the trial leads the court to doubt his good faith, or if there are other discrediting circumstances which develop during the trial.⁴⁸ Where the proof of adultery lies in confessions of the defendant and his paramour, the admissions of the latter in the absence of the defendant are not admissible.⁴⁹ When the proof of the adultery offered by the plaintiff husband lies in admissions made by the wife to a woman who is charged by the wife in the answer with being the paramour of the husband, the issues should not be disposed of simply upon such testimony. As the New York court said in opening a default order,⁵⁰ "She was the informant, as it would appear. It was she who advised the plaintiff of his wife's alleged infidelity, and she gives a most extraordinary account of the sources of her knowledge. She is greatly in-

⁴⁷ *Summerbell v. Summerbell*, *supra*.

⁴⁸ *May v. May*, 71 Kan. 317, 80 Pac. 567.

⁴⁹ *Howard v. Howard*, 77 N. J. Eq. 186, 78 Atl. 195. In this case the confessions of the defendant were made to his wife and her sister, and although not collusive, they were held incompetent alone to support a decree. The language in *Diederichs v. Diederichs*, 44 Misc. Rep. 591, 90 N. Y.

Supp. 131, is very clear: "To warrant the court in basing a judgment of absolute divorce upon the confession of the party charged with adultery, the circumstances of such confession must be shown to be of a character that precludes all suspicion of collusion, and, as a general rule, such confession should be corroborated by other proof."

⁵⁰ *Jewell v. Jewell*, 96 App. Div. 633, 89 N. Y. Supp. 166.

terested in the result of the trial, and should be subjected to a rigid cross-examination." In a later New York case,⁵¹ the husband sued for divorce for adultery, and the wife of the corespondent gave evidence for the plaintiff as to a conversation with the defendant wife, wherein she told her of the corespondent having confessed his misdeeds to her, which the defendant entirely denied. Subsequently the corespondent gave evidence denying the immorality with the defendant, and was then asked as to his conversations with his wife alluded to in the testimony given on the plaintiff's behalf. The questions were properly excluded as being neither part of the conversation between the two women nor relevant to the defendant's conduct when charged with the adultery. The question in issue was not whether the corespondent had admitted his guilt to his wife, but what was the defendant's conduct when told that he had. In those jurisdictions where the admissions must be corroborated by proof of other facts, the amount of corroboration required depends upon the opportunities for collusion; where there is less danger of collusion, the corroborating facts need not be so decisive as in other cases.⁵²

§ 263 (265). Admissions by persons referred to for information.—It not infrequently happens that an informal reference is made over a disputed matter to a third person, not in the nature of a submission to arbitration, but rather as an aid to the settlement of the differences existing between the parties and to enable the parties themselves to effect a settlement on the information. For instance, in a recent Oklahoma case,⁵³ the plaintiff sued for the price of a piano, and the defense was that the piano was sold on a warranty, and was not as warranted, and that the plaintiff agreed to send one of his men to examine it and report. Incidentally, the wife of the defendant, who went as his

⁵¹ *Lunham v. Lunham*, 133 App. (Mich.) 48; *Baker v. Baker*, 13 Cal. Div. 215, 117 N. Y. Supp. 396. 87.

⁵² *Sawyer v. Sawyer*, Walk. Ch. ⁵³ *Armstrong v. Crump*, 25 Okl. 452, 106 Pac. 855.

agent to make the complaint, testified that the plaintiff said to her that he would send an expert to examine the piano and that whatever the expert said the plaintiff would abide by. The expert said the piano was faulty. The plaintiff objected to the evidence of the defendant's wife, and the court held that the objection was untenable and the evidence rightly received, basing their opinion on the rule that the admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the person referred to, in the same manner and to the same extent as if they were made by himself.⁵⁴ The investment of this agent with the authority conferred within its scope gave him the same power in reference to the piano that the plaintiff himself would have had; and, if the statement would have been admissible given by a member of the firm, it was admissible when given by an agent so constituted and empowered. When a party to any proceeding expressly refers to any other person for an answer on a particular subject in dispute, such answer is in general evidence against him, for the reason that he makes such third person his accredited *agent* for the purpose of giving such answer.⁵⁵ Thus in an action where the delivery of goods is in issue, if the defendant agrees

⁵⁴ 1 Greenl. Ev., § 182. The rule as stated by Greenleaf has been criticised in *Rosenbury v. Angell*, 6 Mich. 508, both for the use of the term "admissions" and the omission of any reference to the authority of the third person. Phillips thus states the rule in question under the head of agency and places it upon that ground: "So if one party refers another, on a disputed fact, to a third person *as authorized to answer for him*, he is bound by what his referee answers upon the occasion, as much as if the answer had been given by himself."

⁵⁵ *Evatt v. Hudson*, 97 Ark. 265, 113 S. W. 1023; *People v. Brady* (Cal.), 36 Pac. 949; *Chadsey v. Greene*, 24 Conn. 562; *Bartoletti v. Hoerner*, 154 Ill. App. 336; *Robertson v. Hamilton*, 16 Ind. App. 328, 59 Am. St. Rep. 319, 45 N. E. 46; *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91; *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *McDowell v. Goldsmith*, 2 Md. Ch. 370; *Shaw v. Stone*, 1 Cush. (Mass.) 228; *Marx v. King*, 162 Mich. 258, 127 N. W. 341; *Adler-Goldman Commission Co. v. Adams Express Co.*, 53 Mo. App. 284; *Price v. Lederer*, 33 Mo. App. 426;

to pay for the goods if a third person will say that they had been delivered, the statement of such person may be admitted against the defendant;⁵⁶ and where a party referred to his wife as able to state the facts, her declarations were held admissible against him.⁵⁷ So in an action against an express company for the loss of a trunk, the admission of the defendant's general agents or of a freight clerk to whom those agents have referred the plaintiff for information as to the manner of the loss, when made in answer to his inquiries, are admissible against the company.⁵⁸ If a vendor refers a purchaser to a third person for information in regard to the property to be sold, the declarations of such third person on the subject are admissible,⁵⁹ but such a reference does not make the person referred to an agent for the purpose of making *general admissions*. The declarations are not evidence unless strictly within the subject matter in relation to which the reference is made.⁶⁰ Thus, where a defendant stated that a bookkeeper would furnish whatever information was contained in the books, the declarations of the bookkeeper to the effect that in his opinion certain entries in the book were false to the knowledge of the defendant were held inadmissible;⁶¹ and where a person refers generally to persons in the community as to the question of his general character without naming them, this does not make their declarations evidence

Holderness v. Baker, 44 N. H. 414; Wehle v. Spelman, 1 Hun (N. Y.), 634, 4 Thomp. & C. 649; Duval v. Covenhoven, 4 Wend. (N. Y.) 561; Armstrong v. Crump, 25 Okl. 452, 456, 106 Pac. 855; Jennings v. Haynes, 1 Ohio C. C. 22, 1 Ohio Cir. Dec. 13; Equitable Mfg. Co. v. Cooley, 69 S. C. 332, 48 S. E. 267; Missouri etc. R. Co. v. Pettit, 54 Tex. Civ. App. 358, 117 S. W. 894; Thayer v. Davis, 75 Wis. 205, 43 N. W. 902; Murphy v. Killinger, 8 Wall. (U. S.) 480, 19 L. Ed. 470; Daniel v. Pitt, 1 Camp. 366, note, 6 Esp. 74, Peake's Add. Cas. 238;

1 Greenl. Ev., § 182; Steph. Ev., art. 19.

⁵⁶ Daniel v. Pitt, 1 Camp. 366, 6 Esp. 74, Peake's Add. Cas. 238.

⁵⁷ Reg. v. Mallory, 13 Q. B. Div. 33, 53 L. J. M. C. 134.

⁵⁸ Gott v. Dinsmore, 111 Mass. 45.

⁵⁹ Chadsey v. Greene, 24 Conn. 562; Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773; Bedell v. Commercial Ins. Co., 3 Bosw. (N. Y.) 147.

⁶⁰ Duval v. Covenhoven, 4 Wend. (N. Y.) 564; Murphy v. Killinger, 8 Wall. (U. S.) 480, 19 L. Ed. 470.

⁶¹ Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293.

against him.⁶² The death of the person referred to does not affect the admissibility of the testimony, in that if alive he is not a necessary witness. Once the reference is established, the result of it is competent irrespective of the referee.⁶³

§ 264 (266). **Effect of consenting to pay on condition an affidavit is made.**—This apparent reference to the conscience seems to be a survival of a branch of the ancient trials by ordeal, and it remains good law to-day, but is rather in the nature of a special contract than to be regarded as an admission. It has sometimes been held that where one party offers to pay a claim, provided the adverse party should make an affidavit of its validity, or in some other way agree to abide the results of such affidavit, he is concluded thereby although the affidavit proves untrue;⁶⁴ but by the weight of authority a party is *not estopped* under such circumstances. The purposes of justice and policy are sufficiently answered by throwing on him the *burden of proof*, and holding him bound, unless he impeaches the test referred to by clear proof of *fraud or mistake*.⁶⁵ From a century old New York case⁶⁶ we learn that Spencer, C. J., dealt with it on the direct issue whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise. After citing several cases in point,⁶⁷ the learned

⁶² *Rosenbury v. Angell*, 6 Mich. 508.

⁶³ *McElwee Mfg. Co. v. Trowbridge*, 68 Hun, 28, 22 N. Y. Supp. 674; *Craig v. Craig*, 3 Rawle (Pa.), 472, 24 Am. Dec. 390.

⁶⁴ *Brooks v. Ball*, 18 Johns. (N. Y.) 337; *Bretton v. Prettiman*, T. Raym. 153, 83 Eng. Reprint, 82; *Amie v. Andrews*, 1 Mod. 166, 86 Eng. Reprint, 804; *Stevens v. Thacker, Peake*, 187; *Lloyd v. Willan*, 1 Esp. 178.

⁶⁵ *Tayl. Ev.*, 10th ed., § 765; 1

Greenl. Ev., § 184; *Whitehead v. Tattersall*, 1 Ad. & E. 491, 110 Eng. Reprint, 1295.

⁶⁶ *Brooks v. Ball*, *supra*.

⁶⁷ In *Bretton v. Prettiman* (Sir T. Raym. 153, 83 Eng. Reprint, 82), the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him, and the plaintiff averred that he swore before a master in chancery. On demurrer, it was adjudged for the

Chief Justice said: "These cases, which stand uncontradicted, abundantly show that such a promise as the present is good in point of law; and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause; but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit, would be allowing him to alter the conditions of his engagement, and virtually to rescind his promise." It need hardly be added that if there is a clear and explicit agreement to submit to *arbitration*, which agreement is acted upon, the parties are mutually estopped to question the conclusiveness of the decision, unless it is impeachable under the law governing awards.⁶⁸

plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In *Stevens and Others v. Thacker, Peake's N. P. Rep. 187*, the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord Kenyon said that had the defendant sworn to the affidavit, he should have held that he had discharged himself, though the affidavit had been false; for the plaintiffs, who had agreed to accept that affidavit, as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action

on the bill. In *Lloyd & Willan, 1 Esp. Rep. 178*, the defendant's attorney proposed to the plaintiff's attorney that the defendant should pay the demand, if the plaintiff's porter would make an affidavit that he had delivered the goods in question to the defendant. The affidavit was made, and Lord Kenyon held it to be conclusive, and the defendant was precluded from going into any defense in the case.

⁶⁸ *Males v. Lowenstein*, 10 Ohio St. 512; *Burrows v. Guthrie*, 61 Ill. 70; *Board of Trustees v. Cokely*, 5 Ind. 164; *Reynolds v. Roebuck*, 37 Ala. 408; *Sybray v. White*, 1 Mees. & W. 435, 2 Gale, 68, 1 Tyr. & G. 746; *Price v. Hollis*, 1 Maule & S. 105, 105 Eng. Reprint, 40.

§ 265 (267). **Admissions by interpreters.**—Coming directly under the head of admissions by agents, the statements of an interpreter are of the same weight as those of either of his principals. When a person selects an interpreter to communicate with another person, and to receive the answers, such interpreter is the accredited *agent* of the one employing him; and the statements of the interpreter in the course of the employment are admissible as original evidence, and are in no sense hearsay; nor is it necessary to call the interpreter to prove such statements, or that his interpretation was correct.⁶⁹ The rule has been well stated in the various opinions referred to in the notes, but in none better than in a Massachusetts case.⁷⁰ Knowlton, J., in that case said that when two persons who speak different languages, and who cannot understand each other, converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own. Each acts upon the theory that the interpretation is correct. Each impliedly agrees that his language may be received through the interpreter. If

⁶⁹ *Camerlin v. Palmer Co.*, 10 Allen (Mass.), 539; *Fabrigas v. Mostyn*, 20 How. St. Tr. 122; *Sertaut v. Crane Co.*, 142 Ill. App. 49; *McCormicks v. Fuller*, 56 Iowa, 43, 8 N. W. 800. A wife's statement while acting as interpreter for her husband may be proved: *Schutter v. Williams*, 1 West. L. J. (Ohio) 319. An interpreter who is selected by two persons speaking different languages as the medium of their communication with each other is regarded as their joint agent for that purpose, and the statements of what they say in the presence of each other are regarded as the statements of the persons themselves; and like any other admission may be shown by the testimony of any person who heard them without calling the inter-

preter as a witness: *Kelly v. Ning Yung Ben. Assn.*, 2 Cal. App. 460, 84 Pac. 321; *Greenl. Ev.*, § 183. When two persons voluntarily agree upon a third to act as interpreter between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, so that such other has a right to rely on the communication so made to him. It is the communication of the party through the agent: *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. 274.

⁷⁰ *Commonwealth v. Vose*, 157 Mass. 393, 17 L. R. A. 813, 32 N. E. 355. To the report in the last-named volume there is appended a useful note on the admissibility generally of such statements.

nothing appears to show that their respective relations to the interpreter differ, they may be said to constitute him their joint agent to do for both that in which they have a joint interest. They wish to communicate with each other, they choose a mode of communication, they enter into conversation, and the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation as much as those which fall from their own lips. They cannot complain if the language of the interpreter is taken as their own by anyone who is interested in the conversation. Interpretation under such circumstances is *prima facie* to be deemed correct. There is an old Wisconsin case,⁷¹ which held that although the circumstances may be such as to make the interpreter an agent whose words are binding on the parties, he is *not necessarily an agent*; and the mere fact that a person contracts with another whose language he does not understand, by means of an interpreter, does not constitute the latter an agent so as to bind him by a false translation of the language of the parties. We cannot follow this reasoning at all. On every legal and logical ground the interpreter is the agent, and if he has interpreted falsely, as in the case referred to, the parties must look for their remedy from some other source than that of repudiation to the agency. There seems to be no support for the proposition. Indeed, in a later case from the same state,⁷² the *dictum* of the earlier one is unnoticed, and we find the court saying: "It is understood that what is said to a person who acts as an interpreter between the person speaking and other third parties will be repeated to such other parties in the language which they understand. The person speaking through an interpreter virtually says to such other person, 'You listen to what the interpreter says, and he will tell you what I say'; and what the interpreter says is to be taken as the language of the person speaking

⁷¹ Diener v. Schley, 5 Wis. 483.

⁷² Nadau v. White River Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135.

through him, and may therefore be admitted in evidence against him, under the rule that the statement of a third person is receivable in evidence against a party who has expressly referred another to him for information as to any matter." One who acts as *interpreter during a trial* is not the agent of the parties, but the *officer of the court*.⁷³ His statements given on a former trial cannot be admitted as evidence unless his absence is satisfactorily explained.⁷⁴

§ 266 (268). **Declarations of persons acting in a representative capacity.**—We have seen that generally the competency of admissions is not affected by the time at which they are made.⁷⁵ But it is an important qualification of the last statement that, if the admission is made by a person suing or being sued in a *representative capacity* only, it must be made while the person making it sustains that capacity.⁷⁶ And even then, as we shall show, the statements are not always admissible. Thus, although it has sometimes been intimated that the statements of an executor or assignee or other representative made *before his appointment* might be admissible,⁷⁷ yet it is the rule sustained by the weight of authority that such admissions of an executor or administrator,⁷⁸ guardian,⁷⁹ or trustee⁸⁰ cannot be received, except to affect themselves *individually*,⁸¹ although statements of such persons might be compe-

⁷³ *Schearer v. Harber*, 36 Ind. 536.

⁷⁴ *People v. Ah Yute*, 56 Cal. 119; *People v. Lee Fat*, 54 Cal. 527; *Schearer v. Harber*, 36 Ind. 536.

⁷⁵ See § 236, *ante*.

⁷⁶ *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165; *Horkan v. Benning*, 111 Ga. 126, 36 S. E. 432; *Lewis v. Warden*, 163 Mo. App. 256, 143 S. W. 165; *Charlotte O. & F. Co. v. Rippy*, 123 N. C. 656, 31 S. E. 879; *Missouri etc. R. Co. v. Gentry*, 31 Okl. 579, 122 Pac. 537; *Williams v. Culver*, 39 Or. 337, 64 Pac. 763.

⁷⁷ *Smith v. Morgan*, 2 Moody & R. 257.

⁷⁸ *Church v. Howard*, 79 N. Y. 415; *Brooks v. Goss*, 61 Me. 307; *Dent v. Dent*, 3 Gill (Md.), 482; *Prudential Ins. Co. v. Fredericks*, 41 Ill. App. 419; *Duffy v. Stymest*, 5 All. (Can.) 197; *Nicholson D. Spafford v. Rea*, 3 O. S. (Can.) 84.

⁷⁹ *Lamar v. Micou*, 112 U. S. 452, 28 L. Ed. 751, 5 Sup. Ct. Rep. 221; *Westenfelder v. Green*, 24 Or. 448, 34 Pac. 23.

⁸⁰ *Moore v. Butler*, 48 N. H. 161.

⁸¹ *Whiton v. Snyder*, 88 N. Y. 299.

tent, if made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of the *res gestae*.⁸² Dealing with the various representative classes, we find that the admissions made during the representative tenure of a trustee are competent against his beneficiary, assuming them to be made within the scope of his authority;⁸³ but not those of a mere "dry" or "technical" trustee.⁸⁴ The same rule applies to admissions of guardians.⁸⁵ The admissions of a guardian which mean the sacrifice and giving away of the ward's property are never held to be binding.⁸⁶ In like manner a guardian *ad litem*,

⁸² Church v. Howard, 79 N. Y. 415; Whiton v. Snyder, 88 N. Y. 299; Faunce v. Gray, 21 Pick. (Mass.) 243.

⁸³ Belknap Sav. Bk. v. Lamar Land etc. Co., 28 Colo. 326, 64 Pac. 212, (where the court refused to hold beneficiaries bound by fraudulent admissions of a faithless trustee. "We decline to dignify with discussion the argument that such action of a trustee binds its beneficiaries. We merely dismiss it, with the observation that neither in morals nor in law will it bear scrutiny, and a court of equity will not listen for a moment to such an unconscionable proposition"); Knorr v. Raymond, 73 Ga. 749 ("If he was a continuing trustee, holding the legal title for them, his admissions, while actually handling the subject matter of the trust, in such acts as collecting the rents (which as trustee he was authorized to do), would be good against them"); Franklin Bank v. Cooper, 36 Me. 179; Chipman v. Kellogg, 60 Mich. 438, 27 N. W. 592 (where the trustee was dead); Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194; Helm v. Steele, 3 Humph. (Tenn.) 472.

⁸⁴ Thompson v. Drake, 32 Ala. 99; Fargason v. Edrington, 49 Ark. 207,

4 S. W. 763; Townsend Sav. Bank v. Todd, 47 Conn. 190; Bragg v. Geddes, 93 Ill. 39, 5 Morr. Min. Rep. 624; First Nat. Bank v. Farmers' etc. Bank, 171 Ind. 323, 86 N. E. 417; Allen v. Everett, 12 B. Mon. (Ky.) 371; Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886; Thompson v. Me costa, 141 Mich. 175, 104 N. W. 694; Eitelgeorge v. Mutual House Bldg. Assn., 69 Mo. 52; Barber v. Bennett, 60 Vt. 662, 1 L. R. A. 224, 15 Atl. 348; Caldwell's Exr. v. Prindle, 19 W. Va. 604, 6 Am. St. Rep. 141.

⁸⁵ Chisholm v. Newton, 1 Ala. 371; Rarick v. Vandevier, 11 Colo. App. 116, 52 Pac. 743; Knights Templars etc. Co. v. Crayton, 110 Ill. App. 648; Neal v. Lapleaine, 48 La. Ann. 424, 19 South. 261; Queatham v. Modern Woodmen of America, 148 Mo. App. 33, 127 S. W. 651; Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862; Westenfelder v. Green, 24 Or. 448, 34 Pac. 23.

⁸⁶ Kidwell v. Ketler, 146 Cal. 12, 79 Pac. 514; Cochran v. McDowell, 15 Ill. 10; Chaffin v. Kimball's Heirs, 23 Ill. 36; Crain v. Parker, 1 Ind. 374; Cooper v. Mayhew, 40 Mich. 528; Collins v. Trotter, 81 Mo. 275; Lathers v. Fish, 4 Lans. (N. Y.) 213.

next friend, or *prochein ami* is not a party to a suit in such a sense that his admissions or declarations out of court should be received.⁸⁷ With executors and administrators the law is different, in that they are specially charged with the general interests of the estate, and statements made concerning it while they are transacting its business are admissible.⁸⁸ The courts are divided as to the admissibility of admissions of one of two coexecutors or administrators. It has been held that the statements are admissible against the estate represented but not conclusive, and this seems to be good law, as it leaves it open to the other representative to affirm or challenge it as may be required in the interests of the estate.⁸⁹ On the other hand, there are decisions that the statements to be admissible must have been made in presence of the corepresentative.⁹⁰ In the case

⁸⁷ *Matthews v. Dowling*, 54 Ala. 202; *Hammer v. Pierce*, 5 Harr. (Del.) 304; *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; *Hiatt v. Brooks*, 11 Ind. 508; *Cooper v. Mayhew*, 40 Mich. 528; *Mertz v. Detweiler*, 8 Watts & S. (Pa.) 376.

⁸⁸ *Blue v. Blue*, 155 Ala. 206, 46 South. 751; *Roberts v. Trawick*, 13 Ala. 68; *Plant v. McEwen*, 4 Conn. 544; *Horkan v. Benning*, 111 Ga. 126, 36 S. E. 432; *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165; *Prudential Ins. Co. v. Fredericks*, 41 Ill. App. 419; *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735; *Schmid v. Kreismer*, 31 Iowa, 479; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009; *Faunce v. Gray*, 21 Pick. (Mass.) 243; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. 1045; *Crouse v. Judson*, 41 Misc. Rep. 338, 84 N. Y. Supp. 755; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Whiton v. Snyder*, 88 N. Y. 299; *Mattoon v. Clapp's Heirs*, 8 Ohio, 248; *Hueston's Admr.*

v. Hueston, 2 Ohio St. 488; *Williams v. Culver*, 39 Or. 337, 64 Pac. 763; *Hunt's Appeal*, 100 Pa. 590; *Halyburton v. Kershaw*, 3 Desaus. (S. C.) 105; *Lashlee v. Jacobs*, 28 Tenn. (9 Humph.) 718; *Lindsey v. White* (Tex. Civ. App.), 61 S. W. 438; *Wheelock v. Wheelock*, 5 Vt. 433.

⁸⁹ *James v. Hackley*, 16 Johns. (N. Y.) 273; *Crouse v. Judson*, 41 Misc. Rep. 338, 84 N. Y. Supp. 755 (following *Breese v. Graves*, 67 App. Div. 322, 73 N. Y. Supp. 167).

⁹⁰ *Bruyn v. Russell*, 52 Hun, 17, 4 N. Y. Supp. 784. The law is well expressed in *Church v. Howard*, 79 N. Y. 415. According to that case, it is held in the decisions of the courts of New York that the declarations of an administrator or executor cannot be received as evidence as against either his coexecutor or coadministrator, or as against the heirs or devisees: *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *McIntire v. Morris' Admr.*, 14 Wend. (N. Y.) 90; *Cayuga Co. Bank v. Bennett*, 5 Hill (N. Y.), 236; *Lane v. Doty*, 4

of coreceivers, the law is clearly laid down that each is equal in authority to the other, and would have the right, in the ordinary conduct of business, to give directions concerning it, and both need not be present or participate therein in order to authorize action thereon.⁹¹

§ 267 (269). **Admissions by public corporations.**—A public corporation may make admissions in two different ways—by its records and by officers or agents duly authorized in that behalf. When a corporation performs acts or makes declarations, either acting formally as a cor-

Barb. (N. Y.) 530; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398. Although the cases cited relate more particularly to the admissions or declarations of a coexecutor or coadministrator as against an associate, and the precise question now presented was not decided, it would appear to follow, as a logical sequence of the decisions, that the admission made by a sole administrator or executor, or of all of them together, would be competent evidence and obligatory, if such admission was made while engaged in the performance of some act relating to the estate. The act should be such as called for and made the declaration pertinent, and the declaration should accompany such act, so as to constitute a part of the *res gestae*. When such is the case, the admissions of an administrator may, we think, bind the estate. But loose declarations to third parties, who have no interest or connection with the estate or the subject matter, entirely distinct from the discharge of the official functions of the administrator, and in no way relating to the estate, cannot have any such effect.

⁹¹ *Shirk v. Brookfield*, 77 App. Div. 295, 79 N. Y. Supp. 225. "As

the receivers had contracted with the plaintiff, it is evident that conversations had with either or both in respect to the subject matter of the services and of the compensation therefor were competent. To hold that both receivers must be present and participate in a given action with reference to the management and control of the receivership property seriously affects the right of the plaintiff to show what he did in connection with the business, and the authority therefor. . . . If differences arise between them, it does not deprive either of authority to act. They are the representatives of the court, and the act itself, if within the power of the receiver to do, will be upheld. This certainly must be the rule where the power to act exists, and the action itself is within their power, and has not been repudiated, either by themselves or the court. Where receivers become hostile, the court can intervene to remove them and appoint another: *Meier v. Kansas Pac. Ry. Co.*, 5 Dill. 476, Fed. Cas. No. 9395. But the act of a receiver, lawful in itself, and within his powers, may be upheld, and persons are justified in dealing with the receiver to that extent."

poration, or informally by its officers or agents acting within the scope of their authority, such admissions, like those of an individual, may be offered in evidence by the adverse party.⁹² Thus where a town pays another town for supplies furnished a pauper, such payment is an implied admission of the liability, and may be proved in a subsequent action for other supplies furnished the same pauper.⁹³ Of course the *records* of a corporation, municipal or private, are admissible in favor of the adverse party to prove such matters in the nature of admissions as they contain. It was formerly held that since the *inhabitants* of towns, parishes and other municipal and *quasi*-municipal corporations were parties to the action, and were interested in the result, their declarations might be received as the admissions of the corporation;⁹⁴ but this rule has not prevailed in the United States. Whether the action is brought in the name of the municipality or in the name of the inhabitants, the interest is deemed *too remote* to permit the corporation to be charged by the declarations of its citizens.⁹⁵ It needs no demonstration that, having regard to the importance of the interests involved, and that it is for the public convenience that duly authorized officers should be empowered to speak for and bind the public corporations, their powers are strictly limited to the scope of their authority, and if that is exceeded, the admissions

⁹² *Sharon v. Town of Salisbury*, 29 Conn. 113; *Hofacre v. Monticello*, 128 Iowa, 239, 103 N. W. 488; *Yordy v. Marshall Co.*, 86 Iowa, 340, 53 N. W. 298; *Commercial W. Co. v. Boston*, 194 Mass. 460, 80 N. E. 645; *Blanchard v. Blackstone*, 102 Mass. 343; *Blackmore v. Boardman*, 28 Mo. 420; *Gray v. Rollinsford*, 58 N. H. 253; *Youngstown v. Moore*, 30 Ohio St. 133; *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720; *Reg. v. Inhabitants of Adderbury East*, 5 Ad. & E., N. S., 187, 48 Eng. Com. L. 186, 114 Eng. Reprint, 1219.

⁹³ *Sharon v. Salisbury*, 29 Conn. 113.

⁹⁴ *Rex v. Hardwick*, 11 East, 579, 103 Eng. Reprint, 1129; *Reg. v. Adderbury*, 5 Q. B. 187, 114 Eng. Reprint, 1219; *Rex v. Whitley Lower*, 1 Maule & S. 637; *Rex v. Woburn*, 10 East, 395, 103 Eng. Reprint, 825; 1 Greenl. Ev., § 175.

⁹⁵ *Trustees of Village of Watertown v. Cowen*, 4 Paige Ch. (N. Y.) 510, 27 Am. Dec. 80; *Burlington v. Calais*, 1 Vt. 385, 18 Am. Dec. 691; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217; *Morrell v. Dixfield*, 30 Me. 157; *Landoff, In re*, 34 N. H. 163.

are of no avail against their employers, whether the employers are the national or the state or the municipal corporation.⁹⁶ Municipal corporations are compelled to act through their officers and agents; and the declarations of such officers and agents, when within the scope of their employment and accompanying their acts, are admissible as a part of the *res gestae*.⁹⁷ The rule has been explicitly laid down that a corporation, municipal as well as private, is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority.⁹⁸ In all American courts, towns and other corporations are now to be considered subject to the same presumptions and implications arising from their corporate acts or the acts of their agents, within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons.⁹⁹ They may be bound by the express promise of their agents or officers, acting within the scope of their authority, or such promise may be implied against the corporation from the acts of its agents within their authority, as in the case of natural persons.¹⁰⁰ Where county commissioners had power to grant licenses for ferries and had

⁹⁶ *Connecticut Insane Hospital v. Brookfield*, 69 Conn. 1, 36 Atl. 1017; *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109; *Blanchard v. Blackstone*, 102 Mass. 343; *Thornton v. Campton*, 17 N. H. 338; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Weir v. Plymouth*, 148 Pa. 566, 24 Atl. 94; *Tower v. Town of Rutland*, 56 Vt. 28; *Lee v. Monroe*, 7 Cranch (U. S.), 366, 3 L. Ed. 373; *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769; *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720; *Girvan v. St. John*, 11 New Brunsw. 411.

⁹⁷ *Gray v. Rollinsford*, 58 N. H. 253; *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769; *Farrell v. City of Dubuque*, 129 Iowa, 447, 105

N. W. 696. See note on declarations of agents of corporations to *Stewart v. Huntingdon Bank*, 14 Am. Dec. 632.

⁹⁸ *Glidden v. Town of Unity*, 33 N. H. 571; *La Salle County v. Simmons*, 10 Ill. (5 Gilm.) 513; *Covington etc. R. R. Co. v. Ingles*, 15 B. Mon. (Ky.) 637; *Gray v. Rollinsford*, 58 N. H. 253; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Grimes v. Keene*, 52 N. H. 330.

⁹⁹ *Vide* authorities collected in 2 Kent. Com. 290, and Ang. & A. Corp. 212.

¹⁰⁰ *Smith v. First Cong. Meeting-house*, 8 Pick. (Mass.) 178; *Bellows v. Bank*, 2 Mason, 31, Fed. Cas. No. 1279; *Glidden v. Town of Unity*, *supra*.

declared that they would give the license for a certain ferry to the person who would donate the largest sum of money to the county, the court said: "The declarations of the commissioners respecting the payment of the money were not competent evidence against the county. They were not made by them while officially representing the county in this transaction. The declarations of an agent, while engaged in the business of his principal, respecting a particular matter then depending, are a part of the *res gestae* of the transaction, and binding on the principal; but those made out of the course of the agency, when the agent is not acting for the principal in the particular transaction concerning which they are made, are mere hearsay, and not admissible in evidence against the principal."¹ The doctrine is well settled that, where the acts of the agent will bind the principal, then his representations and statements respecting the subject matter will also bind him, if made at the same time, and constituting part of the *res gestae*. Wherever what the agent did is admissible in evidence, then whatever he said on the subject while doing it is also evidence against the principal.² Where joint committees of a city and a water company, appointed for the purpose of fixing water rates, reported that water rates had been established, taking as a guide the rates charged in two previous years, which report had been accepted and approved by the mayor and council of the city, it was held that the committees above mentioned were in the performance of the duty expressly enjoined upon them by the city, and the statements in their reports that they had followed the rates in such previous years were explanatory of the rates they established, and therefore said statements were clearly within the rule enunciated by the foregoing authorities. The same remark applies to the actions of the council and mayor in accepting and approving their reports.³ In a recent Iowa case the rule was again em-

¹ La Salle County v. Simmons, 5 Gilm. (Ill.) 513; 1 Greenl. Ev., §§ 113, 114; Story, Ag., §§ 134, 135.

² Covington etc. R. Co. v. Ingles, 15 B. Mon. (Ky.) 637.

³ Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720.

phasized. It was an action against a county for personal injury resulting from the collapse of a bridge. Two or three weeks before the bridge fell, it had been examined by three members of the defendant's board of supervisors, and several days after it fell the plaintiff was told by one of the members who made such examination, in substance, that they found the bridge in a bad and unsafe condition. The plaintiff was permitted, over the defendant's objections, to detail his conversation with such member of the board. The court held that the member of the board had supervision of the bridge in question at the time he with the other members of the board made the examination in question, but at the time he made the statement to the plaintiff as to its then condition he was not engaged in the performance of any duty connected therewith or referring thereto. The testimony was therefore incompetent, and, as it related to a vital question in the case, it could not be otherwise than prejudicial to the defendant.⁴ In Texas, following the line of reliable authority, it has been held that the admissions of a county officer that his county did not claim certain land which had been surveyed for it, and that it had relocated the certificates by virtue of which said land had been located, were inadmissible for the purpose of showing such relocation.⁵ The law, therefore, is that when

⁴ *Escher v. Carroll County*, 146 Iowa, 738, 125 N. W. 810. In *Yordy v. Marshall County*, 86 Iowa, 340, 53 N. W. 298, such testimony was held incompetent because the declaration was made by an agent of the county who was not at the time of making it engaged in official business, and that the declaration was not a part of the *res gestae*. The *Yordy* case followed the rule that had already been announced in *Sweatland v. Illinois etc. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Treadway v. Sioux City etc. Railway Co.*, 40 Iowa, 526; *McPherrin v. Jennings*, 66 Iowa, 622,

24 N. W. 242. In the *McPherrin* case it was said: "Under this rule (as to the declarations of an agent) plaintiff was entitled to introduce evidence of the declarations in question only in case he had established that the person who made them was in fact the agent of the defendant, that they related to a matter within the scope of his employment as such agent, and that at the time of making them he was engaged in the performance of some duty with reference to the matter to which they related."

⁵ *Lamar County v. Talley* (Tex. Civ. App.), 127 S. W. 272.

the *declarations* are not connected with the acts of agency, or are not of an official character, which necessarily includes their being made during tenure of office, they are *hearsay* and inadmissible.⁶ The subsequent declarations of town officers are not admissible to prove the liability of the town for the repair of a highway;⁷ nor of the service of *notice of injury*;⁸ nor are declarations of the general *attorney* of a *county* that the county will pay a certain debt admissible;⁹ nor the declarations of an *alderman*, while not transacting the business of the city;¹⁰ nor declarations of an *overseer* of the *poor*;¹¹ nor of a trustee of a *school district*;¹² nor of a *moderator* of a town meeting.¹³ The report of a *committee* appointed to inquire into a given question is not an admission of the municipality in respect thereto.¹⁴

⁶ *School Directors' Dist. No. 2 v. Wallace*, 9 Ill. App. 312; *La Salle County v. Simmons*, 5 Gilm. (Ill.) 513; *Holten v. Board of Commrs.*, 55 Ind. 194; *Yordy v. Marshall Co.*, 86 Iowa, 340, 53 N. W. 298; *Foss v. Whitehouse*, 94 Me. 491, 43 Atl. 109; *Weeks v. Inhabitants of Needham*, 156 Mass. 289, 31 N. E. 8; *Blanchard v. Blackstone*, 102 Mass. 343; *Moore v. Hazelton Township*, 118 Mich. 425, 76 N. W. 977; *South Omaha v. Wrzesinski*, 66 Neb. 790, 92 N. W. 1045; *Stone v. Town of Poland*, 58 Hun, 21, 11 N. Y. Supp. 498; *Adkins v. Monmouth*, 41 Or. 266, 68 Pac. 737; *Green v. North Buffalo Tp.*, 56 Pa. 110; *Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405; *Green v. Town of Woodbury*, 48 Vt. 5; *United States v. Martin*, 2 Paine, 68, Fed. Cas. No. 15,732. The case of *City of Chicago v. Waukesha Brewing Co.*, 97 Ill. App. 583, contains an interesting illustration of the admissibility of declarations by a subordinate city officer in relating to a party his instructions. They were properly held to be admissible, and although the ground is not

stated, it may be assumed as the authorized statement of a subagent.

⁷ *Folsom v. Town of Underhill*, 36 Vt. 580. See note on "Necessity That Declaration or Admission of Public Officer, to be Admissible in Evidence, be Part of Res Gestae," on *Garske v. Ridgeville*, 3 Ann. Cas. 749.

⁸ *Garske v. Ridgeville*, 123 Wis. 503, 3 Ann. Cas. 747, 102 N. W. 22.

⁹ *Holten v. Board of Commrs.*, 55 Ind. 194.

¹⁰ *Mitchell v. City of Rockland*, 41 Me. 363, 66 Am. Dec. 252.

¹¹ *Green v. North Buffalo Tp.*, 56 Pa. 110; *Corinna v. Exeter*, 13 Me. 321.

¹² *Walker v. Dunsbaugh*, 20 N. Y. 170.

¹³ *Morrell v. Dixfield*, 30 Me. 157.

¹⁴ *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Dudley v. Weston*, 1 Met. (Mass.) 477. It is to be noted, however, that these reports of committees do not come within range of the decision in *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720. These reports were "received"

§ 268 (270). Admissions by private corporations.—The same general rules stated in the last section apply in the case of private corporations. The declarations of their officers and agents are not admissible unless they are made while acting within the scope of their authority as a part of the *res gestae* relating to the present transactions.¹⁵ It must first be shown that the person in question is an officer

by the city council and admitted no liability on the part of the cities. One was a suggested compromise and the other a report on the highway where the injury occurred, but at a date long previous to the accident which formed the subject matter of the action. In the Los Angeles case the committee were specially appointed to fix a rate, did fix it and its report was adopted as the rate.

¹⁵ *Bailey v. Blackshear Co.*, 142 Ala. 254, 37 South. 827; *Western Union Tel. Co. v. Woodard*, 84 Ark. 323, 13 Ann. Cas. 354, 105 S. W. 579; *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220; *Bishop etc. v. Treasurer Denver*, 37 Colo. 378, 86 Pac. 1021; *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148; *Robert R. Sizer & Co. v. G. T. Melton & Sons*, 129 Ga. 143, 58 S. E. 1055; *Chicago B. & Q. R. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340; *Vohs v. A. E. Shorthill Co.*, 124 Iowa, 471, 100 N. W. 495; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364, 55 N. W. 496; *J. I. Case Plow Works v. Pulsifer*, 79 Kan. 176, 98 Pac. 787; *Mussellam v. Cincinnati etc. Ry. Co.*, 126 Ky. 500, 31 Ky. Law Rep. 908, 104 S. W. 337; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Pennsylvania R. Co. v. Orem Fruit & Produce Co. of Baltimore City*, 111 Md. 356, 73 Atl. 571; *Garfield & Proctor Coal Co. v. Penn-*

sylvania Coal & Coke Co., 199 Mass. 22, 84 N. E. 1020; *Layzell v. J. H. Sommers Coal Co.*, 156 Mich. 268, 117 N. W. 179, 120 N. W. 996; *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St. Rep. 351, 87 N. W. 602; *Western Union Tel. Co. v. Jackson*, 95 Miss. 471, 49 South. 737; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *New York Life Ins. Co. v. Rankin*, 162 Fed. 103, 89 C. C. A. 103; *Keefe v. Sullivan County R. R.*, 75 N. H. 116, 71 Atl. 379; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27, 537; *Worthington v. Cleveland City Ry.*, 75 Ohio, 626, 80 N. E. 1135; *Perkiomen R. Co. v. Kremer*, 218 Pa. 641, 67 Atl. 913; *Huntingdon etc. Ry. & Coal Co. v. Decker*, 82 Pa. 119; *Stroud v. Columbia N. & L. R. Co.*, 79 S. C. 447, 60 S. E. 963; *Sewanee Min. Co. v. McMahon*, 1 Head (Tenn.), 582; *St. Louis & S. F. R. Co. v. Frazar*, 43 Tex. Civ. App. 585, 97 S. W. 325; *Blue Ridge Light & Power Co. v. Price*, 108 Va. 652, 62 S. E. 938; *H. C. Jaquith Co. v. Shumway's Estate*, 80 Vt. 556, 69 Atl. 157; *Liter v. Ozokerite Min. Co.*, 7 Utah, 487, 27 Pac. 690; *Chilcott v. Washington State Colonization*, 45 Wash. 148, 88 Pac. 113; *Weiss v. Haight & Freese Co.*, 148 Fed. 399; *Walker Mfg. Co. v. Knox*, 136 Fed. 334, 69 C. C. A. 160; *Winchester Co. v. Creary*, 116 U. S. 161, 6 Sup. Ct. Rep. 369, 29 L. Ed. 591.

or agent of the corporation.¹⁶ This rule has been applied to exclude the declarations of a *director* as to an antecedent fact;¹⁷ the statement of the *secretary* of an *insurance company* that the property destroyed was insured;¹⁸ the letters of an assistant *superintendent* discharging a station agent for negligence;¹⁹ the admission by the superintendent, on the day after the accident, of the unfitness of the conductor;²⁰ the statement of the *president* of a *bank* made after the loss of goods in which he requested a witness not to mention certain conversations as to the danger of burglary;²¹ and the admissions of *general agents* as to liability of a company.²² For still stronger reasons the statements of subordinate agents,²³ and those of *stockholders*,²⁴ are not admissions on the part of the corporation, unless, within the rules already given, they constitute a part of the *res gestae*. Under another head other illustrations will be found showing more fully when the declarations of officers and agents of private corporations are admissible as part of the *res gestae*.²⁵

§ 269 (271). Written admissions, letters and telegrams.—One of the objections generally urged against the weight of admissions as evidence is that they consist generally of casual statements, easily misunderstood or per-

¹⁶ *Mason Fruit Jar Co. v. Paine*, 166 Pa. 352, 31 Atl. 98.

¹⁷ *Pemigewassett Bank v. Rogers*, 18 N. H. 255; *Commissioner of Highways of Schroepell v. Oswego etc. R. Co.*, 7 How. Pr. (N. Y.) 94; *Hogg v. Zanesville Mfg. Co.*, *Wright* (Ohio), 139; *Bank of Northern Liberties v. Davis*, 6 Watts & S. (Pa.) 285; *Franklin Bank v. Cooper*, 36 Me. 179; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.), 1; *Peek v. Detroit Novelty Works*, 29 Mich. 313.

¹⁸ *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153.

¹⁹ *Betts v. Farmers' Loan & Trust Co.*, 21 Wis. 80, 91 Am. Dec. 460.

²⁰ *Huntington etc. Ry. & Coal Co. v. Decker*, 82 Pa. 119.

²¹ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

²² *American Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152, 22 L. Ed. 593.

²³ *Fogg v. Pew*, 10 Gray (Mass.), 409, 71 Am. Dec. 662; *Franklin Bank v. Steward*, 37 Me. 519.

²⁴ *Hartford Bank v. Hart*, 3 Day (Conn.), 491, 3 Am. Dec. 274; *Fairfield County Turnpike Co. v. Tkcpr*, 13 Conn. 173; *Mitchell v. Rome Ry. Co.*, 17 Ga. 574.

²⁵ See §§ 357, 358, *post*.

verted. This particular objection does not exist when the statement offered against a party consists of his written declarations; and therefore such admissions are entitled to *greater weight* than mere verbal admissions, unless the latter are clearly and satisfactorily proved.²⁶ It is a matter of constant practice to introduce letters and telegrams in evidence as constituting admissions. Of course, where the letters of a party constitute a *part of the contract* and have been relied on by the other party, they are something more than admissions. They cannot, like mere admissions, be explained or qualified by the writer. And letters which pass between the parties to a contract immediately before and after the transaction may be so connected with it as to become a part of the *res gestae*, and may be admissible on that ground.²⁷ But more frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavorable to the claim or defense of the writer.²⁸ When the letters of a party are

²⁶ As to mode of proving letters and telegrams, see § 583, *post*; § 210, *ante*. See, also, the late cases: Myrick v. Wallace, 5 Ala. App. 398, 59 South. 704; Freat v. American El. Supply Co. (Ill.), 100 N. E. 933; Calahan v. Dunker (Ind. App.), 99 N. E. 1021; Erwin v. Fillenworth (Iowa), 137 N. W. 502; Dimmick v. Hendley, 117 Md. 458, 84 Atl. 171; Heitman v. Chicago etc. R. Co., 45 Mont. 406, 123 Pac. 401; Tenement etc. of New York v. Weil, 76 Misc. Rep. 273, 134 N. Y. Supp. 1062; Pecos etc. R. Co. v. Cox (Tex. Civ. App.), 150 S. W. 265; Chesbrough v. Woodworth, 195 Fed. 875, 116 C. C. A. 465.

²⁷ New England Marine Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56; Roach v. Learned, 37 Me. 110; Zachry v. Nolan, 66 Fed. 467, 14 C. C. A. 253.

²⁸ Burton v. State, 107 Ala. 108, 18 South. 284; Buchanan v. Collins, 42 Ala. 419; Ryland v. Heney, 130

Cal. 426, 62 Pac. 616; Austin v. Long, 1 Ga. App. 258, 57 S. E. 964; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Holley v. Knapp, 45 Ill. App. 372; Huston v. Stewart, 64 Ind. 388; State v. Bartley, 105 Me. 505, 74 Atl. 1129; Buffum v. York Mfg. Co., 175 Mass. 471, 56 N. E. 599; Commonwealth v. Jeffries, 7 Allen (Mass.), 548, 83 Am. Dec. 712; Short Mountain Coal Co. v. Hardy, 114 Mass. 197; Mead v. Randall, 111 Mich. 268, 69 N. W. 506; Butler v. Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670; Tapley v. Tapley, 10 Minn. 448, 88 Am. Dec. 76; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Galvin v. O'Gorman, 40 Mont. 391, 106 Pac. 887; Ossipee Hosiery etc. Mfg. Co. v. Canney, 54 N. H. 295; Dainese v. Allen, 45 How. Pr. (N. Y.) 430; Lee v. Cooley, 13 Or. 433, 11 Pac. 70; Holter v. Weiner, 15 Pa. 242; Monteith v. State, 114 Wis. 165, 89 N. W. 828; Bell v. Gund, 110 Wis. 271, 85 N. W.

in the nature of admissions, they are competent, although written long *before or after the commencement of the litigation*,²⁹ even though written to persons not parties to the litigation,³⁰ on proof of their genuineness.³¹ Letters *written to a party* and received by him may, under some circumstances, be read in evidence against him, but before they can be received as admissions against him, there must be some evidence besides mere possession showing *acquiescence* in their contents, as proof of some act or reply or statement;³² and in such case there must, of course, be proof that the one sought to be charged has received the letter.³³ When one party to the litigation writes to the other, giving his version of the transaction in dispute, the mere *omission to reply* is not to be deemed an admission of the truth of the matters stated in the letter. Not even the same inferences can be drawn in such cases as from the

1031; Snell v. Bray, 56 Wis. 156, 14 N. W. 14; Mulhall v. Keenan, 18 Wall. (U. S.) 342, 21 L. Ed. 808; Chadwick v. United States, 141 Fed. 225, 72 C. C. A. 343; Zachry v. Nolan, 66 Fed. 467, 14 C. C. A. 253.

²⁹ Snell v. Bray, 56 Wis. 156, 14 N. W. 14; Holler v. Weiner, 15 Pa. 242; State v. Watson, 31 Mo. 361.

³⁰ Wefel v. Stillman, 151 Ala. 249, 44 South. 203; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; State v. Morgan, 146 Iowa, 298, 125 N. W. 166; Gulliford v. McQuillen, 75 Kan. 454, 89 Pac. 927; Beecher v. Pettee, 40 Mich. 181; Robertson v. Ephraim, 18 Tex. 118; Wilkins v. Burton, 5 Vt. 76; Rose v. Gunynghame, 11 Ves. 550, 32 Eng. Reprint, 1202; Gibson v. Holland, L. R., 1 C. P. 1.

³¹ Butterworth v. Cathcart, 168 Ala. 262, 52 South. 896; Magruder v. Montgomery, 33 App. D. C. 133 (letters showing motive); Melrose Mfg. Co. v. Kennedy, 59 Fla. 312, 51 South. 595; MacKenzie v. Barrett, 148 Ill. App. 414; Stevenson v. Avery Coal

Min. Co., 143 Ill. App. 397; Bull Remedy Co. v. Clark, 109 Minn. 396, 18 Ann. Cas. 413, 124 N. W. 20; Ruckman v. R. C. Stone Milling Co., 139 Mo. App. 256, 123 S. W. 69; Thayer v. Schley, 137 App. Div. 166, 121 N. Y. Supp. 1064; Trezevant v. Powell (Tex. Civ. App.), 130 S. W. 234; Consolidated Grocery Co. v. Hammond, 175 Fed. 641, 99 C. C. A. 195.

³² Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Sturtevant v. Wallack, 141 Mass. 119, 4 N. E. 615; Rothchild v. Schwarz, 28 Misc. Rep. 521, 59 N. Y. Supp. 527; Gambril v. Schooley, 95 Md. 260, 63 L. R. A. 427, 52 Atl. 500; Koehler v. Palmetier, 112 Iowa, 84, 83 N. W. 816; State v. Blake, 36 Utah, 605, 105 Pac. 910; Rex v. Plumer, Russ. & R. C. C. 264, 15 R. R. 741; Fairlie v. Denton, 3 Car. & P. 103.

³³ Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Smiths v. Shoemaker, 17 Wall. (U. S.) 630, 21 L. Ed. 717.

silence of one party in respect to statements made by the other in conversation.³⁴ While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavit or otherwise, cannot be regarded as an admission of the correctness thereof, and that is true in all respects. Reasons may exist why he may choose and has a right to remain silent and to vindicate himself at some future period, and on some more opportune occasion.³⁵ In such cases *a party cannot make evidence for himself* by addressing letters to the adverse party.³⁶ A distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances, what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law.³⁷ When letters are otherwise competent as admissions, they need *not* be *signed* or actually written by the party, provided they are sent by his direction.³⁸ If a

³⁴ Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Biggs v. Stueler, 93 Md. 100, 48 Atl. 727; Gray v. Kaufman Dairy etc. Co., 162 N. Y. 388, 76 Am. St. Rep. 327, 49 L. R. A. 580, 56 N. E. 903. See § 289, *post*.

³⁵ Talcott v. Harris, 93 N. Y. 567.

³⁶ Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Robinson v. Fitchburg etc. Ry. Co., 7 Gray (Mass.), 92; Hand v. Howell, 61 N. J. L. 142, 38 Atl. 748.

³⁷ Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508.

³⁸ Bartlett v. Mayo, 33 Me. 518.

letter contains an admission, it is admissible, although other letters in the correspondence are in the hands of the party offering the testimony and are not produced,³⁹ or although the letter offered is in reply to one not produced.⁴⁰ In such case the adverse party may, if he desire, offer such other parts of the correspondence as may be relevant.⁴¹ Although the references to admissions in writing are those which may be used against the maker, there are many cases in which the writer's statements may be used in his favor, and although they can scarcely be called admissions, it is well to note that it is frequently necessary to prove written notices of intended procedure such as notice of dishonor of negotiable instruments, notices of demand, letters exercising options, inclosing documents, and other similar correspondence, and that they are admissible in evidence. For example, there was no error in admitting in evidence in the trial of an action against an insurance company a letter addressed by the plaintiff to an adjuster of the company, stating that a certain inventory was inclosed therein, this letter being relevant, in connection with other facts, to show that such inventory was in fact inclosed and sent in the letter. Nor was there any error, on such a trial, in admitting in evidence another letter from the plaintiff to the adjuster, its contents having some relevancy upon the question as to whether or not a demand for payment had been made and refused, and also upon the question of the company's good faith in the premises.⁴²

³⁹ *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238; *North Berwick Co. v. New England Fire etc. Ins. Co.*, 52 Me. 336.

⁴⁰ *Crary v. Pollard*, 14 Allen (Mass.), 284; *Barrymore v. Taylor*, 1 Esp. 326.

⁴¹ *Roe v. Day*, 7 Car. & P. 705; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238; *North Berwick Co. v. New England Fire etc. Ins. Co.*, *supra*; *Gage v. Meyers*, 59 Mich. 300,

26 N. W. 522; *Thayer v. Hoffman*, 53 Kan. 723, 37 Pac. 125.

⁴² *Scottish Union etc. Co. v. Stubbs*, 98 Ga. 754, 27 S. E. 180; *Struthers v. Drexel*, 122 U. S. 487, 7 Sup. Ct. Rep. 1293, 30 L. Ed. 1216; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909, 36 L. Ed. 706; *Illinois Roofing Co. v. Aerial Advertising Co.*, 142 Mich. 698, 106 N. W. 274; *Largent v. Board* (Tex. Civ. App.), 53 S. W. 90; *Morehouse v.*

§ 270 (272). **Other written admissions.**—Except for the purpose of readier reference, there would be no need to deal with other written admissions. The law is practically the same with regard to them as to letters, and is, that that which is written by a person or at his direction may properly be used in evidence against him in any proceeding to which the written matter may relate. So that on principles already discussed other documents or memoranda written or authorized by a party may be offered as admissions against him like his oral statements. If *self-disserving* in their character, it is immaterial in what form the document may appear.⁴³ This rule has been applied to *receipts*,⁴⁴ *bills of lading*,⁴⁵ *orders*,⁴⁶ *advertisements*,⁴⁷ newspaper articles verified as being the approved statement of the person making the admission,⁴⁸ *maps*,⁴⁹ *wills*,⁵⁰ *circulars*,⁵¹ *handbills*,⁵² *general assignments* for the benefit of creditors,⁵³ *proofs of death*,⁵⁴ and under certain circumstances,

Terrill, 111 Ill. App. 460; Berry v. Chicago etc. Co., 24 S. D. 611, 124 N. W. 859; Sills v. Burge, 141 Mo. App. 148, 124 S. W. 605; Larrowe Milling Co. v. Lyons Beet Sugar etc. Co., 137 App. Div. 732, 122 N. Y. Supp. 567. Letters from the owner of the land to the prospective purchaser with reference to the amount of the encumbrance on the land were competent evidence upon the question of good faith of the purchaser in securing a satisfaction of a recorded mortgage, which had been assigned, but not recorded: Foss v. Dullam, 111 Minn. 220, 126 N. W. 820.

⁴³ Steed v. Knowles, 97 Ala. 573, 12 South. 75; Crain v. First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Putman v. Gunning, 162 Mass. 552, 39 N. E. 347; Rich v. Flanders, 39 N. H. 304; Potter v. Ogden, 136 N. Y. 384, 33 N. E. 228; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286; Martin v. Kline, 157 Pa. 473, 27 Atl. 753; Klatt v. N. C. Foster etc. Co., 92 Wis. 622, 66 N. W. 791.

⁴⁴ Harrison v. Remington Paper Co., 140 Fed. 385, 3 L. R. A., N. S., 954, 72 C. C. A. 405.

⁴⁵ Shatzell v. Hart, 2 A. K. Marsh. (Ky.) 191.

⁴⁶ Macomber v. Parker, 14 Pick. (Mass.) 497.

⁴⁷ Mann v. Russell, 11 Ill. 586; Somervell v. Hunt, 3 Har. & McH. (Md.) 113; Putnam v. Gunning, 162 Mass. 552, 39 N. E. 347.

⁴⁸ Edwards v. City of Watertown, 59 Hun, 620, 13 N. Y. Supp. 309.

⁴⁹ Bridgman v. Jennings, 1 Ld. Raym. 734, 91 Eng. Reprint, 1390.

⁵⁰ Cowan v. Hite, 2 A. K. Marsh. (Ky.) 238.

⁵¹ Berry v. Mathewes, 7 Ga. 457.

⁵² Dennis v. Van Voy, 31 N. J. L. 38.

⁵³ Reed v. Newcomb, 62 Vt. 75, 19 Atl. 367.

⁵⁴ Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 490; Voelkel v. Supreme Tent K. M. W., 116 Wis. 202, 92 N. W. 1104.

entries in the books of a bank were held admissible in favor of a receiver of the bank in an action against its president.⁵⁵ Other aspects of the admissibility of writings as forming part of the *res gestae* or of a contract are considered under their appropriate headings.

§ 270a (272). **Same—Corporate records.**—Since a corporation practically speaks by its records, and indeed is in that respect different from a natural person who may express himself by words orally and by conduct as well as by writing, it follows that *the books and records of a corporation* are *prima facie* evidence against it, as admissions; and, under some circumstances, may be conclusive evidence. But, at the most, a corporation can only be bound conclusively by its records, either when they are the records, duly made by the recording officer, of its proceedings, or when some person, who has had proper access to them, or knowledge of them, has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. And a corporation is not bound, as to third persons, by interpolations fraudulently inserted in its records, where such third persons have not acted on, or seen, or known of the existence of, the matters so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make due correction of the records, and that some innocent third person has been misled thereby.⁵⁶ Corporate books are not only competent to prove admissions of the corporation, but when *officers* or members

⁵⁵ *Olney v. Chadsey*, 7 R. I. 224. See § 516, *post*.

⁵⁶ *Booth v. Dexter*, 118 Ala. 369, 24 South. 405; *Somers v. Florida Pebble etc. Co.*, 50 Fla. 275, 39 South. 61; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 36 S. E. 256; *Holden v. Hoyt*, 134 Mass. 181; *Union Pac. Lodge v. Bankers' Surety Co.*, 79 Neb. 801, 113 N. W. 263; *Fleming v. Reed*,

77 N. J. L. 563, 72 Atl. 299; *Campbell v. Perth Amboy etc. Bldg. Assn.*, 76 N. J. Eq. 347, 74 Atl. 144; *Wesp v. Muckle*, 136 App. Div. 241, 120 N. Y. Supp. 976; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. 489; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497.

have access to such books and have probably examined them, the entries may be offered as *their admissions*.⁵⁷ Thus where the manager had pledged stock to the corporation to secure the payment of any sums for which he might be found liable to the corporation as its agent or employee, in an action to foreclose the lien of such pledge and for an accounting of his liabilities to the corporation, the books of the corporation, containing the accounts of its business transactions, kept under his immediate care and supervision and for the accurate keeping of which he was liable under his contract of employment, and which were also the accounts of the manager as agent of the corporation, and which were in effect his declarations and statements of the business transactions of the corporation through his book-keeper, over whom he exercised supervision and control, were admissible against him to show that the books were not correctly kept, and for the purpose of supplementing them by proof of false entries and defalcations.⁵⁸ But there is no rule which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder. The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. But we have not been able to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation; and it has been repeatedly said

⁵⁷ *San Pedro L. Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Anderson v. Mutual Reserve Fund Life Assn.*, 171 Ill. 40, 49 N. E. 205. As to ac-

tions against stockholders, see § 517, *post*.

⁵⁸ *San Pedro L. Co. v. Reynolds*, *supra*.

by judges and text-writers that they are not competent for that purpose. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant.⁵⁹

§ 271 (273). **Same — Partnership books.** — Partnership books are presumed to be equally under the control of the several partners, and to be kept under their direction. Therefore, entries in such books are competent against the firm as admissions;⁶⁰ and in controversies between the members of the firm, such entries are competent *against each member*. They are presumed to be with his knowledge and consent,⁶¹ although the *presumption may be re-*

⁵⁹ *Rudd v. Robinson*, 126 N. Y. 113, 22 Am. St. Rep. 816, 12 L. R. A. 473, 26 N. E. 1046; *Hager v. Cleveland*, 36 Md. 476; *Haynes v. Brown*, 36 N. H. 545 (regarded as a leading case); *Olney v. Chadsey*, 7 R. I. 224; *Hill v. Manchester etc. Waterworks Co.*, 5 Barn. & Ad. 866, 110 Eng. Reprint, 1011.

⁶⁰ *Glover v. Hembree*, 82 Ala. 324, 8 South. 251; *Perry v. Butt*, 14 Ga. 699; *Over v. Hetherington*, 66 Ind. 365; *Eden v. Lingenfelter*, 39 Ind. 19; *Stuart v. McKichan*, 74 Ill. 122; *Cunningham v. Smith*, 11 B. Mon. (Ky.) 325; *State v. Hoffman*, 120 La. 949, 45 South. 951; *Murrell v. Murrell*, 33 La. Ann. 1233; *Foster v. Fifield*, 29 Me. 136; *Grant v. Master-son*, 55 Mich. 161, 20 N. W. 885; *Lederer v. Morrow*, 132 Mo. App. 438, 111 S. W. 902; *Tucker v. Peaslee*, 36 N. H. 167; *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Kohler v. Lindenmeyr*, 129 N. Y. 498, 29 N. E. 957; *Fairchild v. Fairchild*, 64 N. Y. 471; *Heartt v. Corning*, 3 Paige Ch. (N. Y.) 566; *Richardson's Exr. v. Wyatt*, 2 Desaus. (S. C.) 471; *Martin Brown*

Co. v. Perrill, 77 Tex. 199, 13 S. W. 975; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *Chick v. Robinson*, 95 Fed. 619, 37 C. C. A. 205; *Lodge v. Prichard*, 3 De Gex, M. & G. 906, 43 Eng. Reprint, 354; *Smith v. Duke of Chandos*, 2 Atk. 159, 26 Eng. Reprint, 500.

⁶¹ *Kahn v. Boltz*, 39 Ala. 66; *Haller v. Willamowicz*, 23 Ark. 566; *Hale v. Brennan*, 23 Cal. 511; *Pond v. Clark*, 24 Conn. 370; *Kitner v. Whitlock*, 88 Ill. 513; *Hurd v. Haggerty*, 24 Ill. 171; *Smith v. Hood*, 4 Ill. App. 360; *Eden v. Lingenfelter*, 39 Ind. 19; *McDermott v. Hacker*, 109 Iowa, 239, 80 N. W. 338; *Hunter v. Aldrich*, 52 Iowa, 442, 3 N. W. 574; *Calder v. Creditors*, 47 La. Ann. 346, 16 South. 852; *Foster v. Fifield*, 29 Me. 136; *Safe Deposit & T. Co. v. Turner*, 98 Md. 22, 55 Atl. 1023; *Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599; *Topliff v. Jackson*, 12 Gray (Mass.), 565; *Lambert v. Griffith*, 44 Mich. 65, 6 N. W. 106; *Tucker v. Peaslee*, 36 N. H. 167; *Hotop v. Huber*, 160 N. Y. 524, 55 N. E. 206; *Fairchild v. Fairchild*, 64 N. Y. 471;

butted by proof that the partner or partners, against whom the entries are offered, have not had access to the books and have not inspected them, and that the entries are incorrect.⁶² Such inaccuracy may be shown, although there has been full opportunity for inspection, since there is no reason for holding the parties estopped by such entries,⁶³ unless there have been settlements or accounts stated which were relied on by the parties.⁶⁴

§ 271a (273). Same—Ordinary account-books.—The entries in account-books are, like other admissions, evidence against the party making them;⁶⁵ and, of course, equally admissible if made by some person authorized to make them, against the party giving the authority.⁶⁶ They are

Saunders v. Duval, 19 Tex. 467; Fletcher v. Pollard, 2 Hen. & M. (Va.) 544; Moran Bros. Co. v. Watson, 44 Wash. 392, 87 Pac. 508; Withers v. Withers, 8 Pet. (U. S.) 355, 8 L. Ed. 972.

⁶² Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea (Tenn.), 359; Over v. Hetherington, 66 Ind. 365; Adams v. Funk, 53 Ill. 219; Withers v. Withers, 8 Pet. (U. S.) 355, 8 L. Ed. 972; United States Bank v. Binney, 5 Mason, 176, Fed. Cas. No. 16,791.

⁶³ Hunter v. Aldrich, 52 Iowa, 442, 3 N. W. 574; Topliff v. Jackson, 12 Gray (Mass.), 565; Lambert v. Griffith, 44 Mich. 65, 6 N. W. 106; Boire v. McGinn, 8 Or. 466; Heartt v. Corning, 3 Paige Ch. (N. Y.) 566; Scott v. Shipherd, 3 Vt. 104.

⁶⁴ Desha v. Smith, 20 Ala. 747; Pond v. Clark, 24 Conn. 370; Kitner v. Whitlock, 88 Ill. 513; Richardson v. Wyatt, 2 Desaus. (S. C.) 471.

⁶⁵ Lang v. State, 97 Ala. 41, 12 South. 183; Kipp v. Miller, 47 Colo. 598, 135 Am. St. Rep. 236, 108 Pac. 164; Plummer v. Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294; Waldron v. Evans, 1 Dak. 11

(10), 46 N. W. 607; Becker v. Donaldson, 133 Ga. 864, 67 S. E. 92; Gaines v. Gaines, 39 Ga. 68; Story v. De Armond, 179 Ill. 510, 53 N. E. 990; Hill v. Hill, 115 La. 490, 39 South. 503; Moise's Succession, 107 La. 717, 31 South. 990; Richardson v. Anderson, 109 Md. 641, 130 Am. St. Rep. 543, 25 L. R. A., N. S., 393, 72 Atl. 485; Carroll v. Ridgaway, 8 Md. 328; First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778; Commonwealth v. Clark, 145 Mass. 251, 13 N. E. 888; Trend v. Detroit United Ry., 149 Mich. 338, 112 N. W. 977; Coombs v. Coombs, 86 Mo. 176; Downey v. Coykendall, 89 Neb. 21, 130 N. W. 983; Bird v. Magowan (N. J.), 43 Atl. 278; Doolittle v. Stone, 136 N. Y. 613, 32 N. E. 639; Halleck v. State, 11 Ohio, 400; Johnston v. McCain, 145 Pa. 531, 22 Atl. 979; Hampton v. Michael, 6 Gratt. (Va.) 151; Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; Missouri etc. R. Co. v. Elliott, 102 Fed. 96, 42 C. C. A. 188.

⁶⁶ San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410; People v. Rowland, 12 Cal. App. 6, 106

admissible irrespective of the name by which the book may go or pass, or the manner in which it is kept. The reason is that such entries are not admissible merely because they are "book entries," but because they are statements in writing which are binding upon the party responsible for their inscription whether the entry is in his own writing or that of the person he has authorized in that behalf.⁶⁷ When, however, a party calls for the production of and uses a writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled; one side or showing of it merely cannot be used for the hurt of one party to the benefit of another.⁶⁸

Pac. 428; *Patterson v. Bank of Lenox*, 8 Ga. App. 492, 70 S. E. 77; *Second Borrowers etc. Bldg. Assn. v. Cochrane*, 103 Ill. App. 29; *Milhollen v. A. Y. McDonald etc. Mfg. Co.*, 137 Iowa, 114, 112 N. W. 812; *Magi's Succession*, 107 La. 208, 31 South. 660; *Blackington v. City of Rockland*, 66 Me. 332; *Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891; *Williamsburg City Fire Ins. Co. v. Frothingham*, 122 Mass. 391; *Fellows v. Harris*, 12 Smedes & M. (Miss.) 462; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Nelson v. New York*, 131 N. Y. 4, 29 N. E. 814; *Pelzer v. Durham*, 37 S. C. 354, 16 S. E. 46; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485.

⁶⁷ *Loewenthal v. McCormick*, 101 Ill. 143; *Beyle v. Reid*, 31 Kan. 113, 1 Pac. 264; *McLellan v. Crofton*, 6 Me. (Greenl.) 307; *Barry v. Foyles*, 1 Pet. (U. S.) 311, 7 L. Ed. 157.

⁶⁸ 1 Greenl. Ev., § 563; *Whart. Ev.*, §§ 620, 1103; *Jones v. Jones*, 4 Hen. & M. (Va.) 447; *Freeland v. Cocke*, 3 Munf. (Va.) 352; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St.

Rep. 796, 38 S. E. 544; *Dewey v. Hotchkiss*, 30 N. Y. 497. In *Low v. Payne*, 4 N. Y. 247, the plaintiff's books (properly established by preliminary proof), constituted the only evidence; they contained credits which the defendant insisted upon the benefit of, and the court held him thereby compelled to submit to two charges of cash paid, contained in the books, though not properly items of book account. In *Pendleton v. Weed*, 17 N. Y. 72, where the books of two different firms had been put in evidence (in part consisting of different members), the court say: "The plaintiff having given in evidence entries in some of the books of each firm, on the question of payment, it was proper to allow the defendant to refer to other entries on the same subject. If a party uses books of account against his adversary, he makes them evidence for him on the same subject. They are like any declaration or admission by writing or orally; if part is used, the whole relating to the same matter is admissible": *Cowen & Hill's Notes*, 229.

§ 272 (274). **Admissions in pleadings.**—Of the various kinds of judicial admissions, those contained in pleadings command careful consideration, by reason not only of their presumed solemn contents, but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the change in circumstances by withdrawal or amendment, in brief by the circumstances surrounding their offer in evidence against the party making them, including, of course, their verification by parties having absolute knowledge and those who speak only from information and belief. When parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged.⁶⁹ And it is not necessary that such facts should be specifically averred. When

⁶⁹ Austin v. Ferst, 2 Ga. App. 91, 58 S. E. 318; Fite v. Black, 92 Ga. 363, 17 S. E. 349; Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; Louisville etc. Ry. Co. v. McDonald, 33 Ky. Law Rep. 762, 111 S. W. 289; Vollman Buggy Body Co. v. Spry, 26 Ky. Law Rep. 228, 80 S. W. 1092; Parsons v. Copeland, 33 Me. 370, 54 Am. Dec. 628; Bliss v. Nichols, 12 Allen (Mass.), 443; Commonwealth v. Goddard, 2 Allen (Mass.), 148; Snyder v. Patton etc. Co., 143 Mich. 350, 106 N. W. 1106; Lynch v. Chicago etc. R. Co., 208 Mo. 1, 106 S. W. 68; Johnson v. Butte etc. Copper Co., 41 Mont. 158, 165, 108 Pac. 1057; Miller v. Loverene & Browne Co., 74 Neb. 551, 105 N. W. 84; Miller v. Nicodemus, 58 Neb. 352, 78 N. W. 618; Aultman v. Martin, 49 Neb. 103, 68 N. W. 340; McGrath v. Nassau etc. R. Co., 128 App. Div. 63, 112 N. Y. Supp. 471; Merriman v. Blalack, 56 Tex. Civ. App. 594, 121 S. W. 552; International etc. R. Co. v. Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152; Johnson v. Zufeldt, 56 Wash. 5, 104 Pac. 1132; Lederer v. Rosenthal, 99

Wis. 235, 74 N. W. 971; Meade v. Black, 22 Wis. 241; Hilliard v. Lyons, 180 Fed. 685, 103 C. C. A. 651; Colusa Parrot Min. etc. Co. v. Monahan, 162 Fed. 276, 89 C. C. A. 256. See note on "Admissibility and Conclusiveness Against Pleader, in Subsequent Action With Stranger, of Admissions in Pleading," to First National Bank v. Duncan, 18 Ann. Cas. 79. See, also, the following recent decisions: Taylor v. Evans (Ark.), 145 S. W. 564; Mathews v. Livingston (Conn.), 85 Atl. 529; Norris v. Rawlings, 138 Ga. 711, 76 S. E. 60; Meek v. Deal, 87 Kan. 319, 124 Pac. 160; Gulf Refining Co. v. Hart, 130 La. 51, 57 South. 581; Snow v. Revere Rubber Co., 211 Mass. 82, 97 N. E. 618; Salo v. Duluth etc. R. Co. (Minn.), 140 N. W. 188; Miller v. Journal Co., 245 Mo. 722, 152 S. W. 40; Hofer v. Smith (Or.), 129 Pac. 761; Bolt v. State Savings Bank (Tex. Civ. App.), 145 S. W. 707; Boville v. Dalton Paper Mills (Vt.), 85 Atl. 623; Toone v. O'Neill Const. Co. (Utah), 121 Pac. 10.

a fact is admitted by clear and necessary implication from other facts expressly stated in the pleading, the admission so made is as effective as though it were expressly stated, and will not be overcome by a mere general denial.⁷⁰ They may even be contained in a reply filed, where the action in which that procedure was adopted did not permit of a reply, and it has been held that the contents of an unauthorized pleading filed in a justice's court may be treated on appeal as in the nature of formal admissions made by the party filing it.⁷¹ Under familiar rules the pleadings in the pending case are more than admissions. They are until changed *conclusive* upon the parties filing them. Although pleadings in the pending case are sometimes formally offered as admissions of the adversary, it is generally held that they may be referred to and commented upon by counsel without such offer.⁷² But where there are several issues in one case, a statement in one plea cannot be used to disprove a statement in another plea.⁷³ Their admissibility runs through the whole course of the action,⁷⁴ including new trial and appeal, and applies alike to both.⁷⁵

⁷⁰ *Malick v. Kellogg*, 118 Wis. 405, 95 N. W. 372; *Miller v. Larson*, 17 Wis. 624.

⁷¹ *Warder etc. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300.

⁷² *Tisdale v. President etc. Canal Co.*, 116 N. Y. 416, 22 N. E. 700; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Lee v. Heath*, 61 N. J. L. 250, 39 Atl. 729; *Leavitt v. Cutler*, 37 Wis. 46. In Massachusetts a different rule is held: *Taft v. Fisk*, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621.

⁷³ *Nye v. Spencer*, 41 Me. 272; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931.

⁷⁴ *Moynahan v. Perkins*, 36 Colo. 481, 10 Ann. Cas. 1061, 85 Pac. 1132; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; *Merrill v. Leisnering*, 166

Mich. 219, 131 N. W. 538; *Warder etc. Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300; *Spurlock v. Missouri etc. R. Co.*, 125 Mo. 404, 28 S. W. 634; *Cohen v. Barry*, 111 N. Y. Supp. 668.

⁷⁵ *Hartsell v. Masterson*, 132 Ala. 275, 31 South. 616; *Kankakee etc. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Farley v. O'Malley*, 77 Iowa, 531, 42 N. W. 435; *In re Cooksey*, 79 Kan. 550, 100 Pac. 62; *Edwards v. Mattingly*, 107 Ky. 332, 53 S. W. 1032, 21 Ky. Law Rep. 1045; *Bowman v. Globe Steam Heating Co.*, 80 Mo. App. 628; *Lee v. Heath*, 61 N. J. L. 250, 39 Atl. 729; *Breese v. Graves*, 67 N. Y. App. Div. 322, 73 N. Y. Supp. 167; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605; *Smith v. Nimocks*, 94 N. C. 243;

And when by rule of court, as in New York, an affidavit of defense in an action on a promissory note becomes a pleading, the defendant is concluded by it. The court, in a recent case in that state,⁷⁶ said: "The admissions in the affidavit were evidence for the plaintiff, and, while it does not appear that the affidavit was formally offered, these admissions were twice made the basis of objections to offers by the defendant, which had the effect of bringing them upon the record, as did the affirmance by the court of the plaintiff's point that under the pleadings and evidence the verdict must be in favor of the plaintiff. It is not the same as if the affidavit was a mere admission, which, with her attention called to it, the defendant might possibly explain away." In a recent Montana case,⁷⁷ the question of the admissibility of parts of pleadings is exhaustively discussed, and has a direct importance in those states wherein the pleadings are verified. A party may undoubtedly use such portion of his opponent's verified pleading as may contain matter capable of being used as an admission.⁷⁸ The rare position of what we may call a

Darling v. Miles, 57 Or. 593, 111 Pac. 702, 112 Pac. 1084; *Kline v. Huntington First Nat. Bank* (Pa.), 15 Atl. 433; *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284; *Scoville v. Brock*, 79 Vt. 449, 118 Am. St. Rep. 975, 65 Atl. 577; *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520; *Crosby v. Hammerling*, 170 Fed. 857.

⁷⁶ *Hilliard v. Lyons*, 180 Fed. 685, 103 C. C. A. 651.

⁷⁷ *Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 108 Pac. 1057.

⁷⁸ The importance of the opinion in *Johnson v. Butte*, *supra*, calls for special reference to the facts. Fred Simila was employed by the defendant company as a miner, and was working in a shaft at the Black Rock mine, when a piece of timber fell upon him, inflicting injuries from which he subsequently died. The administrator of

his estate brought this action, and in his complaint alleged that one James Goggin was employed by the defendant company as a shift boss at the time when and the place where Simila was injured, and that Simila's injuries were occasioned by the negligence of Goggin which caused the timber to fall. The answer of the defendant admits its corporate existence, and admits that Simila was in its employ; but denies that Simila was injured at all while engaged in the discharge of his duties as a servant of the defendant company. There is a specific denial that Goggin was in fact, or was acting as, a shift boss for the defendant company, and a denial that through any act of his Simila was injured. There is then a general denial of all the allegations of the complaint not specifically admitted or

special admission for the purposes of the cause recently

denied, and certain affirmative defenses are pleaded, the second of which only requires notice here; and the gist of that defense is found in the following declaration: "That the said Simila was injured through the fault and negligence of one of defendant's employees, who was then and there a fellow-servant of the said Simila." Upon the trial the plaintiff offered in evidence the paragraph of the answer from which the above language is quoted, but an objection to the offer was sustained. At the close of plaintiff's case the defendant moved for a nonsuit. The motion was granted. From the opinion we extract portion of the discussion upon the point. It was urged that the trial court erred in excluding from the jury's consideration the second affirmative defense set forth in defendant's answer. While the affirmative plea that Simila was injured through the negligence of one of defendant's employees who was then a fellow-servant of Simila would not alone support the plaintiff's allegation that Simila was injured through the negligence of James Goggin and that Goggin was a shift boss, it would, however, tend to prove that Simila was injured through the negligence of an employee of the defendant company, and relieve the plaintiff from the necessity of proving that the particular act which caused Simila's injury was a negligent act, and that the person who caused it was an employee of the defendant. If this portion of the answer had been admitted, plaintiff would then have had to prove only: (a) That Simila was injured while in the discharge of his duties as an employee of the defendant; (b) that the particular individual whose act caused the injury was James Goggin; (c) that

James Goggin was a shift boss; and (d) the extent of Simila's injury and the damages resulting therefrom, to make out a *prima facie* case. There is ample evidence in the record to support the first and fourth of these facts. The opinion proceeds: "This court has recognized the right of the defendant to interpose inconsistent defenses, under the provisions of section 6549, Rev. Codes; but it has never gone to the extent of saying that such defenses may be so far inconsistent that, if the allegations of one are true, the allegations of the other must of necessity be false. Generally speaking, our Code requires pleadings to be verified (Rev. Codes, § 6565); but, in permitting a defendant to set forth in his answer as many defenses as he has, it was never intended to sanction or encourage perjury. In states where the pleadings are required to be verified, the general rule is: 'The defendant may plead inconsistent defenses, provided they be not so incompatible as necessarily to render one or the other absolutely false': *Clarke v. Lyon County*, 7 Nev. 75; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 331; 1 Ency. Pl. & Pr. 857; *Bliss on Code Pleading*, § 343, It appears to us to be the acme of absurdity to say that the casual admission of a defendant, made on the street, may be put in evidence against him, but that his solemn admission, made deliberately and under oath, in a pleading, which calls for a true statement of the facts, may not be used against him. If by the second affirmative defense the defendant sought to charge that Simila's injuries were caused by a fellow-servant, it would seem that it would have been sufficient to say so, without volunteering the

occurred in a New York case.⁷⁹ In the case referred to, the action was instituted to have the ownership of a lane determined and the defendant enjoined from maintaining a fence upon it. Each claimed by title. The answer of the defendant denied the plaintiff's ownership of an undivided interest in the fee of the lane. After the deeds upon which the parties relied were placed in evidence, the defendant admitted that the plaintiff was the owner in common of an undivided part of the fee of such lane. The case was tried upon that theory, but a careful examination of the entire record showed that the admission made at different times by the defendant was an admission of law upon conceded facts rather than an admission of a fact independent of the deeds and records upon which the parties to the action concededly depended. The court said: "The judgment being for the defendant the admissions do

information that the act which caused the injury was a negligent one. . . . There is not any reason whatever why admissions in a pleading ought not to be used in evidence against the pleader. In passing, we may say that it is very doubtful whether the answer in this case is open to adverse criticism. The denial is that Simila was injured 'while engaged in his duties as defendant's servant.' It was not any objection to the offered evidence that the plaintiff did not embrace in his offer the entire answer. Section 7871, Revised Codes, provides: 'When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.' In Abbott's Trial Brief, Civil Jury Trials, 299, the rule is

stated as follows: 'A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he does not omit a part of a sentence or clause which qualifies that part which he reads, so as to pervert the sense or render it uncertain.' From the allegations of this affirmative defense, plaintiff was seeking to show that Simila's injury was caused by a negligent act, and that the person whose negligence caused the injury was an employee of the defendant company. The plaintiff would not have been bound by the allegation that the person who caused the injury was a fellow-servant of Simila. We quote again from Abbott's Trial Brief, 298, the following: 'A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it.' Our conclusion is that the trial court erred in excluding the evidence offered."

⁷⁹ City Club of Auburn v. McGear, 198 N. Y. 160, 91 N. E. 539.

not require that a new trial be granted, because the record shows that both parties stand upon their legal rights to be determined upon conceded facts, and each has stated in his brief before this court that his legal rights must be determined upon a construction of the deeds which are before us." When a statement by a party in a pleading, other than in the pending suit, is offered in evidence, the statement is admissible on the same principle as oral admissions, hence it is not necessary that the parties should be the same; and the pleadings of a party may be received against him *in a subsequent suit although the parties are different*.⁸⁰ In a South Dakota decision,⁸¹ which was a controversy concerning the use of water for irrigation between the plaintiff as an appropriator and the defendants as riparian proprietors, it was urged that the court erred in allowing defendants to introduce in evidence the complaint in an action wherein the plaintiff's grantor was plaintiff and one Harrison was defendant. That was an action to recover for water used by Harrison; the com-

⁸⁰ Callan v. McDaniel, 72 Ala. 96; McLemore v. Nuckolls, 37 Ala. 662; Valley Planting Co. v. Wise, 93 Ark. 1, 123 S. W. 768; Greer v. Tripp, 56 Cal. 209; Boulder etc. Ditch Co. v. Ditch etc. Co., 36 Colo. 455, 86 Pac. 101; Printup v. Patton, 91 Ga. 422, 18 S. E. 311; Seymour v. O. S. Richardson Fueling Co., 103 Ill. App. 625; Robbins v. Butler, 24 Ill. 387; Coldren Land Co. v. Royal, 140 Iowa, 381, 118 N. W. 426; Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010; Clarke v. Robinson, 5 B. Mon. (Ky.) 55; Vredenburg v. Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 South. 122; Robison v. Swett, 3 Me. (Greenl.) 316; Nicholson v. Snyder, 97 Md. 415, 55 Atl. 484; Mobberly v. Mobberly, 60 Md. 376; Radelyffe v. Barton, 161 Mass. 327, 37 N. E. 373; Rich v. Minneapolis, 40 Minn. 82, 41 N. W. 455; Wrightsman

v. Herrick, 130 Mo. App. 266, 109 S. W. 104; Dowzelot v. Rawlings, 58 Mo. 75; Paxton v. State, 60 Neb. 763, 84 N. W. 254; Guy v. Manuel, 89 N. C. 83; Chicago etc. R. Co. v. Mashore, 21 Okl. 275, 17 Ann. Cas. 277, 96 Pac. 630; Feldman v. McGuire, 34 Or. 309, 55 Pac. 872; Lindsay v. Dutton, 227 Pa. 208, 75 Atl. 1096; Kline v. Huntingdon First Nat. Bank (Pa.), 15 Atl. 433; Gibson v. Rowland, 35 Pa. Sup. Ct. 158; Cooper v. Day, 1 Rich. Eq. (S. C.) 26; Seligmann v. Greif (Tex. Civ. App.), 109 S. W. 214; Lewis v. Crouch (Tex. Civ. App.), 85 S. W. 1009; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Hyman v. Wheeler, 29 Fed. 347, 15 Morr. Min. Rep. 519; Tiley v. Cowling, Bull. N. P. 243, 1 Ld. Raym. 744, 91 Eng. Reprint, 1398.

⁸¹ Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702.

plaint showing the number of inches claimed to be used by the plaintiff's grantor at the time. The complaint was verified by the superintendent of the plaintiff's grantor. It was competent as a written admission against such grantor's interest, and as such was admissible against the plaintiff in the later action.⁸² The defendants also offered in evidence as an admission against interest the answer in another action in which the plaintiff's grantor was a defendant and had verified such answer. The plaintiff's objections to it, mainly on the ground of different parties and that there was no jurisdiction in the court wherein it was made, were not sustained. In the language of the court "it was introduced as a written declaration of the parties for whom and by whom it was prepared and was admissible as such whether or not the court had jurisdiction of the action in which it was filed." The *weight* to be given to such admissions depends upon various circumstances. If the pleading is sworn to and hence is the deliberate and solemn statement of the party, its admissions may afford evidence against him not easily rebutted. When the allegations are made on *information and belief*, they are still admissible in evidence, as this fact only detracts from the weight of the testimony.⁸³ But if the pleadings are *not*

⁸² Citing 1 Jones, Ev., § 243.

⁸³ Pope v. Allis, 115 U.S. 363, 29 L. Ed. 393, 6 Sup. Ct. Rep. 69, in which case the language of Mr. Justice Woods, "When the averment is made on information and belief, it is nevertheless admissible as evidence, though not conclusive. (Lord Ellenborough, in Doe v. Steel, 3 Camp. 115.) The authority cited sustains the proposition that the fact that the averment is made on information and belief, merely detracts from the weight of the testimony; it does not render it inadmissible," is directly opposed to that of Mayor etc. of New York v. Fay, 53 Hun (N. Y.), 553, 6 N. Y. Supp. 400, which adopts the rules as

set out in Cook v. Barr, 44 N. Y. 156. The rule as laid down in Pope v. Allis, *supra*, is entitled to all respect. In Smith v. Boston Elevated Ry. Co., 184 Fed. 387, 37 L. R. A., N. S., 429, 106 C. C. A. 497, the principle is applied to other sworn statements. "A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention

sworn to, and are drawn by counsel, and the allegations have not been expressly directed or approved by the party, they may be of little significance.⁸⁴ Indeed, under the former practice it was held that *bills in chancery not sworn to* were not admissible, except to prove such a fact as their own existence, or the commencement of a suit, or what the facts in issue were. They were rejected, as admissions, on the ground that they consisted largely of the suggestions of counsel so framed as to obtain an answer under oath. And the pleadings in *actions at law* have also often been rejected as admissions, when not shown to have been approved or directed by the party himself.⁸⁵ Many of the cases holding that pleadings were inadmissible as admissions were based on the theory that most of the allegations were merely pleader's matter—fiction stated by

of the judicial power in his behalf, and thus subject to the rule '*allegans contraria non est audiendus*,' which, as stated in Broom's Legal Maxims, p. 130, expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest." This principle is illustrated in *Harriman v. Northern Securities Co.*, 197 U. S. 244, 294, 49 L. Ed. 739, 25 Sup. Ct. Rep. 493; *Davis v. Wakelee*, 156 U. S. 680, 689 et seq., 39 L. Ed. 578, 15 Sup. Ct. Rep. 555; *Sturm v. Boker*, 10 U. S. 312-334, 37 L. Ed. 1093, 14 Sup. Ct. Rep. 99; *National Steamship Co. v. Tugman*, 143 U. S. 28-32, 36 L. Ed. 63, 12 Sup. Ct. Rep. 361; *Pope v. Allis*, *supra*; *Railway Co. v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693. Where a corporation is a party, and the pleading is signed by the president as such and verified by the secretary, statements in such

pleading cannot be used as admissions against the president in his private capacity without proof of his knowledge of them: *Oregon etc. R. Co. v. De Grubissich* (C. C. A.), (not yet reported, decided in July, 1913).

⁸⁴ *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S. W. 768; *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004; *Netzwor Mfg. Co. v. Southern R. Co.*, 7 Ga. App. 163, 66 S. E. 399; *Tison v. South Georgia R. Co.*, 8 Ga. App. 91, 68 S. E. 651; *Farmer v. State*, 100 Ga. 41, 28 S. E. 26; *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443; *City of Elizabeth v. Central R. Co.*, 79 N. J. L. 542, 77 Atl. 529; *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129; *Baldwin v. Gregg*, 13 Met. (Mass.) 253; *Boileau v. Rutlin*, 2 Ex. 665, 12 Jur. 899.

⁸⁵ *Boileau v. Rutlin*, 2 Ex. 665, 12 Jur. 899; *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473, 33 L. Ed. 674, 10 Sup. Ct. Rep. 399; *Baldwin v. Gregg*, 13 Met. (Mass.) 253; *Dennie v. Williams*, 135 Mass. 28.

counsel and sanctioned by the courts. Although the courts have shown a proper disposition to differentiate between those which merely display the ingenuity of equity counsel and those which are genuine statements of the party,⁸⁶ the whole modern tendency is to reject this view and to treat pleadings as statements of the *real issues* in the cause and hence as admissions of the parties, having weight according to the circumstances of each case.⁸⁷ But some of the

⁸⁶ *Boileau v. Rutlin, supra*; *Doe v. Sybourn*, 7 Term Rep. 3, 101 Eng. Reprint, 823; *Reg. v. Simmonds*, 4 Cox C. C. 277; *Doe v. Steel*, 3 Camp. 115, 13 Rev. Rep. 768; *Grant v. Jackson*, Peake, 204; *Slack v. Buchanan*, Peake, 5; *Tennessee Coal etc. R. Co. v. Linn*, 123 Ala. 112, 82 Am. St. Rep. 108, 26 South. 245; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Tyson v. South Georgia R. Co., supra*; *Miller v. Chrisman*, 25 Ill. 269; *Rankin v. Maxwell*, 2 A. K. Marsh. (Ky.) 488, 12 Am. Dec. 431; *Rees v. Lawless*, 4 Litt. (Ky.) 218; *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Dennie v. Williams*, 135 Mass. 28; *Meyer v. Blakemore*, 54 Miss. 570; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Owens v. Dawson*, 1 Watts (Pa.), 149, 151, 26 Am. Dec. 49; *Delaware County Commrs. v. Diebold Safe etc. Co.*, 133 U. S. 473, 33 L. Ed. 674, 10 Sup. Ct. Rep. 399. In *Lindsay v. Dutton*, 227 Pa. 208, 75 Atl. 1096, in an action framed in *assumpsit*, the pleadings in a former equity suit between the same parties were properly admitted as evidence of admissions by the parties concerned, to contradict their evidence in the existing action. It was, however, expressly held that they were not to be taken as estopping them from taking a different position from that adopted in the equity suit.

⁸⁷ *Posey v. Hanson*, 10 App. Cas. D. C. 496; *Younglove v. Knox*, 44

Fla. 743, 33 South. 427; *St. Paul F. & M. Ins. Co. v. Brunswick-Grocery Co.*, 113 Ga. 786, 39 S. E. 483; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Schmisser v. Beatrice*, 147 Ill. 210, 35 N. E. 525; *Kankakee etc. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Boots v. Canine*, 94 Ind. 408; *Sharts v. Awalt*, 73 Ind. 304; *Springer v. Drösch*, 32 Ind. 486, 2 Am. Rep. 356; *Tingle v. Kelly*, 29 Ky. Law Rep. 24, 92 S. W. 303; *Eccles v. Shackelford*, 1 Litt. (Ky.) 35; *Cragin v. Carleton*, 21 Me. 492; *Lowney v. Perham*, 20 Me. 235; *Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484; *Garey v. Sangston*, 64 Md. 31, 20 Atl. 1034; *Calvert v. Friebus*, 48 Md. 44; *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670; *Gordon v. Parmelee*, 2 Allen (Mass.), 212; *Boston v. Richardson*, 13 Allen (Mass.), 146; *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617; *Yoki v. First State Bank*, 87 Minn. 295, 91 N. W. 1101; *Baum v. Fryrear*, 85 Mo. 151; *Tague v. Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Tindall v. McIntyre*, 24 N. J. L. 147; *Millard v. Adams*, 1 Misc. Rep. 431, 21 N. Y. Supp. 424; *Meade v. Black*, 22 Wis. 241; *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393, 6 Sup. Ct. Rep. 69; In *Comstock v. Jacobs*, 84 Vt. 277, Ann. Cas. 1913A, 679, 78 Atl. 1017, the mere fact of the plaintiff being the administrator of two estates, husband's and wife's, did not render admissions made by him in an action for the husband's estate fatal

authorities still hold that if the pleading is not signed by the party, there should be some proof that he has authorized it.⁸⁸

§ 273 (275). *Same, continued.*—On the same principle, where *amended pleadings* have been filed, allegations in the original pleadings are held admissible,⁸⁹ but in such

in the action for the wife's estate when he did not know at the time of the first action to which estate the subject matter properly belonged.

⁸⁸ *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443. In *Lee v. Chicago etc. Ry. Co.*, 101 Wis. 352, 77 N. W. 714, the court admitted in evidence a complaint for the same cause of action, filed in another state, it being signed by the plaintiff's attorney and verified by his guardian *ad litem*. An interesting opinion on using the plea of *nolo contendere* as an admission will be found in *State v. La Rose*, 71 N. H. 435, 52 Atl. 943.

⁸⁹ *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *Smith v. Smith*, 136 Ga. 197, 71 S. E. 158; *Shurtliff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574; *Bartlow v. Chicago, B. & Q. R. Co.*, 243 Ill. 332, 90 N. E. 721; *Baltimore O. & C. Ry. v. Evarts*, 112 Ind. 533, 14 N. E. 369; *Daub v. Englebach*, 109 Ill. 267; *Sheldon v. Crane*, 146 Iowa, 461, 125 N. W. 238; *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000; *Ludwig v. Blackshere*, 102 Iowa, 366, 71 N. W. 356; *Watt v. Missouri K. & T. R. Co.*, 82 Kan. 458, 108 Pac. 811; *Juneau v. Stunkle*, 40 Kan. 756, 20 Pac. 473; *Wyles v. Berry*, 116 Ky. 377, 25 Ky. Law Rep. 606, 76 S. W. 126; *State v. Bowe*, 61 Me. 171; *Meriweather v. Publishers: Knapp & Co.*, 224 Mo. 617, 123 S. W. 1100; *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *Anderson v. McPike*, 86 Mo. 293;

Ranken v. Probey, 136 App. Div. 134, 120 N. Y. Supp. 413; *Fogg v. Edwards*, 20 Hun (N. Y.), 90; *Willis v. Western Union Tel. Co.*, 150 N. C. 318, 64 S. E. 11; *Leistikow v. Zuelsdorf*, 18 N. D. 511, 122 N. W. 340; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Johnson v. Sheridan Lumber Co.*, 51 Or. 35, 93 Pac. 470; *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526; *O'Connell v. King*, 26 R. I. 544, 59 Atl. 926; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *Behrens Lumber Co. v. Lager*, 26 S. D. 160, Ann. Cas. 1913A, 1128, 128 N. W. 698; *Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.), 134 S. W. 363; *Austin v. Jackson Trust & Sav. Bank* (Tex. Civ. App.), 125 S. W. 936; *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; *Kilpatrick-Koch Drygoods Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Brown v. Pickard*, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512; *Browder v. Southern R. Co.*, 107 Va. 10, 13, 57 S. E. 572; *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125; *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234. In California there appears to be a conflict upon this point, the weight of authority being against the reception of admissions in superseded pleadings. In *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359, the general rule was followed, but in *Ralphs v. Hensler*, 114 Cal. 196, 45 Pac. 1052, followed in

case the original pleadings can have no effect, unless formally offered in evidence;⁹⁰ and not even then if it is made to appear that the contents of the pleading were repudiated by the party immediately on obtaining cognizance of it.⁹¹ It will be observed that the following distinctions exist between the pleadings upon which the case is tried and those that have been superseded. The former is before the court and jury of necessity, without offer, not as evidence, but to show the issues to be tried; and admissions made therein are taken as true, and conclusive against the party making them. The latter is not necessarily before the court and jury, and, if before them, is only as evidence, is not conclusive, and may be shown to have been made inadvertently, or by mistake, or may be contradicted or explained. Being only evidence, and subject to explanation, it seems that it should be introduced as any other evidence, and, unless so introduced, should not be considered. To hold otherwise is to permit a party to spring a surprise upon his adversary, by presenting the admissions when the opportunity to explain has passed.⁹² It has

Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076, and later cases, the courts there have broken away and decline to admit such admissions. In this they find support in *Smith v. Davidson*, 41 Fed. 172. See note on "Admissibility in Evidence Against Pleader of Abandoned Pleading," to *Arkansas City v. Payne*, 18 Ann. Cas. 83.

⁹⁰ *Boots v. Canine*, 94 Ind. 408; *Leach v. Hill*, 97 Iowa, 81, 66 N. W. 69; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450; *Folger v. Boyington*, 67 Wis. 447, 30 N. W. 715.

⁹¹ *Baldwin v. Siddons*, 46 Ind. App. 313, 90 N. E. 1055, 92 N. E. 349.

⁹² *Shiple v. Reasoner*, 87 Iowa, 555, 54 N. W. 470. The rule is particularly well stated in *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234: "Some intimations in other jurisdic

tions that such a pleading is not admissible at all, without affirmative proof of authority from the party to the attorney to make it, cannot control us, in presence of the well established rule in this state. When, however, a writing ceases to be a pleading, by reason of presence of a substitute, it is of force only as is any other declaration of facts—as an evidentiary admission of such facts—and its cogency to establish them varies according to many collateral circumstances, such as deliberation and care with which made, the clearest of comprehension of either the maker or the reporter of the statement, or, especially when emanating from an agent, the fullness of consultation with and disclosure from the principal. For these reasons, it is, of course, proper to offer evidence of any such circum-

been held that when a party has been compelled by the court to elect between two inconsistent pleas, the election, not being a voluntary amendment, shuts out the opponent from using the excised portion even as an admission. The defendant in a slander action answered denying the publication and also admitting it and justifying. Compelled by the court to elect, he chose the first answer, and it was held error to permit the second one admitting the publication to be used.⁹³ In a Texas case it has been held that a plea stricken out should not have been admitted as an admission against the defendants.⁹⁴ It is hardly necessary to add that the pleading of one plaintiff or defendant is not competent as an admission of a *complainant* or a *codefendant*.⁹⁵ It is an ancient rule of pleading that each party tacitly admits all such traversable allegations on the opposite side as he does not traverse. *Qui non negat fatetur*.⁹⁶ Under the reformed procedure the same general rule is recognized with the qualification that the allegation of new matter in an answer, not pleaded as a part of a counterclaim or as new matter in a reply, is to be deemed controverted by the adverse party. It is a familiar statement that a *demurrer* admits all those facts which are well pleaded. But as a rule of evidence, a demurrer is not an absolute admission of any fact. It simply admits those facts which are well pleaded for the sole purpose of having their legal sufficiency determined by the court.⁹⁷ The de-

stances to guide the jury in deciding upon the weight to be given to the admission, in comparison with any evidence conflicting therewith. For such purpose the testimony of the attorney offered was clearly admissible, and should have been received: *Husbrook v. Strawser*, 14 Wis. 403; *Lindner v. St. Paul Fire etc. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125. See, also, *Wilson v. Newton County (Ga. App.)*, 76 S. E. 648.

⁹³ *Lane v. Bryant*, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 584.

⁹⁴ *Dunson v. Nacogdoches County*, 15 Tex. Civ. App. 9, 37 S. W. 978.

⁹⁵ *Reese v. Reese*, 41 Md. 554; *Stewart v. Stone*, 3 Gill & J. (Md.) 510.

⁹⁶ *Gwam v. Roe*, 1 Salk. 91, 91 Eng. Reprint, 84.

⁹⁷ *Bohe v. Frowner*, 18 Ala. 89; *Branham v. Mayor*, 24 Cal. 585; *Chapin v. Curtis*, 23 Conn. 388; *Pease v. Phelps*, 10 Conn. 62; *Matthews v. Tower*, 39 Vt. 433; *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834. But a demurrer does not admit a foreign law alleged in the complaint: *Knicker-*

murrer cannot be used in another suit as an admission of the allegations in the pleading demurred to, when it does not appear that the demurrer was adjudged insufficient, and that the party elected to abide thereby.⁹⁸ The statements in the pleadings demurred to are no evidence on questions of damages, or when the cause is tried on the merits.⁹⁹ But for the purpose of determining the questions of law involved, a demurrer to evidence admits all the facts which a jury might reasonably infer from the evidence.¹⁰⁰

§ 274 (276). Admissions in pleadings—When conclusive.—Where a party to an action makes solemn admissions against his interest in a pleading, they should be treated as admitted facts, and he will not be heard to question the correctness thereof at any stage of the case in the trial court, or on appeal, when properly preserved in a transcript or case-made so long as they remain a part of the record. If the statements or admissions were made by himself or by his counsel under an honest mistake or misapprehension of what the facts really were, and he desires to be relieved from the effect thereof, he should apply to the trial court for leave to withdraw such admissions or pleadings, and if required to do so, make a showing of good faith in support of his application, which should be granted or denied in the furtherance of justice.¹ Each party to an action is in that action conclusively bound by those admissions which he expressly makes in the pleadings, or by stipulations, oral or written, which are formally entered into for the purpose of dispensing with proofs.² As we

bocker Trust Co. v. Iselin, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877.

⁹⁸ Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Tomkins v. Asby, 1 Moody & M. 32.

⁹⁹ McKinzie v. Mathews, 59 Mo. 99.

¹⁰⁰ Golden v. Knowles, 120 Mass. 336; Fowle v. Alexandria, 11 Wheat. (U. S.) 320, 6 L. Ed. 484.

¹ Rogers v. Brown, 15 Okl. 524, 86 Pac. 443.

² Willis v. Rice, 157 Ala. 252, 131 Am. St. Rep. 55, 48 South. 397; Beauchamp v. Bertig, 90 Ark. 351, 23 L. R. A., N. S., 659, 119 S. W. 75; Goodrum v. Ayers, 56 Ark. 93, 19 S. W. 97; Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Joshua Hendy Mach. Works v.

have already seen, the same rule applies to those material allegations in pleadings which are tacitly admitted by failing to interpose any denial when, under the rules of plead-

Pacific Cable Constr. Co., 99 Cal. 421, 33 Pac. 1084; Denver etc. R. Co. v. Howe, 49 Colo. 256, 112 Pac. 779; Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086; City of Meriden v. West Meriden Cemetery Assn., 83 Conn. 204, 76 Atl. 515; Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Cooksey v. Bryan (D. C.), 2 App. Cas. 557; Wells v. Ragdale, 102 Ga. 53, 29 S. E. 165; Cratty v. Peoria Library Assn., 120 Ill. App. 596; Sanitary Dist. of Chicago v. Pittsburgh etc. R. Co., 216 Ill. 575, 75 N. E. 248; Fuller v. Exchange Bank, 38 Ind. App. 570, 78 N. E. 206; State Bank of Dayton v. Felt, 99 Iowa, 532, 61 Am. St. Rep. 253, 68 N. W. 818; Niquette v. Green, 81 Kan. 569, 106 Pac. 270; Johnston v. Winfield Town Co., 14 Kan. 390; Myrick v. Hembree, 136 Ky. 110, 123 S. W. 668; Durrett v. Stewart, 88 Ky. 665, 11 S. W. 773, 11 Ky. Law Rep. 172; Shea v. Sewerage & Water Bd., 124 La. 299, 50 South. 166; Hall v. Bossier Levee Dist. Commrs., 111 La. 913, 35 South. 976; Barnes v. Taylor, 29 Me. 514; Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498; Morton v. Clark, 181 Mass. 134, 63 N. E. 409; Van Doorn v. Heap, 160 Mich. 199, 125 N. W. 11; Carver v. Detroit etc. Plank Road Co., 126 Mich. 458, 85 N. W. 1028; Reilly v. Bader, 46 Minn. 212, 48 N. W. 909; Heston State Bank v. Luthy, 155 Mo. App. 363, 137 S. W. 66; Oglesby v. Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Wulf v. Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; Clague v. Tri-State Land Co., 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; Faulkner v. Gilbert, 61 Neb. 602,

85 N. W. 843; Alexander v. Archer, 21 Nev. 22, 24 Pac. 373; Schenck v. Schenck, 10 N. J. L. 274; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Matthews v. Peterson, 152 N. C. 168, 67 S. E. 340; Henning v. Warner, 109 N. C. 406, 14 S. E. 317; William Knabe & Co. Mfg. Co. v. Dinwiddie, 116 N. Y. Supp. 716; Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129; Peckham Iron Co. v. Harper, 41 Ohio St. 100; Rogers v. Brown, 15 Okl. 524, 86 Pac. 443; Myers v. Perry First Presb. Church, 11 Okl. 544, 69 Pac. 874; Holland v. Rhoades, 56 Or. 206, 106 Pac. 779; La Follett v. Mitchell, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; Riley v. Pittston Coal Min. Co., 224 Pa. 633, 73 Atl. 944; Youghiougheny River Coal Co. v. Hopkins, 198 Pa. 343, 48 Atl. 19; Sprague v. Sea View R. Co. (R. I.), 72 Atl. 994; Anderson v. Western Union Tel. Co., 85 S. C. 252, 67 S. E. 232, 477; Tant v. Guess, 37 S. C. 489, 16 S. E. 472; J. I. Case Threshing Mach. Co. v. Pederson, 6 S. D. 140, 60 N. W. 747; Lee v. Security Bank etc. Co., 124 Tenn. 582, 139 S. W. 690; House v. Wakefield, 2 Cold. (Tenn.) 325; Rutherford v. Gaines, 103 Tex. 263, 126 S. W. 261; Hancock v. Dimon, 17 Tex. 369; Hague v. Juab County Mill etc. Co., 37 Utah, 290, 107 Pac. 249; Holbrook v. Quinlan, 84 Vt. 411, 80 Atl. 339; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409; Murray Hill L. Co. v. Milwaukee L. H. & T. Co., 126 Wis. 14, 104 N. W. 1003; Wilson v. Groelle, 83 Wis. 530, 53 N. W. 900; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23; Balloch v. Hooper, 146 U. S. 363, 13

ing, a denial is necessary.³ But a tacit or incidental admission in one suit will *not conclude* the party making it in another action, where precisely the *same matter is not in litigation*;⁴ and even then admissions which are expressly made by the pleadings in one action are not conclusive in other suits, unless the second action is brought on a judgment recovered in the first.⁵ The *affidavits* and depositions of a party are, of course, competent to show his admissions,⁶ although used in another suit,⁷ and from their

Sup. Ct. Rep. 128, 36 L. Ed. 1008; Carter v. Rinker, 174 Fed. 882; McFarlane v. Wadhams, 165 Fed. 987; Bingham v. Stanley, 2 Q. B. 117, 1 G. & D. 237, 114 Eng. Reprint, 47; Robins v. Lord Maidstone, 4 Q. B. 811, 114 Eng. Reprint, 1103; Boileau v. Rutlin, 2 Ex. 665, 12 Jur. 899.

³ See § 273, *ante*.

⁴ Carter v. James, 13 Mees. & W. 137, 2 D. & L. 236, 13 L. J. Ex. 373, 8 Jur. 912; Rigge v. Burbridge, 16 Mees & W. 598, 15 L. J. Ex. 309; Hutt v. Morell, 3 Ex. 241. See note on "Admissibility and Conclusiveness Against Pleader in Subsequent Action With Stranger of Admission in Pleading," to First Nat. Bank v. Duncan, 18 Ann. Cas. 79.

⁵ Skelton v. Hawling, 1 Wils. 258, 95 Eng. Reprint, 605.

⁶ Brown v. French, 159 Ala. 645, 49 South. 255; Leake v. J. R. King Dry Goods Co., 5 Ga. App. 102, 62 S. E. 729; Illinois Cent. R. Co. v. Cobb, 64 Ill. 143; Trustees of Wabash & E. Canal v. Bledsoe, 5 Ind. 133; Davenport v. Cummings, 15 Iowa, 219; Faunce v. Gray, 21 Pick. (Mass.) 243; Southern Bank v. Nichols, 202 Mo. 309, 100 S. W. 613; Kritzer v. Smith, 21 Mo. 296; Bogart v. New York etc. R. Co., 118 App. Div. 50, 102 N. Y. Supp. 1093; Meyer v. Campbell, 1 Misc. Rep. (N. Y.) 283, 20 N. Y. Supp. 705; Forrest v. Forrest,

6 Duer (N. Y.), 102; Mushat v. Moore, 4 Dev. & B. L. (N. C.) 257; McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123; Chaddick v. Haley, 81 Tex. 617, 17 S. W. 233; Parlin etc. Co. v. Vawter, 39 Tex. Civ. App. 520, 88 S. W. 407; Fulton v. Gracey, 15 Gratt. (Va.) 314; Cambioso v. Maffet, 4 Fed. Cas. No. 2430, 2 Wash. 98; Hilliard v. Lyons, 180 Fed. 685, 103 C. C. A. 651; Rex v. Clarke, 8 Term Rep. 220, 101 Eng. Reprint, 1355; Doe v. Steel, 3 Camp. 115, 3 R. R. 768. As to the effect of answers under oath, see Elliott v. Hayden, 104 Mass. 180; Knowlton v. Moseley, 105 Mass. 136; Cook v. Barr, 44 N. Y. 156; Dunbar v. Dunbar, 80 Me. 152, 6 Am. St. Rep. 166, 13 Atl. 578; Wylder v. Crane, 53 Ill. 490; Lawrence v. Lawrence, 21 N. J. Eq. 317; Printup v. Patton, 91 Ga. 422, 18 S. E. 311. See, also, § 273, *ante*.

⁷ Spann v. Torbert, 130 Ala. 541, 30 South. 389; Shafter v. Richards, 14 Cal. 125; Sizer v. Melton, 129 Ga. 143, 58 S. E. 1055; Davenport v. Cummings, 15 Iowa, 219; Knight v. Rothschild, 172 Mass. 546, 52 N. E. 1062; Rosenfeld v. Siegfried, 91 Mo. App. 169; Padley v. Catterlin, 64 Mo. App. 629; Brewer v. Hyndman, 18 N. H. 9; Platner v. Ryan, 76 N. J. L. 239, 69 Atl. 1007; Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. Supp. 423; Furniss v. Mutual Life

solemn character are entitled to great weight; but they are not conclusive against him and do not constitute an estoppel.⁸ It is hardly necessary to say that defects in the affidavit or deposition, or the omission to prove it with the same strictness that would be called for in a prosecution for perjury do not affect the competency of the admissions.⁹ Where a party states that he has read an affidavit of another and knows that the statements contained in it are true, his admission is competent on his adoption of the averments contained therein. It amounts to the same thing as if he had stated what the affidavit states.¹⁰ *Admissions* made by parties or their attorneys in their pleadings in the action, or by stipulations as to facts, or by dispensing with certain proofs *may be withdrawn* if not true, provided there remains sufficient time for the other party in which to prepare his case, and provided such party

Ins. Co., 46 N. Y. Super. Ct. (14 Jones & S.) 467; Mason v. McCormick, 85 N. C. 226; Tippin v. Ward, 5 Or. 450; Bilger v. Buchanan (Tex.), 6 S. W. 408; Commercial Bank v. Clark, 28 Vt. 325; Nash v. Yellow Poplar Lumber Co., 109 Va. 14, 63 S. E. 14; Lastrapes v. Blanc, 14 Fed. Cas. No. 8100, 3 Woods, 134.

⁸ Doe v. Steel, 3 Camp. 115, 13 R. R. 768; Cameron v. Lightfoot, 2 W. Black. 1190, 96 Eng. Reprint, 701; Studdy v. Sanders, 2 Dowl. & R. 347; De Whelpdale v. Milburn, 5 Price, 485.

⁹ Morrell v. Cawley, 17 Abb. Pr. (N. Y.) 76; Davenport v. Cummings, 15 Iowa, 219; Moore v. Brown, 23 Kan. 269; Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 S. W. 1130. In this case the court, referring to an excluded deposition, said: "It should have been received, not as a deposition, but as an admission, as declarations made by a party to the suit." As to explanation of discrepancies in dep-

ositions, see Dreyfus v. St. Louis etc. Ry. Co., 124 Mo. App. 585, 102 S. W. 53. In Profile & Flume Hotels Co. v. Bickford, 72 N. H. 73, 54 Atl. 699, the court said: "If the deposition of the defendant was incompetent as substantive evidence, either because not filed as required by statute, or because the deponent was present in court, nevertheless any admissions or declarations of the defendant pertinent to any issue on trial were competent to be proved by the adverse party; and it is immaterial whether such declarations were proved by the oral testimony of one who heard them, or by the defendant's signed statement in the form of a deposition: Phenix Mut. Life Ins. Co. v. Clark, 58 N. H. 164."

¹⁰ Knight v. Rothschild, 172 Mass. 546, 52 N. E. 1062. As to affidavits of third parties, see Love v. People, 94 Ill. App. 237; Hargis v. Price, 4 Dana (Ky.), 79.

has not been injured by relying on such admissions.¹¹ Such admissions will not be allowed to be withdrawn, however, if the situation of the parties has been substantially changed, as by the death of a party or of a witness.¹² If a party desires to withdraw admissions of the character under discussion, he should give full and *timely notice* of his purpose, so that the other party may have reasonable time to supply the proof.¹³ And if such notice is given, the court in its discretion may relieve the party from the conclusive effect of the admission, if it is shown to have been made through mistake.¹⁴ Mistakes honestly, though carelessly, made in allegations can always be recalled if, as we have said, in time to prevent prejudice to the other party, and on proper explanation. In a New York case,¹⁵ where explanatory testimony as to circumstances under which an answer was made was rejected, the subject is clearly dealt with as follows: "An admission of a fact in an original pleading does not lose its effect as an admission of fact because the pleading has been superseded as such by an amended pleading. It stands simply as an admission made by the party. . . . The original answer, however, was interposed by the defendant's attorney. The defendant had no knowledge of its contents, and the attorney upon the stand offered to show the facts and circumstances under which the admission was made, and that he made it merely as a matter of form without any information that the admission was true, but simply to raise a legal question which he felt must dispose of the case. The fact that the admission was made without the knowledge of the defendant weakens its force, and, if the attorney who made it had been permitted to explain the circumstances and reasons therefor, it might have destroyed its

¹¹ Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

¹² Wilson v. Bank of Louisiana, 55 Ga. 98.

¹³ Hargroves v. Redd, 43 Ga. 142; Elton v. Larkins, 5 Car. & P. 385, 1 Moody & R. 196.

¹⁴ Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313.

¹⁵ Ranken v. Probey, 136 App. Div. 134, 120 N. Y. Supp. 413. See, also, Davis v. Welch, 128 La. 785, 55 South. 372.

force as evidence to prove an admission by the defendant. The fact that the answer interposed in the case contains an admission is sufficient *prima facie* to charge the defendant with it; but, if it appears that the defendant had no knowledge of the admission, that it was made without his authority and without any information which justified it, it is substantially deprived of value. The rejection of this evidence was prejudicial error."

§ 275 (277). **Estoppel by conduct — Illustrations.** — Although in the foregoing sections some of the admissions referred to have been shown to be conclusive upon the party making them and those in privity with him, by far the greater part were of the class known as casual admissions having no element of estoppel and of course liable to be rebutted. But it has long been recognized as the rule that there is another class of admissions which cannot be disputed; and the rule is the same whether the admission is in fact *true or false*. The test is not whether the admission is true, but whether it would be contrary to public policy and good morals to allow it to be disputed. One branch of the rule of estoppel by conduct is thus stated by Stephen: "When one person by anything which he does or says, or abstains from doing or saying intentionally causes or permits another person to believe a thing to be true and to act upon such belief otherwise than he would have acted but for that belief, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing."¹⁶ The rule was stated by Lord Denman¹⁷ to be that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same

¹⁶ Steph. Ev., art. 102.

¹⁷ Pickard v. Sears, 6 Ad. & E. 469, 112 Eng. Reprint, 179.

time. Thus, where an owner acquiesces in the *sale of property*, as if it were that of another, and by his conduct leads innocent purchasers to buy, he is estopped to claim the property as his own.¹⁸ This rule applies when an owner stands by and sees a third person sell property as his own, without asserting his own title or giving the purchaser any notice of it, and he is estopped as against such purchaser from asserting it afterward;¹⁹ where an *indorser* has stated that the signature as indorser is genuine and the plaintiff has relied on such statement;²⁰ where one *adopts a signature*, knowing it to be forged;²¹ where a third person buys a note or mortgage or other claim relying on the assurance of the maker or debtor that the claim is valid, or that there is no defense;²² where the maker of a note stands by in *silence*, when it is transferred for a consideration;²³ where the owner of a chattel mortgage,

¹⁸ *Stephens v. Baird*, 9 Cow. (N. Y.) 274; *Mason v. Williams*, 8 Jones (53 N. C.), 478; *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Pickard v. Sears*, 6 Ad. & E. 469, 112 Eng. Reprint, 179. See, also, the recent cases: *Chicago etc. R. Co. v. Rhodes*, 21 Colo. App. 229, 121 Pac. 769; *Totten v. Totten* (Mich.), 138 N. W. 257; *In re New York etc. R. Co.*, 151 App. Div. 50, 135 N. Y. Supp. 234; *Lehigh Valley Nat. Bank v. Ott* (Pa.), 84 Atl. 507.

¹⁹ *Guthrie v. Quinn*, 43 Ala. 561; *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424, and note; *Nivin v. Belknap*, 2 Johns. (N. Y.) 573; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Storrs v. Barker*, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; *Power's Appeal*, 125 Pa. 175, 11 Am. St. Rep. 882, and note, 17 Atl. 254; *Marines v. Goblet*, 31 S. C. 153, 17 Am. St. Rep. 22, and note, 9 S. E. 803; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24

Am. Dec. 492; *Engle v. Burns*, 5 Call (Va.), 463, 2 Am. Dec. 593; *Vilas v. Mason*, 25 Wis. 310. See note to *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424.

²⁰ *Fall River Nat. Bank v. Buffington*, 97 Mass. 498.

²¹ *Casco Bank v. Keene*, 53 Me. 103; *Rudd v. Matthews*, 79 Ky. 479, 42 Am. Rep. 231; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702, and note; *Buck v. Wood*, 85 Me. 204, 27 Atl. 103.

²² *Cloud v. Whiting*, 38 Ala. 57; *Preston v. Mann*, 25 Conn. 118; *Vanderpool v. Brake*, 28 Ind. 130; *Smith v. Stone*, 17 B. Mon. (Ky.) 168; *Hamer v. Johnston*, 6 Miss. (5 How.) 698; *Libbey v. Pierce*, 47 N. H. 309; *Petrie v. Feeter*, 21 Wend. (N. Y.) 172; *Lesley v. Johnson*, 41 Barb. (N. Y.) 359; *Weyh v. Boylan*, 85 N. Y. 394, 39 Am. Rep. 669; *Crout v. De Wolf*, 1 R. I. 393; *Cary v. Wheeler*, 14 Wis. 281; *Marr v. Howland*, 20 Wis. 282.

²³ *Watson's Exrs. v. McLaren*, 19 Wend. (N. Y.) 557.

knowing that the mortgagor is endeavoring to obtain a loan, conceals the existence of his mortgage to aid him in such purpose;²⁴ where the holder of a lien against personalty, consisting of goods or chattels, consents to their sale,²⁵ or stands by without disclosing his lien;²⁶ where the owner of land, by his words or acts, leads the public to suppose and to act on the belief that he has *dedicated land* for a street or other public use;²⁷ and where one person owning an estate stands by and sees another erect *improvements* on it in the belief that he has title thereto, and does not inform the party of his own title.²⁸ But there is no estoppel where the statement is made after the purchaser has become the owner, although the purchaser repeats the statement to one who buys of him.²⁹ It is an established rule in California that when one lays out a tract of land into lots and streets, and sells the lots by reference to a map which exhibits them as they lie with relation to each other, the purchasers have a private easement, not only in the streets and ways abutting on their lots and leading therefrom to some public place or highway, but also in the streets and ways leading therefrom to other lots, and this private easement in such streets or ways is entirely independent of any dedication thereof to public use, but constitutes a private appurtenance to the lots so sold, of which the owner cannot be deprived except by due process of law. If streets are marked on the ground in the absence of a map, and lots are

²⁴ McLean v. Dow, 42 Wis. 610; Chapman v. Hamilton, 19 Ala. 121.

²⁵ Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695.

²⁶ Miller v. Ross, 107 Mich. 538, 65 N. W. 562.

²⁷ Holdane v. Trustees of Village of Cold Spring, 21 N. Y. 474; Wilder v. City of St. Paul, 12 Minn. 192; Kyle v. Town of Logan, 87 Ill. 64; Kelly v. City of Chicago, 48 Ill. 388; Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Morgan v. Chicago & A. Ry. Co., 96 U. S. 716, 24 L. Ed. 743,

²⁸ McCormick v. McMurtrie, 4 Watts (Pa.), 192; McKelvey v. Truby, 4 Watts & S. (Pa.) 323; Beaupland v. McKeen, 28 Pa. 124, 70 Am. Dec. 115; Forbes v. McCoy, 24 Neb. 702, 40 N. W. 132; Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Steel v. St. Louis Smelting etc. Co., 106 U. S. 456, 1 Sup. Ct. Rep. 389, 27 L. Ed. 226. See note to Cook v. Walling, 10 Am. St. Rep. 22.

²⁹ Windle v. Canaday, 21 Ind. 248, 83 Am. Dec. 348, and note.

sold on the representation that such streets exist, the appurtenant right to use the streets, not expressed in the deed, rests upon an equitable estoppel.³⁰

§ 276 (278). **Same—Corporations—Illustrations.**—The principle under discussion is often illustrated in the law of corporations, against whom estoppels *in pais* have the same effect as against private individuals. Thus, where a person has treated an association as a corporation by making contracts with it in its assumed corporate capacity, he cannot, when sued on the contract after enjoying the benefit of the contract, give evidence to show that the plaintiff has no corporate existence;³¹ nor can a company which has executed notes or mortgages or other contracts, while assuming to act in a corporate capacity, be allowed to prove in an action against it on such contracts that there has been no legal incorporation.³² In *actions on subscriptions*

³⁰ *Danielson v. Sykes*, 157 Cal. 686, 109 Pac. 87. Among the most important recent cases on estoppel by conduct are *Smyth v. Nelson*, 135 Ga. 96, 68 S. E. 1032; *Mayer v. McCracken*, 245 Ill. 551, 92 N. E. 355; *Ward v. Yarnelle*, 173 Ind. 535, 91 N. E. 7; *Wright v. Lieth*, 146 Iowa, 290, 125 N. W. 220; *Hunter v. Wabasha R. Co.*, 149 Mo. App. 243, 130 S. W. 103; *Sheldon v. Michigan Cent. R. Co.*, 161 Mich. 503, 126 N. W. 1056, 17 Det. Leg. N. 450; *Mudgett v. Grand Trunk R. Co.*, 65 Misc. Rep. 304, 119 N. Y. Supp. 843; *Smith v. Cleaver*, 25 S. D. 351, 126 N. W. 589; *Texarkana & Ft. S. R. Co. v. Sabine Tram Co.* (Tex. Civ. App.), 129 S. W. 198; *El Paso & S. W. R. Co. v. Eichel* (Tex. Civ. App.), 120 S. W. 922; *Hilton v. Sloan*, 37 Utah, 359, 108 Pac. 689; *Zierner v. C. G. Bretting Mfg. Co.*, 142 Wis. 224, 125 N. W. 318; *Kamni v. Rees*, 177 Fed. 14, 100 C. C. A. 432.

³¹ *West Winsted Sav. Bank & Bldg. Assn. v. Ford*, 27 Conn. 282, 71 Am. Dec. 66; *Alexander v. Tolleston Club*, 110 Ill. 65; *Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340; *Franklin v. Twogood*, 18 Iowa, 515; *Butchers' etc. Bank v. McDonald*, 130 Mass. 264; *Worcester Medical Inst. v. Harding*, 11 Cush. (Mass.) 285; *St. Louis v. Shields*, 62 Mo. 247; *Palmer v. Lawrence*, 3 Sand. (N. Y.) 161; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Grant v. Henry Clay Coal Co.*, 80 Pa. 208; *Commissioners of Douglas v. Bolles*, 94 U. S. 104, 24 L. Ed. 46.

³² *West Winsted Sav. Bank etc. Assn. v. Ford*, 27 Conn. 282, 71 Am. Dec. 66; *Eggert v. Cleveland*, 138 Ill. App. 434; *Racine etc. Ry. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Clinton Novelty Iron Wks. v. Neiting*, 133 Iowa, 311, 111 N. W. 974; *Farmers'*

to stock, where the rights of creditors of the corporation are involved, the shareholder is estopped from proving that the corporation has no legal existence;^{32a} and where a *stockholder has attended meetings* of an association, claiming to act in a corporate capacity, or where he has in other ways held himself out as a member, he is estopped to deny such membership or his liability as a member as against those who have relied on such acts.^{32b} And gen-

Mutual v. Reser, 43 Ind. App. 634, 88 N. E. 349; Licking Valley Bldg. Assn. v. Commonwealth, 28 Ky. Law Rep. 543, 89 S. W. 682; Howard Mut. Loan etc. Assn. v. McIntyre, 3 Allen (Mass.), 571; Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 South. 224; Dooley v. Cheshire Glass Co., 15 Gray (Mass.), 494; Niles v. Benton etc. Ry. & Light Co., 154 Mich. 378, 117 N. W. 937; Empire Mfg. Co. v. Stuart, 46 Mich. 482, 9 N. W. 527; Hasbrouck v. Rich, 113 Mo. App. 389, 88 S. W. 131; New York Cement Co. v. Consolidated Rosendale Cement Co., 178 N. Y. 167, 70 N. E. 451; Rush v. Haley Steamboat Co., 84 N. C. 702; Callendar v. Painesville etc. R. Co., 11 Ohio St. 516; Reynolds v. Myers, 51 Vt. 444; Stone v. Congregational Soc. of East Berkshire, 14 Vt. 86; Snyder v. Charleston etc. Bridge Co., 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616; Aller v. Cameron, Fed. Cas. No. 243, 3 Dill. 198. In Maryland, however, it has been held, in a case of a religious corporation, that "to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administra-

tion of justice": Boyce v. Trustees of M. E. Church, 46 Md. 359. For an interesting case where the parties set out deliberately to stop short of incorporation, see Card v. Moore, 68 App. Div. 327, 74 N. Y. Supp. 18.

^{32a} Eaton v. Aspinwall, 19 N. Y. 119; Frost v. Walker, 60 Me. 468; Wheelock v. Kost, 77 Ill. 296; Hager v. Cleveland, 36 Md. 476; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. (Mass.) 576; Walworth v. Brackett, 98 Mass. 98. See, also, Utley v. Union Tool Co., 11 Gray (Mass.), 139; Gaff v. Flesher, 33 Ohio St. 107; Central Agricultural etc. Assn. v. Alabama Life Ins. Co., 70 Ala. 120; Keyser v. Hitz, 2 Mackey (D. C.), 473.

^{32b} Erie etc. Plank-Road Co. v. Brown, 25 Pa. 156; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Wheeler v. Millar, 90 N. Y. 353; Boston etc. Ry. Co. v. Wellington, 113 Mass. 79; Clark v. Farrington, 11 Wis. 306; Jewell v. Rock River Co., 101 Ill. 57; Haynes v. Brown, 36 N. H. 545; Chaffin v. Cummings, 37 Me. 76; Griswold v. Seligman, 72 Mo. 110; Musgrave v. Morrison, 54 Md. 161; Cheltenham Ry. Co. v. Daniel, 2 Q. B. 281, 114 Eng. Reprint, 110; West Cornwall etc. Co. v. Mowatt, 15 Q. B. 521, 117 Eng. Reprint, 556.

erally it may be taken that admissions by conduct, in regard to private corporations, operate as with individuals. Corporations, quite as much as individuals, are held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.³³ The holding themselves out as a corporation enables creditors to follow them through the ramifications of reorganization and prevents them taking advantage of contracts *ultra vires* when they have been offered an opportunity to retire and have declined it, and shareholders are presumed to have adopted voidable acts of the governing body after a reasonable time for repudiation has elapsed.³⁴ So corporations which have made contracts through their officers are not allowed to repudiate their ostensibly official acts in exercise of powers apparently within the scope of their duties.³⁵ In like manner the various records of a cor-

³³ *Zabriskie v. Cleveland etc. R. Co.*, 23 How (U. S.) 381, 16 L. Ed. 488. Where corporations have not caused themselves to be completely registered, their conduct as corporations prevents them taking advantage of their own wrong. In *Bargate v. Shortridge*, 5 H. L. Cas. 297, 10 Eng. Reprint, 914, Lord St. Leonards said: "It does appear to me that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. The way, therefore, in which I propose

to put it to your lordships, in point of law, is this: the question is not whether that irregularity can be considered unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

³⁴ *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 527; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69; *Zabriskie v. Cleveland etc. R. Co.*, 23 How. (U. S.) 381, 16 L. ed. 488.

³⁵ *Seelcy v. San Jose Ind. Mill etc. Co.*, 59 Cal. 22; *West v. Prather*, 7 Cal. App. 81, 93 Pac. 892; *Mulford*

poration operate as an estoppel against the denial of their contents, and if *bona fide* dealers with them are misled by records altered by their officers, the damage must be borne by them.³⁶ A corporation can neither deny its charter

v. Torrey Exploration Co., 45 Colo. 81, 100 Pac. 596; Constantine v. Kalamazoo Sugar Co., 132 Mich. 480, 93 N. W. 1088; Second Nat. Bank of Allentown v. Pottier etc. Mfg. Co., 2 N. Y. Supp. 644, 56 N. Y. Sup. Ct. (24 Jones & S.) 216; Empire Implement Mfg. Co. v. Hench, 219 Pa. 135, 67 Atl. 995; West Seattle Land etc. Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69. An interesting case comes from New Jersey in Parsons Mfg. Co. v. Hamilton Ice Mfg. Co., 78 N. J. L. 309, 73 Atl. 254. The defendant corporation took over the assets and business of an incorporated company of the same name, with the prefix "The" added. Among the obligations of the old company was an unpaid promissory note, given to plaintiff in final payment of the consideration for the sale of an automatic blower, which defendant had taken upon the sale or transfer of assets, and subsequently sold. The officers and managers of the defendant company were the same men who managed and directed the business of the old concern, and caused the name of defendant corporation to be signed to the note in controversy, before the defendant company was organized, and upon occasions arranged with plaintiff for an extension of time to pay the note in suit. *Held*, (1) it was for the jury, under the circumstances, to conclude whether the note in question was taken over by the defendant as an obligation with the old company's assets; (2) either by novation or by ratification

of its managers' acts as well as by estoppel resulting from the taking over of the entire assets and business, and the promises of its managers, based thereon, to pay, the liability of the defendant could be predicated.

³⁶ Holden v. Whitney, 29 Fed. 881. In this case it appeared that the receivers of the Reading Savings Bank brought suit against the defendant, to obtain the reconveyance of a number of mortgages claimed to belong to them as receivers of the bank. On March 22, 1879, the bank failed. It was discovered about this time that N. P. Pratt, the secretary and treasurer of the bank, had fraudulently disposed of a large part of the assets. By a vote of the trustees, passed in 1876, the treasurer was authorized to discharge and release all mortgages belonging to the bank. This record was altered by Pratt so as to read "discharge, assign, and release." By means of this fraudulent interpolation Pratt succeeded in disposing of a large number of mortgages. The rights of purchasers of these securities have several times been before the courts for adjudication. In Whiting v. Wellington, 10 Fed. 810, Judge Lowell held that a purchaser in good faith without notice obtained a title by estoppel against the savings bank by virtue of the certificate of its recording officer that a certain vote was found upon its record. This decision was followed in Commonwealth v. Reading Sav. Bank, 137 Mass. 431, and in Holden v. Phelps, 141 Mass. 456, 5 N. E. 815. In Wyss-Thalman v. Beaver Valley

nor raise any question of the constitutionality of a proceeding which is in accordance with the charter it was content to accept. Having come into being, consenting to come into being subject to the provisions of the instrument of its creation, it cannot be heard to complain of them.³⁷ While, as a general rule, the officers, and particularly the directors, of a corporation are chargeable with knowledge of the facts which its books of account and records disclose, it is never applicable where the matter complained of is one between the corporation itself and any of its officers or agents.³⁸

§ 276a (278). Same—Copartners—Husband and wife. In a well-known English case,³⁹ Lord Esher epitomized the law of estoppel by conduct, and his digest is a universal guide. (1) If a man by his words or conduct willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon the belief, he who knowingly made the false statement is estopped from averring afterward that such a state of things did not in fact exist. (2) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon

Brewing Co., 219 Pa. 189, 68 Atl. 187, the minute-book of the corporation was evidence against them although it was not produced from their custody.

³⁷ *Murphy v. Worcester etc. Ry. Co.*, 199 Mass. 279, 85 N. E. 507; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *People v. Murray*, 5 Hill (N. Y.), 468; *Interstate Consol. Ry. v. Massachusetts*, 207 U. S. 79, 12 Ann. Cas. 555, 52 L. Ed. 111, 28 Sup. Ct. Rep. 26.

³⁸ *Pacific Vinegar etc. Works v. Smith*, 152 Cal. 507, 93 Pac. 85. The rule is not only never recognized, but is distinctly disaffirmed. To apply it, would be to put a premium on dishonest bookkeeping, and, as pointed

out by Mr. Justice Brewer, in the case of a bank, to permit the bookkeeper and cashier to combine and plunder the bank of all its assets, unknown to anyone, though every transaction should be entered in the books, and, after doing this, to receive immunity because of the knowledge imputed to the other officers: See, also, *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Hallmark's Case*, 8 Ch. Div. 329, 47 L. J. Ch. 868, 38 L. T. 660.

³⁹ *Carr v. London etc. Ry. Co.*, L. R. 10 C. P. 307.

in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. (3) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented. (4) If, in the transaction which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterward, as against the first, to show that the state of facts referred to did not exist.⁴⁰ A familiar illustration of estoppel by conduct is that, where one holds himself out as a *partner* and thereby induces others to act on the faith of such act or representation, he cannot be heard to prove that no such partnership in fact existed;⁴¹ and the same

⁴⁰ Bigelow's classification, in his fifth edition, page 570, reads as follows, and he gives authority for each proposition. He says: "To constitute this particular estoppel by conduct, represented by *Pickard v. Sears*, 6 Ad. & E. 469, 112 Eng. Reprint, 179, all the following elements must be present: 1. There must have been a false representation or a concealment of material facts; 2. The representation must have been made with knowledge, actual or virtual, of the facts; 3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter; 4. It must have been made with the intention, actual or virtual, that

the other party should act upon it; 5. The other party must have been induced to act upon it."

⁴¹ *Letson v. Hall*, 1 Ala. App. 619, 55 South. 944; *Bluff City Lumber Co. v. Bank of Clarksville*, 95 Ark. 1, 128 S. W. 58; *Pike v. Douglass*, 28 Ark. 59; *Deputy v. Harris*, 1 Marv. (Del.) 100, 40 Atl. 714; *Dubos v. Jones*, 34 Fla. 539, 16 South. 392; *Virginia-Carolina Chemical Co. v. Fisher*, 58 Fla. 377, 50 South. 504; *Meinhard v. Bedingfield Mercantile Co.*, 4 Ga. App. 176, 61 S. E. 34; *Barnett Line of Steamers v. Blackmar*, 53 Ga. 98; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Stephenson v. Cornell*, 10 Ind. 475; *Winter v.*

rule applies if he permits himself so to be held out. The doctrine of estoppel furnishes the basis upon which one person, not in fact a partner of another, may by his own acts or conduct, or by acquiescence in such other person's acts and conduct, bind himself as such partner, or, in other words, the liability of a person not in fact a partner, but who has held himself out as such, or has permitted himself to be so held out as such, rests on the doctrine of estoppel.⁴²

Pipher, 96 Iowa, 17, 64 N. W. 663; Lee v. Bullard, 3 La. Ann. 462; Getchell v. Foster, 106 Mass. 42; Van Kleeck v. McCabe, 87 Mich. 599, 24 Am. St. Rep. 182, 49 N. W. 872; Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; Jansen v. Jacobson, 112 Minn. 520, 128 N. W. 824; McCarthy v. Nash, 14 Minn. 127; Boisgerard v. Wall, Smedes & M. Ch. 404; Young v. Smith, 25 Mo. 341; Parchen v. Anderson, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588; Sargent v. Collins, 3 Nev. 260; Johanning v. Wilson, 86 N. Y. Supp. 7; Rheinstein Dry Goods Co. v. McDougall, 149 N. C. 252, 62 S. E. 1085; Johnson v. Morrison, 8 Ohio Dec. 597, 9 Cine. L. Bul. 51; Johnson v. J. J. Douglass Co., 8 Okl. 594, 58 Pac. 743; North Pac. Lumber Co. v. Spore, 44 Or. 462, 75 Pac. 890; Bing v. Schmitt, 226 Pa. 622, 75 Atl. 854; Shafer v. Randolph, 99 Pa. 250; Ex parte Wilson, 84 S. C. 444, 66 S. E. 675; Beall v. Lowndes, 4 S. C. 258; Turner v. Douglass, 77 Tex. 619, 14 S. W. 221; Walker v. Skliris, 84 Utah, 353, 98 Pac. 114; Smith v. Burton, 59 Vt. 408, 10 Atl. 536; Johnson v. Williams, 111 Va. 95, 68 S. E. 410; National Grocery Co. v. Simmons, 63 Wash. 264, 115 Pac. 306; Townley Bros. v. Crickenberger, 64 W. Va. 379, 63 S. E. 320; Rainsford v. Massengale, 5 Wyo. 1, 35 Pac. 774; Sun Mut. Ins. Co. v. Kountz Line, 122 U. S. 583, 30 L.

Ed. 1137, 7 Sup. Ct. Rep. 1278; Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507, 4 Sup. Ct. Rep. 689; Carr v. London & N. W. Ry. Co., L. R. 10 C. P. 316; Pickard v. Sears, 6 Ad. & E. 469, 112 Eng. Rep. 179; Freeman v. Cooks, 2 Ex. 654; Exp. Co. v. Maughan, 20 Ont. L. R. 310, 15 Ont. W. R. 237.

⁴² Bank of Waynesboro v. Healing Springs etc. Co., 163 Ala. 495, 50 South. 882; Stevens v. Walton, 17 Colo. App. 440, 68 Pac. 834; Meinhard v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; Askew v. Silman, 95 Ga. 678, 22 S. E. 573; Steele v. Michigan Buggy Co. (Ind. App.), 95 N. E. 435; Strecker v. Conn, 90 Ind. 469; Maxwell v. Gibbs, 32 Iowa, 32; Rider v. Hammell, 63 Kan. 733, 66 Pac. 1026; Grief v. Boudousquie, 18 La. Ann. 631, 89 Am. Dec. 698; Gumbel v. Abrams, 20 La. Ann. 568, 96 Am. Dec. 426; Plumer v. Lord, 9 Allen (Mass.), 455, 85 Am. Dec. 773; Brown v. Grant, 39 Minn. 404, 40 N. W. 263; Huyssen v. Lawson, 90 Mo. App. 82; Kelm v. Rathbun, 36 Mo. App. 199; Sargent v. Collins, 3 Nev. 260; Marks v. Samuels, 54 App. Div. 249, 66 N. Y. Supp. 552; Paine v. Roman, 6 N. Y. St. 420, 44 Hun, 622; Daniel v. Lancee, 21 Pa. Super. Ct. 474; Parker v. Oakley (Tenn. Ch. App.), 57 S. W. 426; Carlton v. Coffin, 28 Vt. 504; Johnson v. Williams, 111 Va. 95, 68 S. E. 410.

And where a retiring partner gives no notice to persons who continue to give credit supposing him to be a member of the firm, he cannot deny that he is a partner as far as their interests are thereby affected.⁴³ As it is well put in a New York opinion, the theory upon which such a liability arises is that persons who hold themselves out to the world as partners, by dealing in such a manner as to create the appearance of partnership, to the injury of innocent third parties, are estopped from denying that their actual relation is not what their acts would seem to indicate it to be.⁴⁴ As between him and the creditors of the ostensible firm, a partner is estopped from denying his liability; but this equity is between him and the creditors. Neither he nor the other members of the ostensible firm are estopped from denying the partnership as between themselves. Neither was misled by the other's conduct, for they knew from the beginning that there was no partnership. There can be no equitable estoppel between the parties where neither has been misled by the conduct of the other.⁴⁵ And the estoppel by conduct is equally operative upon those recognizing and dealing with a partnership as such. Thus in an action to enforce a promissory note executed to the plaintiffs as a copartnership, neither the makers of the note nor their personal representatives can dispute the firm relationship. The owner of a building is estopped from setting up the illegality of the formation of a partnership by two corporations which furnish materials for the building, in an action to foreclose a lien therefor, by an assignee of the partnership.⁴⁶ Another familiar example is

⁴³ *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851; *Freeman v. Cooke*, 2 Ex. 661; *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246.

⁴⁴ *Clark v. Rumsey*, 59 App. Div. 435, 69 N. Y. Supp. 102.

⁴⁵ *Johnson v. Williams*, *supra*.

⁴⁶ *Tutt v. Davis*, 13 Cal. App. 715, 110 Pac. 690; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Wise v. Will-*

iams, 72 Cal. 544, 14 Pac. 204; *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *De Floor v. Stephens*, 133 Ga. 617, 66 S. E. 786; *Gordon v. Janney*, *Morris* (Iowa), 182; *Pharr v. McHugh*, 32 La. Ann. 1280; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562.

that arising out of the relation of *husband and wife*. Where a man cohabits with a woman, or by other conduct leads the public to suppose that they are married, he will not be heard to prove against those who have given credit on the faith of such representations or acts, that they are not in fact married.⁴⁷ Under similar circumstances a woman may be estopped to deny that she is married, when third persons have been led to rely on her representations to their injury.⁴⁸ But in a controversy between a man and a woman in respect to property, there is no such estoppel, if neither believed a valid marriage to exist nor if the alleged marriage was void *ab initio*.⁴⁹ It is still question-

⁴⁷ *Ponder v. Graham*, 4 Fla. 23; *Young v. Foster*, 14 N. H. 114; *Gathings v. Williams*, 5 Ired. (27 N. C.) 487, 44 Am. Dec. 49; *Johnston v. Allen*, 39 How. Pr. (N. Y.) 506; *Watson v. Threlkeld*, 2 Esp. 637, 5 R. R. 760; *Munro v. De Chemant*, 4 Camp. 216; *Ryan v. Sams*, 12 Q. B. 460, 12 Jur. 745, 116 Eng. Reprint, 940; *Blades v. Free*, 9 Barn. & C. 167, 4 M. & Ry. 282, 109 Eng. Reprint, 63; *Edwards v. Fairbrother*, 2 Moore & P. 293, 3 Car. & P. 421. See note to *Strode v. Strode*, 96 Am. Dec. 214.

⁴⁸ *Temples v. Equitable Mortgage Co.*, 100 Ga. 503, 62 Am. St. Rep. 326, 28 S. E. 232; *Applegate v. Applegate*, 45 N. J. Eq. 116, 17 Atl. 293; *Carpenter v. Smith*, 24 Iowa, 200; *Brown v. Beckett*, 6 D. C. 253; *Alabama etc. R. Co. v. Beardsley*, 79 Miss. 417, 89 Am. St. Rep. 660, 30 South. 660; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660; *Mace v. Codell*, 1 Cowp. 232. See note to *Strode v. Strode*, 96 Am. Dec. 214.

⁴⁹ *Ponder v. Graham*, *supra*; *Robbins v. Potter*, 98 Mass. 532; *Gathings v. Williams*, 5 Ired. (27 N. C.) 487, 44 Am. Dec. 49; *Allen v. Wood*, 1 Bing. (N. C.) 8; *In re Sloan's Es-*

tate, 50 Wash. 86, 17 L. R. A., N. S., 960, 96 Pac. 684; *In re Newlin's Estate*, 231 Pa. 312, 80 Atl. 255. In *Johnson v. Johnson*, 1 Cold. (Tenn.) 626, it was held that as between themselves, the parties were after the lapse of many years estopped to dispute the marriage. After discussing the estoppel as to third persons the court says: "And if they are estopped as to third persons, why shall they not, as against each other in all civil cases, be also precluded from gainsaying the marriage? Do not the same reasons of morality and policy apply in the one case as in the other? And more especially should they be held to be estopped, as between themselves, when either is seeking to disturb or defeat rights which may have been acquired by the other, either directly or indirectly, on the faith of the marriage." To the same effect are *Chamberlain v. Chamberlain*, 68 N. J. Eq. 414, 59 Atl. 813; *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45; and in *Coad v. Coad*, 87 Neb. 290, 127 N. W. 455, it was held that if one party to such relation induces the other to believe, in good faith, that the contract is made and is binding, the law will hold the party taking

able whether, as a corollary to the estoppel of the husband and wife, a third person may also be estopped from denying their marriage, especially if in the course of dealing he has recognized it. In the nearest decision on the point⁵⁰ the opinion does not carry further than to say that where the defendant agreed in consideration of a conveyance made by his brother, he would, on the death of that brother, pay to the woman then living with the grantor as his wife an amount equal to her dower, the defendant was liable. We think that in such case the defendant should have been estopped from denying the marriage, but the decision just avoids the point.⁵¹

§ 277 (279). Same—When admissions are in good faith and by mistake—Knowledge of facts.—The doctrine of *estoppel in pais*, notwithstanding the great number of cases which have turned upon it, and are reported in the books, cannot be said even yet to rest upon any determinate legal test, which will reconcile the decisions, or will embrace all

such advantage to the full terms of the agreement as in other cases. So, if one party to the agreement is known by the other to rely upon the contract in good faith and that it is binding, the other party will be bound by it. As to estoppel in action to annul marriage, see note to *Strode v. Strode*, 96 Am. Dec. 215.

⁵⁰ *Spicer v. Spicer*, 16 Abb. Pr., N. S. (N. Y.), 112.

⁵¹ The court said: "According to the plaintiff's statement, John Spicer was about to make a testamentary disposition of this very property in her favor. She was capable of taking it as his devisee. At this time the defendant interfered and procured the conveyance of the premises to himself upon the promise that he would pay her an amount equal to her dower upon the death of John. This, perhaps, might fairly be said to mean that he would pay her such

amount as she, if entitled to dower in the lands, might claim, but I prefer to rest my conclusions on the ground, that having diverted the property from its course to her by will, by force of his promise, he is estopped from denying the validity of that promise while continuing to hold and enjoy its fruits. I think, therefore, she may maintain this action upon a promise given, and accepted, and acted upon, as she swears this 'was, though she would not,' as the widow of John Spicer, have been entitled to admeasurement of dower": *Cram v. Burnham*, 5 Greenl. (5 Me.) 213, 17 Am. Dec. 218, an action by the alleged husband and the payee of a note must be read with this qualification, that the plaintiff sued on the note made to his supposed wife and it lay on him to prove his case. He was not defending on a liability, but was usurping a privilege.

transactions, to which the great principles of equitable necessity, wherein it originated, demand that it should be applied. In fact, it is because it is so purely a doctrine of practical equity that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished. An able judge (Baron Parke) has suggested that only such acts and conduct should be treated as an *estoppel in pais* as would sustain an averment of false representation in an action on the case. This test, however, does not seem to have been adopted by leading jurists. Referring again to Lord Denman's synopsis we find that "Where one by his words or conduct willfully causes another to believe in the existence of a state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time."⁵² It may be inferred from the illustrations already given that before an estoppel can arise from the conduct of an individual there must be some fault on his part. The real inquiry should be how far his ignorance of the facts, to which his representations had reference, will qualify and excuse his conduct, and relieve him of the responsibility which would ordinarily attach to it. For it is undeniably true, inasmuch as the doctrine of estoppel especially concerns conscience and equity, that ignorance, unaccompanied with culpability of any kind, ought to excuse conduct and language which would otherwise render the author justly responsible for the injury resulting to another who had placed confidence in them.⁵³ Said Mr. Justice Field: "There must be some intended de-

⁵² Preston v. Mann, 25 Conn. 118. The word "willfully," as used in this connection, is not to be taken in the limited sense of the term "*maliciously*" or of the term "*fraudulently*"; nor does it of necessity imply an active desire to produce a particular impression, or to induce a particular line of conduct. Whatever the motive may be, if one so acts or speaks that

the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a willful design, to induce the other to believe him, and to act upon that belief, if such proves to be the actual result.

⁵³ Preston v. Mann, *supra*.

ception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud."⁵⁴ While it is not in all cases necessary to show actual knowledge of the facts on the part of the one against whom the estoppel is claimed, it should at least be shown that the declarations were made under such circumstances that he ought to have had such knowledge or that they were made negligently and recklessly.⁵⁵ He cannot urge, as an excuse, that he had forgotten them.⁵⁶ When a person, through misapprehension, ignorance or inadvertence, does acts or makes declarations which mislead another to his injury, but when at the same time there is *no willful deception or culpable negligence* and no intention that the representation should be acted upon as true by the other party, and when nothing accompanies it that is equivalent to a promise that the representation is true, the person making the declarations or doing the acts is not estopped from proving the truth against the party thus misled.⁵⁷ It follows that there is no estoppel when the dec-

⁵⁴ Henshaw v. Bissell, 18 Wall. (U. S.) 255, 21 L. Ed. 835.

⁵⁵ Preston v. Mann, 25 Conn. 118; McIntire v. Yates, 104 Ill. 491; Davenport Cent. Ry. Co. v. Davenport Gas Light Co., 43 Iowa, 301; Ligon v. Minton (Ky.), 125 S. W. 304; Stubbs v. Franklin etc. R. Co., 101 Me. 355, 64 Atl. 625; Martin v. Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740; Swett v. Boyce, 134 Mass. 381; Morse v. Dearborn, 109 Mass. 593; Harlow v. Marquette etc. R. Co., 41 Mich. 336, 2 N. W. 48; Stone v. Covell, 29 Mich. 359; Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Madison County v. Paxton, 57 Miss. 701; Longworth v. Aslin, 106 Mo. 155, 17 S. W. 294; Midland R. Co. of New Jersey v. Hitchcock, 37 N. J. Eq. 549; Mutual Life Ins. Co. of New York v. Norris, 31 N. J. Eq. 583;

Trenton Banking Co. v. Duncan, 86 N. Y. 221; Conable v. Smith, 61 Hun, 185, 15 N. Y. Supp. 924; Chapman v. Chapman, 59 Pa. 214; Simpson v. Moore, 5 Lea (Tenn.), 372; Bender v. Brooks (Tex. Civ. App.), 130 S. W. 653; Weinstein v. Nat. Bank of Jefferson, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; Greene v. Smith, 57 Vt. 268; Twitchell v. Bridge, 42 Vt. 68; Leather Manufacturers' Nat. Bank v. Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 Sup. Ct. Rep. 657; Evans v. Edmonds, 13 Com. B. 777, 1 C. L. R. 653, 17 Jur. 883, 22 L. J. C. P. 211, 1 W. R. 412; Jarrett v. Kennedy, 6 Com. B. 319, 60 Eng. Com. L. 319.

⁵⁶ Bullis v. Noble, 36 Iowa, 618; Raley v. Williams, 73 Mo. 310.

⁵⁷ Hasty v. Stave Co., 80 Ark. 405, 97 S. W. 675; Griffith v. Wright, 6 Colo. 248; Preston v. Mann, 25 Conn. 118; Danforth v. Adams, 29 Conn. 107;

larations are made in good faith and in ignorance of the real facts—in other words, when made innocently and by mistake.⁵⁸

§ 278 (280). Same—Erection of improvements—Boundary lines.—This particular branch of the law of estoppel is covered by and dealt with in the principle which prevents one who is cognizant of the act of another interfering with his rights and yet takes no step to prevent it, and who does not raise his voice in protest, to be thereby foredoomed to suffer the consequence of his inaction or silence.⁵⁹ But

Wright v. Stice, 173 Ill. 571, 51 N. E. 71; Swezey v. Collins, 40 Iowa, 540; Smith v. Sprague, 119 Mich. 148, 75 Am. St. Rep. 384, 77 N. W. 689; Conable v. Smith, 61 Hun, 185, 15 N. Y. Supp. 924; Ward v. Cameron (Tex. Civ. App.), 76 S. W. 240; Bender v. Brooks (Tex. Civ. App.), 130 S. W. 653; Hilton v. Sloan, 37 Utah, 359, 108 Pac. 689; Globe Nav. Co. v. Maryland Casualty Co., 39 Wash. 299, 81 Pac. 826; Sullivan v. Colby, 71 Fed. 460, 18 C. C. A. 193.

⁵⁸ Moore v. C. F. Luehrmann etc. Lumber Co., 82 Ark. 485, 102 S. W. 385; Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261; Breeze v. Brooks, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885; Clinton v. Town of Haddam, 50 Conn. 84; Boone v. Graham, 215 Ill. 511, 74 N. E. 559; Tillotson v. Mitchell, 111 Ill. 518; Pitcher v. Dove, 99 Ind. 175; Biglow v. Ritter, 131 Iowa, 213, 108 N. W. 218; Van Horn v. Overman, 75 Iowa, 421, 39 N. W. 679; Ford Lumber etc. Co. v. Cress, 132 Ky. 317, 116 S. W. 710; Lively v. Ball, 8 Dana (Ky.), 312; Tongue's Lessee v. Nutwell, 17 Md. 212, 79 Am. Dec. 649; Wright v. Newton, 130 Mass. 552; Brewer v. Boston etc. Ry. Corp., 5 Met. (Mass.) 478, 39 Am. Dec. 694; Beecher v. Ferris, 112 Mich. 584, 70 N. W. 1106; Ward v. Dean,

69 Minn. 466, 72 N. W. 710; Illinois Cent. R. Co. v. La Blane, 74 Miss. 626, 21 South. 748; Huffman v. Nixon, 152 Mo. 303, 75 Am. St. Rep. 454, 53 S. W. 1078; Stanwood v. Beck (N. J.), 52 Atl. 353; Maloney v. Iroquois Brewing Co., 63 App. Div. 454, 71 N. Y. Supp. 1089; Rugg v. Ormrod, 198 N. Y. 119, 91 N. E. 366; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Estis v. Jackson, 111 N. C. 145, 32 Am. St. Rep. 784, 16 S. E. 7; McAfferty v. Conover, 7 Ohio St. 99, 70 Am. Dec. 57; McKittrick v. Greenville Traction Co., 84 S. C. 275, 66 S. E. 289; Lawrence v. Luhr, 65 Pa. 236; Kenny v. McKenzie, 23 S. D. 111, 120 N. W. 781; Maloney v. Moore (Tenn. Ch. App.), 42 S. W. 805; Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736; Henshaw v. Bissell, 18 Wall. (U. S.) 255, 21 L. Ed. 835; Miller v. Ahrens, 163 Fed. 870; Carr v. London etc. R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109, 31 L. T., N. S., 785, 23 Wkly. Rep. 747; Lacroix v. Longtin, 22 Ont. L. R. 506, 17 Ont. W. R. 877, 2 Ont. W. N. 416.

⁵⁹ Adams v. Birmingham Realty Co., 154 Ala. 457, 45 South. 891; Stephens v. Head, 119 Ala. 511, 24 South. 738; Bramble v. Kingsbury, 39

there are many qualifications. For example, if the trespasser is already aware of the rights of the one trespassed upon, then he cannot claim any benefit from the apparent acquiescence. A party is not estopped from claiming his property by reason of seeing improvements erected upon it⁶⁰ or by seeing it sold to others,⁶¹ if the purchaser knows that the property belongs to such first party. As was said by Chief Justice Dixon in a Wisconsin case: "One essential element of every equitable estoppel, by which a man is to be precluded from claiming what is his own, is that the purchaser and party claiming the benefit of such estoppel should have been ignorant of the true state of

Ark. 131; Arapahoe County v. Denver, 30 Colo. 13, 69 Pac. 586; Garbutt v. Mayo, 128 Ga. 269, 13 L. R. A., N. S., 58, 57 S. E. 495; Harris v. Amoskeag Lumber Co., 101 Ga. 641, 29 S. E. 302; Rice v. Gould, 73 Ill. App. 538; Frier v. Lowe, 232 Ill. 622, 83 N. E. 1083; De Pauw Plate Glass Co. v. Alexandria, 152 Ind. 443, 52 N. E. 608; McCormick Harvesting Mach. Co. v. Perkins, 135 Iowa, 64, 110 N. W. 15; French v. Laundry, 132 Iowa, 81, 107 N. W. 430; Blevins v. Blevins, 143 Ky. 220, 136 S. W. 195; Lawson v. Biller, 88 Ky. 599, 11 S. W. 602, 11 Ky. Law Rep. 115, 318; Ledoux's Heirs v. Lavdan, 52 La. Ann. 311, 27 South. 196; Detroit United Ry. Co. v. Lau, 157 Mich. 357, 122 N. W. 130; Lucas v. Parks, 84 Mich. 202, 47 N. W. 550; Tousley v. Board of Education, 39 Minn. 419, 40 N. W. 509; Thompson v. County, 227 Mo. 220, 126 S. W. 1044; Price v. Hallett, 138 Mo. 561, 38 S. W. 451; Johnson County v. Taylor, 87 Neb. 487, 127 N. W. 862; Cogan v. Conover Mfg. Co., 69 N. J. Eq. 358, 60 Atl. 408; Ruckelhaus v. Borchering, 54 N. J. Eq. 344, 34 Atl. 977; Jones v. Duerk, 25 N. Y.

App. Div. 551, 49 N. Y. Supp. 987; Burns v. Womble, 131 N. C. 173, 42 S. E. 573; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Gaddes v. Pawtucket Sav. Inst., 33 R. I. 177, Ann. Cas. 1913B, 407, 80 Atl. 415, 421; Randall v. Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763; Farr v. Semmler, 24 S. D. 290, 123 N. W. 835; Dewey v. Goodman, 107 Tenn. 244, 64 S. W. 45; Pierce v. Texas Rice Dev. Co., 52 Tex. Civ. App. 205, 114 S. W. 857; Murphy v. Ganey, 23 Utah, 633, 66 Pac. 190; Montpelier etc. R. R. Co. v. Coffrin, 52 Vt. 17; Boyes v. Turk Min. Co., 56 Wash. 515, 106 Pac. 475; In re Alfstad, 27 Wash. 175, 67 Pac. 593; Wisconsin Oak Lumber Co. v. Laursen, 126 Wis. 484, 105 N. W. 906; Wehrman v. Conklin, 155 U. S. 314, 39 L. Ed. 167, 15 S. Ct. Rep. 129; De Bussche v. Alt, 8 Ch. D. 286, 47 L. J. Ch. 381, 38 L. T., N. S., 370; Malcolmson v. Provident etc. Soc., 10 Ont. App. 610.

⁶⁰ Brewer v. Boston etc. Ry. Corp., 5 Met. (Mass.) 478, 39 Am. Dec. 694.

⁶¹ Brown v. Tucker, 47 Ga. 485; Hale v. Skinner, 117 Mass. 474; Greene v. Smith, 57 Vt. 268.

title."⁶² But if he permits an encroachment on or improvement to his property and thus misleads the active party, he will be precluded from afterward asserting the claim he had masked in silence.⁶³ This applies to those

⁶² *Hass v. Plantz*, 56 Wis. 105, 43 Am. Rep. 699, 14 N. W. 65; *Gove v. White*, 20 Wis. 425.

⁶³ *Hendrix v. Southern R. Co.*, 130 Ala. 205, 89 Am. St. Rep. 27, 30 South. 596; *Biggs v. Utah Irr. Ditch Co.*, 7 Ariz. 331, 64 Pac. 494; *Morris v. Fletcher*, 67 Ark. 105, 77 Am. St. Rep. 87, 56 S. W. 1072; *Miller v. Canal etc. Co.*, 155 Cal. 59, 22 L. R. A., N. S., 391, 99 Pac. 502; *Beardsley v. Clem*, 137 Cal. 328, 70 Pac. 175; *Broadmoor Dairy etc. Co. v. Brookside Water etc. Co.*, 24 Colo. 541, 52 Pac. 792; *Mitchell v. Leavitt*, 30 Conn. 587; *Burton v. Duffield*, 2 Del. Ch. 130; *Price v. Stratton*, 45 Fla. 535, 33 South. 644; *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282, 6 S. E. 27; *Peabody v. Damon*, 16 Haw. 447; *Chicago v. Illinois Steel Co.*, 229 Ill. 303, 120 Am. St. Rep. 258, 82 N. E. 286; *Rodemeier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176, 48 N. E. 468; *Ross v. Thompson*, 78 Ind. 90; *Wood v. Hall*, 138 Iowa, 308, 110 N. W. 270; *Iowa etc. Land Co. v. Fehring*, 126 Iowa, 1, 101 N. W. 120; *Schafer v. Wilson*, 113 Iowa, 475, 85 N. W. 789; *Parker v. Atchison*, 58 Kan. 29, 48 Pac. 631; *Trimble v. King*, 131 Ky. 1, 22 L. R. A., N. S., 880, 114 S. W. 317; *Welford v. Gerard*, 108 Ky. 322, 56 S. W. 416, 22 Ky. Law Rep. 203; *Rogers v. Portland etc. R. Co.*, 100 Me. 86, 70 L. R. A. 574, 60 Atl. 713; *Martin v. Maine Cent. R. Co.*, 83 Me. 100, 21 Atl. 740; *Browne v. Trustees of Baltimore M. E. Church*, 37 Md. 108; *Bragg v. Boston etc. R. Corp.* 9 Allen (Mass.), 54; *Pittsburgh etc. Iron Co. v. Lake Superior Iron Co.*,

118 Mich. 109, 76 N. W. 395; *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 146; *Holcomb v. Independent School Dist.*, 67 Minn. 321, 69 N. W. 1067; *Frederic v. Mayers*, 89 Miss. 127, 43 South. 677; *Wynne v. Mason*, 72 Miss. 424, 18 South. 422; *Sanford v. Kern*, 223 Mo. 616, 122 S. W. 1051; *Craddock v. Short*, 134 Mo. 449, 35 S. W. 1141; *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123; *Loh v. Broadway Realty Co.*, 77 N. J. L. 112, 114, 71 Atl. 112; *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822; *Hudson River Water Power Co. v. Glens Falls Gas etc. Co.*, 90 App. Div. 513, 85 N. Y. Supp. 577; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35; *First German Reformed Church v. Summit County*, 23 Ohio C. C. 553; *McBroom v. Thompson*, 25 Or. 559, 42 Am. St. Rep. 806, 37 Pac. 57; *Redmond v. Excelsior Sav. Fund etc. Assn.*, 194 Pa. 643, 75 Am. St. Rep. 714, 45 Atl. 422; *Columbia etc. R. Co. v. Laurens Cotton Mills*, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119; *Caldwell v. Williams*, Bail. Eq. (S. C.) 175; *Farr v. Semmler*, 24 S. D. 290, 123 N. W. 835; *Wampol v. Kountz*, 14 S. D. 334, 86 Am. St. Rep. 765, 85 N. W. 595; *Moses v. Sanford*, 2 Lea (Tenn.), 655; *Sutor v. International etc. R. Co. (Tex. Civ. App.)*, 125 S. W. 943; *Clark v. Kirby*, 18 Utah, 258, 55 Pac. 372; *Atkinson v. Washington Irr. Co.*, 44 Wash. 75, 120 Am. St. Rep. 987, 86 Pac. 1123; *Bell v. Groves*, 20 Wash. 602, 56 Pac. 401; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep.

who have actual as opposed to constructive knowledge of their rights.⁶⁴ And the doctrine of estoppel is extended to those who rely on an interchange of similar conduct, and in consequence perform some act on that inducement which they would not otherwise have done. Where an entry is made under a license, and the conduct of the licensor is such that it would be a fraud on the licensee, to permit its revocation, the doctrine of equitable estoppel applies. Thus, when pursuant to a verbal contract, the owners co-operate in the construction of a ditch for the purpose of draining their lands, the equitable doctrine of estoppel will prevent one of them from damming up the ditch to the detriment of the other.⁶⁵ Nor in general does any estoppel arise from

1027, 44 S. E. 433, 22 Morr. Min. Rep. 656; *Radant v. Werheim Mfg. Co.*, 106 Wis. 600, 82 N. W. 562; *Dodge v. Stacy*, 39 Vt. 558; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Griffith v. Berkshire Power Co.*, 158 Fed. 219; *Ramsden v. Dyson*, L. R. 1 H. L. 129, 12 Jurr., N. S., 506, 15 Wkly. Rep. 926; *Lafrance v. Lafontaine*, 30 Can. Sup. Ct. 20.

⁶⁴ *Brandmeier v. Pond Creek Coal Co.*, 219 Pa. 19, 67 Atl. 951.

⁶⁵ *Munch v. Stelter*, 109 Minn. 403, 134 Am. St. Rep. 785, 25 L. R. A., N. S., 727, 124 N. W. 14. In this case the parties entered into an oral agreement for the purpose of draining and benefiting the lands of each, whereby it was mutually agreed to construct a ditch commencing upon respondent's land and running for a considerable distance over appellants' land into an outlet consisting of a lake or slough; that it was agreed that each of the four owners should pay one-fourth of the cost of constructing the ditch; that pursuant to the agreement the ditch was dug, and each of the owners paid one-fourth of the cost thereof, amounting to sixty-nine dollars each; that the ditch as constructed served

the purpose of draining and materially benefiting the lands of all the parties, draining practically all of respondent's wet land and part of the land of each of the appellants; that about two years thereafter appellants, without the knowledge and consent of respondent, obstructed the ditch by damming it at a point on appellants' land, which resulted in obstructing the flow of water from respondent's land, but did not interfere with the drainage of appellants' land. The court held that the verbal agreement became executed to such an extent as to estop appellants from asserting that it was void under the statute of frauds. See, also, *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196, 71 N. E. 990; *Carleton v. Redington*, 21 N. H. 291; *Pitzman v. Boyce*, 111 Mo. 387, 33 Am. St. Rep. 536, 19 S. W. 1104; *Nowlin Lbr. Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030. In other jurisdictions the courts have extended the doctrine of equitable estoppel to cases of that character:

acquiescence through mistake of fact as to an erroneous boundary line;⁶⁶ and it has been frequently held that where there is an agreement or *acquiescence in a wrong boundary*, when the true boundary can be ascertained from the deed, neither party is estopped from claiming to the true line.⁶⁷ To create the estoppel, the one party must have knowledge of the true line and the other must be ignorant of it. A third person cannot derive any advantage from the acts of the parties *inter se*.⁶⁸ But there are other cases in which long acquiescence in a boundary line, accompanied with improvements or other acts showing reliance on such boundary, has been held equivalent to knowledge of the facts, and it was there held to constitute an estoppel, even though there was actual mistake.⁶⁹

Derick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Robinson v. Luther*, 140 Iowa, 723, 119 N. W. 146 (to a limited extent); *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 808.

⁶⁶ *Brewer v. Boston & W. R. Corp.*, 5 Met. (Mass.) 478, 39 Am. Dec. 694; *Hass v. Plantz*, 56 Wis. 105, 43 Am. Rep. 699, 14 N. W. 65; *Reed v. McCourt*, 41 N. Y. 435; *Lemmon v. Hartsook*, 80 Mo. 13; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Pitcher v. Dove*, 99 Ind. 175; *Davenport v. Turpin*, 43 Cal. 597; *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313; *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140, 12 Jur., N. S., 506, 15 Wkly. Rep. 920; *Sheridan v. Barrett*, 4 L. R. Ir. 223.

⁶⁷ *Boone v. Graham*, 215 Ill. 511, 74 N. E. 559; *Francois v. Maloney*, 56 Ill. 399; *Heinz v. Cramer*, 84 Iowa, 497, 51 N. W. 173; *Higginson v. Schaneback*, 23 Ky. Law Rep. 2230, 66 S. W. 1040; *Colby v. Norton*, 19 Me. 412; *Brewer v. Boston etc. R. Corp.*, 5 Met. (Mass.) 478, 39 Am.

Dec. 694; *Liverpool Wharf v. Prescott*, 7 Allen (Mass.), 494; *De Long v. Baldwin*, 111 Mich. 466, 69 N. W. 831; *Combs v. Cooper*, 5 Minn. 254; *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313; *Foard v. McAnnely*, 215 Mo. 371, 114 S. W. 990; *Goozee v. Grant*, 81 Neb. 597, 116 N. W. 508; *Clough v. Bowman*, 15 N. H. 504; *Raynor v. Timerson*, 54 N. Y. 639; *Detwiler v. Toledo*, 13 Ohio C. C. 572; *Talbot v. W. K. Smith Security Sav. etc. Co.*, 56 Or. 117, 107 Pac. 480, 108 Pac. 125; *Western v. Meeker* (Tex. Civ. App.), 109 S. W. 461; *Carley v. Parton*, 75 Tex. 98, 12 S. W. 950; *Stuart v. Luddington*, 1 Rand. (Va.) 403, 10 Am. Dec. 550; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Hass v. Plantz*, 56 Wis. 105, 43 Am. Rep. 699, 14 N. W. 65; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. 542.

⁶⁸ *Turner v. Angus*, 145 Mich. 679, 108 N. W. 1100; *Glasgow v. Baker*, 72 Mo. 441; *Taber v. Hall*, 23 R. I. 613, 51 Atl. 432; *State v. King*, 64 W. Va. 546, 63 S. E. 468.

⁶⁹ *Chicago etc. Ry. Co. v. People*, 91 Ill. 251; *Stosser v. City of Ft.*

§ 279 (281). Same—Want of knowledge by injured party—The act must be calculated to mislead and must actually mislead.—Just as the party against whom the estoppel is claimed is charged with a knowledge of the facts, either directly or indirectly, so, before a person can avail himself of an estoppel arising from the conduct or declarations of another, he must show that he was himself destitute of knowledge of the true state of the facts. If either he knows the facts, or the circumstances are such that he ought to know the facts, he is in no situation to claim the benefit of an estoppel.⁷⁰ It is not always necessary to such

Wayne, 100 Ind. 443; Hagey v. Detweiler, 35 Pa. 409; Adams v. Rockwell, 16 Wend. (N. Y.) 285; McCormick v. Barnum, 10 Wend. (N. Y.) 104. For illustrations of the subject, see note to Evans v. Miller, 38 Am. Rep. 315.

⁷⁰ Mary Lee Coal etc. Co. v. Winn, 97 Ala. 495, 12 South. 607; Walker v. Towns, 23 Ark. 147; Hicks v. Post, 154 Cal. 22, 96 Pac. 878; Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267; Waterman v. Buckingham, 79 Conn. 286, 64 Atl. 212; Williams v. Wadsworth, 51 Conn. 277; Stonecipher v. Kear, 131 Ga. 688, 127 Am. St. Rep. 248, 63 S. E. 215; Perkins Lumber Co. v. Thomas, 117 Ga. 441, 43 S. E. 692; Hollenbeck v. Smith, 231 Ill. 484, 83 N. E. 206; Vail v. Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651; Smith v. Cremer, 71 Ill. 185; Bowles v. Trapp, 139 Ind. 55, 38 N. E. 406; Logansport v. La Rose, 99 Ind. 117; Robinson v. Nail, 2 Ind. Ter. 509, 52 S. W. 49; Logan v. Davis, 147 Iowa, 441, 124 N. W. 808; Vorhes v. Ackley, 127 Iowa, 658, 103 N. W. 998; Shanks v. Seamonds, 24 Iowa, 131, 92 Am. Dec. 465; Schott v. Linscott, 80 Kan. 536, 103 Pac. 997; Gray v. Zellmer, 66 Kan. 514, 72 Pac. 228; New Domain Oil etc. Co.

v. Gaffney Oil Co., 134 Ky. 792, 121 S. W. 699; Louisville v. Harlem, 97 Ky. 286, 30 S. W. 646, 17 Ky. Law Rep. 168; Frantz v. Pink, 125 La. 1013, 52 South. 131; Breaux v. Albert Hanson Lumber Co., 125 La. 421, 51 South. 444; Brian v. Bonvillain, 111 La. 441, 35 South. 632; Mountain Lake Park Assn. v. Shartzter, 83 Md. 10, 34 Atl. 536; Hale v. Skinner, 117 Mass. 474; Robbins v. Potter, 98 Mass. 532; Cook v. Foster, 96 Mich. 610, 55 N. W. 1019; Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; Western Land Assn. v. Banks, 80 Minn. 317, 83 N. W. 192; Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 97 Am. St. Rep. 609, 75 S. W. 445; Bader v. Chicago Mill etc. Co., 134 Mo. App. 135, 113 S. W. 1154; Smullin v. Wharton, 86 Neb. 553, 125 N. W. 1112; Union State Bank v. Hutton, 62 Neb. 664, 87 N. W. 533; Clark v. Parsons, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 898; In re Bayley, 67 N. J. Eq. 566, 59 Atl. 215; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; People v. Board of Supervisors, 101 App. Div. 327, 91 N. Y. Supp. 948; Mayor etc. of New York v. Law, 125 N. Y. 380, 26 N. E. 471; Hutchins v. Hebbard, 34 N. Y. 24; Helms v.

an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. "Indeed," said Folger, J., "it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who is estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop."⁷¹ If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.⁷² "The vital principle is that

Helms, 135 N. C. 164, 47 S. E. 415; Bishop v. Minton, 112 N. C. 524, 17 S. E. 436; Adams v. Brown, 16 Ohio St. 75; Bragdon v. McShea, 26 Okl. 35, 107 Pac. 916; Adams v. Ashman, 203 Pa. 536, 53 Atl. 375; Miller v. Eichberg, 41 Pa. Sup. Ct. 435; Gaston v. Brandenburg, 42 S. C. 348, 20 S. E. 157; State v. Mellette, 16 S. D. 297, 92 N. W. 395; Cooper v. Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353; Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192; Wortham v. Thompson, 81 Tex. 346, 16 S. W. 1059; Centennial Eureka Min. Co. v. Juab County, 22 Utah, 395, 62 Pac. 1024; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Campbell v. Fox, 68 W. Va. 484, 69 S. E. 1007; Atkinson v. Plum, 50 W. Va. 104, 58 L. R. A. 788, 40 S. E. 587; McDougald v. New Richmond Roller Mills Co., 125 Wis. 121, 103

N. W. 244; Brothers v. Kaukauna Bank, 84 Wis. 381, 36 Am. St. Rep. 932, 54 N. W. 786; Kingman v. Graham, 51 Wis. 232, 8 N. W. 181; Steel v. St. Louis Smelting etc. Co., 106 U. S. 447, 27 L. Ed. 226, 1 Sup. Ct. Rep. 389; Brant v. Virginia Coal Co., 93 U. S. 326, 23 L. Ed. 927; Miller v. Ahrens, 163 Fed. 870; Carr v. London etc. R. Co., L. R. 10 C. P. 307, 44 L. J. C. P. 109; McLean v. Clark, 20 Ont. App. 660.

⁷¹ Gaylord v. Van Loan, 15 Wend. (N. Y.) 308; Continental Nat. Bank v. Nat. Bank of the Commonwealth, 50 N. Y. 575.

⁷² Parke, B., in Freeman v. Cooke, 2 Ex. 658. In Carr v. London etc. R. Co., L. R. 10 C. P. 307, Mr. Justice Brett said: "If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of

he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."⁷³ Before a person is estopped to deny the truth of his representations, it should either be shown that he actually means to have such representations relied upon, or that they were made under such circumstances that such intention on his part might be reasonably inferred;⁷⁴ in

culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterward, as against the first, to show that the state of facts referred to did not exist." See, also, *Manufacturers & Traders' Bank v. Hazard*, 30 N. Y. 226; *Blair v. Wait*, 69 N. Y. 113; *McKenzie v. British Linen Co.*, 6 App. Cas. 101; *Miles v. McIlwraith*, 8 App. Cas. 133; *Cornish v. Abbingdon*, 4 Hurl. & N. 549, 28 L. J. Ex. 262.

⁷³ *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, and quoted therefrom in *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695, and in *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88. In a note of the late A. C. Freeman appended to the case last named he said: "It is well, even at the risk of repeating matter that is so well known as almost to warrant our treating it as axiomatic, to show from what estoppel has generated and in what atmosphere it has grown. The word shows its ancient French origin, and we lean to the proposition that equitable estoppel is in reality the spirit extract of fraud, bearing to it almost the relation of alcohol to fermentation,

and if there is an absence of direct or actual fraud, the attitude of denial of that which is just and of good conscience of itself constitutes the element of fraud upon which the doctrine of estoppel fastens and feeds. It has lived with the common law from its beginning, although its rules have been tempered with its application, and while Lord Coke's definition, like his times, is rough, that an estoppel is where a man is concluded by his own act or acceptance to say the truth, it is so fine in its ruggedness that, if perhaps there is a fault in it for too wide a generalization, in the main it covers the ground of the later definitions, which merely put into a logical and legal phraseology that if a man by his statements or behavior leads another to do something which he would not have done but for the expression of that language or the exhibition of such behavior, such first man shall not be allowed to deny his utterance or act to the loss, injury or damage of the other one. He shall neither tell the lie nor act it. If he tries to do either, it is fraud. That fraud has begotten equitable estoppel which effectually alike at law and in equity prevents the perpetration of the injustice."

⁷⁴ *Knowles v. Street*, 87 Ala. 357, 6 South. 273; *Seymour v. Oelrichs*, 156

other words, the proof of the intent may be either direct or presumptive. It follows that there need *not* be an *actual design to mislead*. It is enough that the act or representation is calculated to mislead, and does mislead, the other party to his disadvantage while acting in good faith and with reasonable care and diligence.⁷⁵

§ 280 (282). Who may claim benefit of estoppel.—Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who was adversely affected by the act which constitutes the estoppel. Consequences which result from a party's mistakes or neglects of duty are not ground of estoppel.⁷⁶ Persons for

Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; *Boggs v. Merced Min. Co.*, 14 Cal. 279, 10 Morr. Min. Rep. 334; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *Hill v. Blackwelder*, 113 Ill. 283; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Sessions v. Rice*, 70 Iowa, 306, 30 N. W. 735; *Martin v. Maine Cent. R. Co.*, 83 Me. 100, 21 Atl. 740; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Lincoln v. Gay*, 164 Mass. 537, 49 Am. St. Rep. 480, 42 N. E. 95; *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; *Amba v. Chicago etc. R. Co.*, 44 Minn. 266, 46 N. W. 321; *Raley v. Williams*, 73 Mo. 310; *Lydick v. Gill*, 68 Neb. 273, 94 N. W. 109; *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 898; *Kuhl v. Mayor etc. of Jersey City*, 23 N. J. Eq. 84; *Deering v. Schreyer*, 110 App. Div. 200, 97 N. Y. Supp. 14; *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627; *Manufacturers' & Traders' Bank v. Hazard*, 30 N. Y. 226; *Ashley v. Pick*, 53 Or. 410, 100 Pac. 1103; *Waters' Appeal*, 35 Pa. 523, 78 Am. Dec. 354; *Bender v. Brooks* (Tex. Civ. App.), 130 S. W. 653; *Kiersky v. Nichols*

(Tex. Civ. App.), 29 S. W. 71; *Strong v. Ellsworth*, 26 Vt. 366; *Globe Nav. Co. v. Maryland Casualty Co.*, 39 Wash. 299, 81 Pac. 826; *Atkinson v. Plum*, 50 W. Va. 104, 58 L. R. A. 788, 40 S. E. 587; *Kingman v. Graham*, 51 Wis. 232, 8 N. W. 181; *Leather Mfg. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. Ed. 811; *Marine Iron Works v. Weiss*, 148 Fed. 145, 78 C. C. A. 279; *Freeman v. Cooke*, 2 Ex. 654.

⁷⁵ *Manufacturers & Traders' Bank v. Hazard*, 30 N. Y. 226. See, also, cases last cited.

⁷⁶ *Cuttle v. Brockway*, 32 Pa. 45; *Wood v. Pennell*, 51 Me. 52; *Chase v. Deming*, 42 N. H. 274. Declarations, statements and admissions, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct has been thus influenced, and who would suffer injury by their denial. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations: 1 *Greenl. Ev.*, p. 240, § 207; 2 *Smith's Lead. Cas.* 642; *Simons v. Steele*, 36 N. H. 73.

whom the representations are not intended and to whom they are not addressed cannot claim the benefit of an estoppel based on such representations.⁷⁷ Thus the declaration of A to B, not made with the purpose or belief that it would be communicated to C, or would influence his action, constitutes no estoppel upon A, although C afterward hears of it and acts upon it.⁷⁸ So infants are not estopped by the action of a parent, who is jointly interested with them in property, by a submission to arbitration by the parent of matters connected with such property.⁷⁹ In a case in the house of lords it was said by the Lord Chancellor: "I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another you must add that he has misled another under such circumstances, that he had reasonable ground for supposing that the person whom he was misleading, was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterward come to him to make it good."⁸⁰ When one was sued as a partner, and in fact was not a partner, but was a clerk in the employ of the firm, it was sought to estop him denying the nonpartnership by reason of his references to the firm as "his" business place, signing the firm's name to letters, in which, however, his name did not appear. The court in dealing with the proposition said: "We suppose nothing is more common than for the villagers, in a place where there is but a single mercantile establishment, whether it is a factory, store or bank, to speak of it as 'our' store, or 'our' factory or bank, with-

⁷⁷ Kinney v. Whiton, 44 Conn. 262, 26 Am. Rep. 462; Morgan v. Spangler, 14 Ohio St. 102; Durant v. Pratt, 55 Vt. 270.

⁷⁸ Mayenborg v. Haynes, 50 N. Y. 675. The party may be estopped if the declaration is not confidential, but general, and acted on by others: Mit-

chell v. Read, 9 Cal. 204, 70 Am. Dec. 647.

⁷⁹ Snow v. Walker, 42 Tex. 154; Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777 (apprenticeship indentures).

⁸⁰ Jordan v. Money, 5 H. L. Cas. 212, 10 Eng. Reprint, 868.

out any reference to their interest in the establishment itself. And for a clerk to do it does not seem to us as even very strong evidence that he is a principal in the establishment, much less does it seem sufficient to estop him from denying that he is a partner."⁸¹ The naked declaration of an intention existing in the mind, as opposed to an assertion of a fact, made to one who gives no reason for his inquiry, will not prevent the assertion of a legal right, contrary to such expressed intention.⁸² The immediate parties or their privies are the only ones entitled to claim the benefit of the estoppel.⁸³ But conduct or declarations may be of so *general* or *notorious* a character that the public generally may assume that they are intended to be relied upon, as where a man publicly treats a woman as his wife, or an associate as his partner.⁸⁴ An estoppel *in pais* oper-

⁸¹ Danforth v. Adams, 29 Conn. 107.

⁸² Keating v. Orne, 77 Pa. 89. As to husband and wife and parent and child, see Anderson v. Third Ave. R. Co., 9 Daly (N. Y.), 487; Neeson v. City of Troy, 29 Hun (N. Y.), 173.

⁸³ Farley Nat. Bank v. Henderson, 118 Ala. 441, 24 South. 428; Martin v. St. Louis etc. R. Co., 55 Ark. 510, 19 S. W. 314; Figg v. Handley, 52 Cal. 244; Lewis v. Jerome, 44 Colo. 459, 99 Pac. 562; Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 Atl. 162; Townsend Sav. Bank v. Todd, 47 Conn. 190; Murray v. Sells, 53 Ga. 257; Union Nat. Bank v. Post, 55 Ill. App. 369; Krathwohl v. Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; Gaines v. Frankfort Deposit Bank, 19 Ky. Law Rep. 171, 39 S. W. 438; Eareckson v. Rogers, 112 Md. 160, 75 Atl. 513; Ten Eyck v. Pontiac etc. R. Co., 74 Mich. 226, 16 Am. St. Rep. 633, 3 L. R. A. 378, 41 N. W. 905; Hamar v. Johnston, Smedes & M. Ch. (Miss.) 563; Dee v. Nachbar, 207 Mo. 680, 106 S. W.

35; Citizens' Bank v. Burrus, 178 Mo. 716, 77 S. W. 748; Omaha v. Gsanter, 4 Neb. Unof. 52, 93 N. W. 407; Empire Mfg. Co. v. Moers, 27 App. Div. 464, 50 N. Y. Supp. 691; Jackson v. Brinckerhoff, 3 Johns. (N. Y.) Cas. 101; Second Nat. Bank of Toledo v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; People's Nat. Bank v. Board of Commrs., 24 Okl. 145, 104 Pac. 55; Falls City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884; Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492; Taylor v. Tompkins, 1 Tex. App. Civ. Cas., § 1050; Hilton v. Sloan, 37 Utah, 359, 108 Pac. 689; Wright v. Hazen, 24 Vt. 143; Virginia Hot Springs Co. v. Grose, 106 Vt. 476, 56 S. E. 222; Wingard v. Wingard, 56 Wash. 389, 25 L. R. A., N. S., 453, 105 Pac. 834; Russell v. Andrae, 79 Wis. 108, 48 N. W. 117, 84 Wis. 374, 54 N. W. 792; People's Sav. Inst. v. Miles, 76 Fed. 252, 22 C. C. A. 152; Ross v. Sutherland, 32 Nova Scotia, 243.

⁸⁴ See § 87 et seq., *ante*; also § 276, *ante*.

ates only in favor of the person who has been *misled* to his injury; and he only can set it up.⁸⁵ Thus where an account is rendered, and the other party does not accept it, and in no way changes his situation, there is no estoppel from claiming a larger sum;⁸⁶ and in an action for false imprisonment where the defendant, an officer, had only a copy of the warrant, it was held that he was not estopped from showing this fact, as the plaintiff had not acted upon any representation although he had been led to suppose that the officer had the original.⁸⁷ When a telegraphic message was seen by one for whom it was not intended, but was designed solely for the information of the person to whom it was addressed and not to influence the action of any other, no claim to an estoppel *in pais* against the sender could be predicated upon the statements contained in it nor upon his action concerning them.⁸⁸ As an estoppel operates only in favor of parties and privies, so its operation is limited against parties and their privies; and as a stranger cannot benefit by it except as above mentioned, so he cannot be affected by it.⁸⁹ There is a great weight of

⁸⁵ Jett v. Crittenden, 89 Ark. 349, 116 S. W. 665; Strahl v. Smith, 30 Colo. 392, 70 Pac. 677; Townsend Sav. Bank v. Todd, 47 Conn. 190; Illinois Masons' Benev. Soc. v. Baldwin, 86 Ill. 479; Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100; Moore v. Scruggs, 131 Iowa, 692, 117 Am. St. Rep. 437, 109 N. W. 205; First Nat. Bank v. Duncan, 80 Kan. 196, 18 Ann. Cas. 78, 101 Pac. 992; Butchers' Slaughtering etc. Assn. v. Boston, 139 Mass. 290, 30 N. E. 94; Spurlock v. Sproule, 72 Mo. 503; Lawrence v. Towle, 59 N. H. 28; Stevens v. Headley, 69 N. J. Eq. 533, 62 Atl. 887; Winegar v. Fowler, 82 N. Y. 315; Ricketson v. Best (Tex. Civ. App.), 134 S. W. 353; Earl v. Stevens, 57 Vt. 474; Butler v. Supreme Court of I. O. F., 53 Wash. 118, 26 L. R. A., N. S., 293, 101 Pac.

481; Clark v. McLaugherty, 53 W. Va. 376, 44 S. E. 269; Guichard v. Brande, 57 Wis. 534, 15 N. W. 764; Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Cooper v. Brazelton, 135 Fed. 476, 68 C. C. A. 188.

⁸⁶ Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262.

⁸⁷ Howard v. Hudson, 2 El. & Bl. 1, 118 Eng. Reprint, 669.

⁸⁸ Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259.

⁸⁹ Wilson v. Holt, 91 Ala. 204, 8 South. 794; People v. Bass, 15 Cal. App. 62, 113 Pac. 695; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908; Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 Atl. 162; Billings' Appeal, 49 Conn. 456; Lewman v. Equitable Loan etc. Co., 124 Ga. 190, 3 L. R. A., N. S., 879, 52 S. E. 599; Davenport etc. Bridge etc. Co. v.

authority supporting the view that acts done in a representative capacity do not operate as estoppels against the individual, and of course that acts done in the individual capacity do not estop the same individual in his representative character. As to the latter, there is no room for doubt, and, notwithstanding the cases are not entirely in unison, the better law undoubtedly is that an estoppel is limited in its scope to the acts or statements of the party in the specific capacity he assumed on the occasion out of which the estoppel is alleged to arise.⁹⁰

§ 281 (283). **Estoppel by deed.**—It will elsewhere appear, in the discussion of the effect of judgments as evidence, that in some cases the law attaches an artificial effect to certain classes of evidence.⁹¹ The same principle

Johnson, 188 Ill. 472, 59 N. E. 497; Coe College v. Cedar Rapids, 120 Iowa, 541, 95 N. W. 267; Darnaby v. Watts (Ky.), 21 S. W. 333; Boyle v. West, 107 La. 347, 31 South. 794; De la Vergne Refrigerating Mach. Co. v. Hub Brewing Co., 175 Mass. 419, 56 N. E. 584; Morton v. Preston, 18 Mich. 60, 100 Am. Dec. 146; Beede v. Pabody, 70 Minn. 174, 72 N. W. 970; Oberfelder v. Kavanaugh, 29 Neb. 427, 45 N. W. 471; Hopler v. Cutler (N. J.), 34 Atl. 746; Thyll v. New York etc. R. Co., 84 N. Y. Supp. 175; Duryea v. Mackey, 151 N. Y. 204, 45 N. E. 458; Fleming v. Barden, 126 N. C. 450, 78 Am. St. Rep. 671, 53 L. R. A. 316, 36 S. E. 17; Pontius v. Walls, 197 Pa. 223, 47 Atl. 203; Croker v. Beaufort, 45 S. C. 269, 22 S. E. 885; Snow v. Walker, 42 Tex. 154; Heyl v. Goelz, 97 Wis. 327, 72 N. W. 626; American Coat Pad. Co. v. Phoenix Pad Co., 113 Fed. 629, 51 C. C. A. 339. See, also, § 278, *ante*.

⁹⁰ Crisman v. Lanterman, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89; Rohn v. Rohn, 98 Ill. App. 509;

Simpson v. People's Ice Mfg. Co., 44 La. Ann. 612, 10 South. 814; De Poret v. Gusman, 30 La. Ann. 930; Morton v. Preston, 18 Mich. 60, 100 Am. Dec. 146; Magee v. Gregg, 11 Smedes & M. (Miss.) 70; Arlington State Bank v. Paulsen, 59 Neb. 94, 89 N. W. 263; Chapman v. Gates, 54 N. Y. 132; Micon v. Lamar, 1 Fed. 14, 17 Blatchf. 378. In Rutz v. Obear, 15 Cal. App. 435, 115 Pac. 67, a stockholder in a corporation became possessed of all the stock, and on the authority of *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220, it was held that where one individual owns all the stock of a corporation, the same is but the corporate double of the owner of the stock, and such proof destroys the separate entity of the corporation, and in such event the statements and admissions of the sole owner of the stock may be received as establishing facts from which an estoppel might arise as to the corporation. As to estoppel by deed of an administrator, see § 281, *post*.

⁹¹ See § 585 et seq., *post*.

will now be illustrated in respect to recitals and statements in deeds; and it will be found that such recitals are not, like casual admissions, judged by their intrinsic weight as evidence, but that, under the limitations to be named, they *conclusively bind the parties* and their *privies*. Bigelow, in defining an estoppel by deed, says it is "a preclusion against the competent parties to a valid sealed contract, and their privies, to deny its force and effect by any evidence of inferior solemnity. Such cannot allege any title or right in derogation of the deed. Thus, a grantor by deed with general warranty cannot set up any encumbrance against the grantee, not excepted in the deed, such as a right of way."⁹² It has long been a familiar rule of the law that parties may, by executing instruments under seal, conclude themselves from disproving or contradicting, by any evidence of less solemnity, the statements contained therein.⁹³ Said Lord Mansfield: "No man shall be allowed

⁹² Bigelow on Estoppel, 5th ed., 332.

⁹³ Tew v. Henderson, 116 Ala. 545, 23 South. 128; Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941; Belcher Consol. Gold Min. Co. v. Deferrari, 62 Cal. 160; Drake v. Root, 2 Colo. 685; Smith v. Moodus Water Power Co., 35 Conn. 392; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Morris v. Wheat, 8 App. Cas. (D. C.) 379; Usina v. Wilder, 58 Ga. 178; Despain v. Wagner, 163 Ill. 598, 45 N. E. 129; Hull v. Glover, 126 Ill. 122, 18 N. E. 198; McAdams v. Bailey (Ind. App.), 80 N. E. 171; Neely v. Boyce, 128 Ind. 1, 27 N. E. 169; Blackburn v. Muskogee Land Co., 6 Ind. Ter. 232, 91 S. W. 31; Van Husen v. Omaha Bridge etc. R. Co., 118 Iowa, 366, 92 N. W. 47; Madden v. State, 68 Kan. 658, 75 Pac. 1023; Gaulbaugh v. Rouse, 31 Ky. Law Rep. 1195, 104 S. W. 959; Cox v. Lacey, 3 Litt. (Ky.) 334; Beard v. Lufriu, 46 La. Ann. 875, 15 South. 207; Currier v. Earl, 13 Me.

216; Le Strange v. State, 58 Md. 26; Reese v. Reese, 41 Md. 554; Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776; Francis v. Boston & R. Mill Corp., 4 Pick. (Mass.) 365; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515; Dyer v. Rich, 1 Met. (Mass.) 180; Root v. Synder, 161 Mich. 200, 126 N. W. 206; Case v. Green, 53 Mich. 615, 19 N. W. 554; Morris v. Watson, 15 Minn. 212; Cutler v. Board of Supervisors, 56 Miss. 115; Miller v. New Madrid Banking Co., 235 Mo. 522, 139 S. W. 192; Steele v. Culver, 158 Mo. 136, 59 S. W. 67; Hundley v. Filbert, 73 Mo. 34; Gudtner v. Kilpatrick, 14 Neb. 347, 15 N. W. 708; Logan v. Eaton, 66 N. H. 575, 31 Atl. 13; Baltimore etc. R. Co. v. Bouvier, 70 N. J. Eq. 158, 62 Atl. 868; Inter City Realty Co. v. Newman, 128 App. Div. 195, 112 N. Y. Supp. 481; Ludlow v. Hudson River R. Co., 4 Hun (N. Y.), 239; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Cuthrell v. Hawkins, 98 N. C. 203, 3

to dispute his own solemn deed."⁹⁴ Thus, a specific *recital* in a deed that the grantor has title to or that he is in possession of the land conveyed will estop him from asserting the contrary as against the grantee. In other words, the grantor is estopped from saying that he had no interest in the land.⁹⁵ Where the deed describes the land conveyed as bounded by a street, the parties to the conveyance are estopped to deny the *existence* of the *street*.⁹⁶ The recital of a lease in a deed of *release* is conclusive evidence of the existence of the lease against the parties and their privies,⁹⁷ but not upon strangers, or those claiming paramount to the deed.⁹⁸ When a mortgage recites a lease and the lessees have acknowledged the mortgage, both parties are estopped.⁹⁹ One who holds under a deed, which by its terms is subject to a *prior mortgage*, is estopped from ques-

S. E. 672; *Wilson v. Western North Carolina Land Co.*, 77 N. C. 445; *Brynjolfson v. Dagner*, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; *Jones v. Timmons*, 21 Ohio St. 596; *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286; *Welch v. Oregon R. etc. Co.*, 34 Or. 447, 56 Pac. 417; *Muntz v. Whitecomb*, 40 Pa. Sup. Ct. 553; *Crews v. McKinnie*, 2 Nott & McC. (S. C.) 52; *Bliss v. Tidrick*, 25 S. D. 533, Ann. Cas. 1912C, 671, 127 N. W. 852; *Harvey v. Harvey*, 13 R. I. 598; *Mengel Box Co. v. Ferguson*, 124 Tenn. 433, 137 S. W. 101; *Ruffin v. Johnson*, 5 Heisk. (Tenn.) 604; *Tomlinson v. Drought* (Tex. Civ. App.), 127 S. W. 262; *Richardson v. Powell*, 83 Tex. 588, 19 S. W. 262; *Box v. Lawrence*, 14 Tex. 545; *Walworth v. Town of Readsboro*, 24 Vt. 252; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Jenkins v. Collard*, 145 U. S. 546, 36 L. Ed. 812, 12 Sup. Ct. Rep. 868; *American Life Ins. Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Carver v. Jackson*, 4

Pet. (U. S.) 1, 7 L. Ed. 761; *Young v. Raincock*, 7 Com. B. 310, 338, 18 L. J. C. B. 193, 13 Jur. 539; *Beckett v. Bradley*, 7 Man. & G. 994, 2 D. & L. 586, 8 Scott N. R. 843.

⁹⁴ *Goodtitle v. Bailey*, 2 Cowp. 597, 98 Eng. Reprint, 1260.

⁹⁵ *Williams v. First Presbyterian Society*, 1 Ohio St. 478; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932. See note to *Wadkins v. Watson*, 22 L. R. A. 779.

⁹⁶ *Donohoo v. Murray*, 62 Wis. 100, 22 N. W. 167; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157.

⁹⁷ *Shelley v. Wright*, Willes, 9; *Crane v. Morris*, 6 Pet. (U. S.) 611, 8 L. Ed. 514; *Carver v. Jackson*, 4 Pet. (U. S.) 1, 83, 7 L. Ed. 761; *Cossens v. Cossens*, Willes, 25.

⁹⁸ *Carver v. Jackson*, 4 Pet. (U. S.) 1, 83, 7 L. Ed. 761.

⁹⁹ *Wender Blue etc. Coal Co. v. Louisville Property Co.*, 137 Ky. 339, 125 S. W. 732.

tioning the consideration or validity of such mortgage.¹⁰⁰ The grantor is estopped to deny the recitals of due notice of a sale;¹ of an *authority* stated to have been given by a corporation;² of the taking of an oath of office;³ or that certain *conveyances* have been made to him.⁴ A *surety* on a bond is estopped from claiming that his principal has not legally qualified for the trust or office.⁵ Sureties on the bonds of administrators, guardians, sheriffs and the like are estopped to deny that the principal held the designated office.⁶ So one joining with the grantor in a deed of conveyance whereby there was sold "all the right, title, claim, and interest that we now have or may hereafter have," the one joining knowing he was a devisee under the grantor's will, is estopped from claiming his interest under the will on the death of the grantor.⁷ A grantor in a warranty deed would be estopped from showing that the consideration was not valuable but merely a good consideration. He could show that it was a different value from that recited, but not that there was no value. As estoppels must be mutual, the grantee in such conveyance

¹⁰⁰ *Freeman v. Auld*, 44 N. Y. 50; *Johnson v. Thompson*, 129 Mass. 398; *Tuite v. Stevens*, 98 Mass. 305; *Smith v. Graham*, 34 Mich. 302.

¹ *Simson v. Eckstein*, 22 Cal. 580.

² *Stowe v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *McDonald v. King*, 1 N. J. L. 432.

³ *Larco v. Casaneuava*, 30 Cal. 560.

⁴ *Kineman v. Loomis*, 11 Ohio, 475; *Rangely v. Spring*, 28 Me. 127; *Farrar v. Cooper*, 34 Me. 394; *McDonald v. King*, 1 N. J. L. 432.

⁵ 2 *Smith's Lead. Cas.*, 8th Am. ed., 819; *Seiple v. Mayor etc. of Elizabeth*, 3 Dutch. 27 (N. J. L.) 407; *People v. Norton*, 9 N. Y. 176; *Hayden v. Smith*, 49 Conn. 83; *Meyer v. Wiltshire*, 92 Ill. 395; *Gray v. State*, 78 Ind. 68, 41 Am. Rep. 545; *Phenix Ins. Co. v. Findley*, 59 Iowa, 591, 13 N. W. 738; *Jones v. Gallatin County*,

78 Ky. 491; *Williamson v. Woodman*, 73 Me. 163; *Taylor v. State*, 51 Miss. 79; *Kelly v. State*, 25 Ohio St. 567; *McClure v. Commonwealth*, 80 Pa. 167.

⁶ *Norris v. State*, 22 Ark. 524; *State v. Mills*, 82 Ind. 126; *Jones v. Gallatin County*, 78 Ky. 491; *Williamson v. Woodman*, 73 Me. 163; *Cutler v. Dickinson*, 8 Pick. (Mass.) 386; *Shroyer v. Richmond*, 16 Ohio St. 455; *Cox v. Thomas*, 9 Gratt. (Va.) 312; *Bruce v. United States*, 17 How. (U. S.) 437, 15 L. Ed. 129. In *Conant v. Newton*, 126 Mass. 105, a bond recited that one "had been duly appointed trustee," and the sureties were not estopped from setting up that his appointment was oral, and therefore that the bond was not a valid probate bond.

⁷ *Moseley v. Stewart* (Tenn. Ch. App.), 52 S. W. 671.

could not be permitted to deny that he paid value in some amount. He could not say he obtained it as a gift.⁸ In Texas, it is held that where administrators conveyed land as the property of the estate, they were estopped from claiming a part of it as their private property, on the ground, that although they assumed to convey as administrators, they assumed also that the title was in the estate, and they could not be heard afterward to say that any part of it was in themselves.⁹ When a second deed is made to replace a first one, and by its terms shows that the land described therein was the identical land conveyed in the first, the grantee is estopped by the terms of the second deed from claiming any of the land which is not embraced therein.¹⁰ But it is otherwise when the second deed conveys to other parties the identical land, or other land to the same parties. Thus where the deed intended to be to a man and his wife was made to the man alone, and subsequently a correcting deed was executed to both containing a recital of the error, it was held that the recital estopped the wife from claiming against the representatives of her husband, the grantors having had no title when the second deed was executed. The distinction is obvious. If A conveys to B land X and intended to convey land Y, a second deed conveying Y becomes practically the only deed of conveyance of the land intended to be conveyed, the legal estate in which was in A notwithstanding the first deed, whereas if A, intending to convey to B and C, conveys to B only, the legal estate is divested from A, and any subsequent conveyance from him con-

⁸ *Holloway v. Vincent*, 143 Mo. App. 434, 128 S. W. 1009.

⁹ *Tomlinson v. Drought* (Tex. Civ. App.), 127 S. W. 262; *Millican v. McNeill*, 102 Tex. 189, 132 Am. St. Rep. 863, 20 Ann. Cas. 74, 21 L. R. A., N. S., 60, 114 S. W. 106. See, also, to same effect, *Bliss v. Tidrick*, 25 S. D. 533, 127 N. W. 852 (administrator was grantor and heir).

¹⁰ *Poitevent v. Scarborough*, 103 Tex. 111, 124 S. W. 87; *Doty v. Barnard*, 92 Tex. 104, 47 S. W. 712. Other late and important cases are, *Demaris v. Rodgers*, 110 Minn. 49, 124 N. W. 457 (recital of assumption of mortgage); *Roper Lumber Co. v. Hudson*, 153 N. C. 96, 68 S. E. 1065 (recital of land conveyed).

veys that which he has not and is nugatory.¹¹ If there is a recital intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it estops all; but, if intended to be a statement of one party only, he alone is estopped, and the intent is to be gathered from the deed.¹² Recitals explanatory of the reasons for making a deed, particular in form and intended to qualify the formal part of the deed, are conclusive by way of estoppel upon the parties to the deed. They are binding admissions upon the grantee of the truth of the facts recited, and whatever rights legitimately arise on such admitted facts may at all times be asserted, whether it be to obtain or defend such rights.¹³ The general rule is that there can be no estoppel by deed against the grantee in a deed poll, because he does not join in the execution of it, and the doctrine that parties to a sealed instrument cannot dispute its force or effect, when applied to such an instrument, is limited in its effect to an estoppel against the grantor, and does not reach the grantee.¹⁴ A grantor is not estopped

¹¹ *Langley v. Kesler*, 57 Or. 281, 110 Pac. 401, 111 Pac. 246.

¹² *Holt v. Ruleau*, 83 Vt. 151, 21 Ann. Cas. 1059, 74 Atl. 1005; *Stoughill v. Buck*, 14 Q. B. 781, 117 Eng. Reprint, 301.

¹³ *Pinckard v. Milmine*, 76 Ill. 453; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, 4 L. R. A. 434, 21 N. E. 430; *Langley v. Kesler*, 57 Or. 281, 110 Pac. 401, 111 Pac. 246.

¹⁴ *Langley v. Kesler*, 57 Or. 281, 110 Pac. 401, 111 Pac. 246; *Robertson v. Pickrell*, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup. Ct. Rep. 407. There are certain exceptions to the general rule above announced, noted and commented on by Bigelow, such as that the acceptance of a deed poll sometimes works an estoppel upon the grantee, in the case of admissions and covenants intended for him; that a

grantee, holding under his grantor, cannot dispute his grantor's title for the purpose of escaping entirely the payment of the purchase price of the property; that a grantee cannot question the validity of his grantor's title at the time of his conveyance in contest with another, who claims under a paramount title which he himself has acquired, or connected himself with; that he "cannot assert the existence of such paramount title, or allege any defect in his grantor's title, nor can he say that the conveyance he has accepted was made in fraud of his grantor's creditors, so long as he claims under that title alone. Nor will a person be permitted to accept a deed with seisin, and then turn around upon his grantor and allege that his covenants are broken by reason of the fact that he himself at the time he accepted the deed was seized

in equity from showing that a deed poll executed *pendente lite* is in truth a mortgage.¹⁵

§ 282 (284). Same—Title subsequently acquired—Mutuality and privity.—It is a well-known illustration of this principle of estoppel by deed that, if a grantor undertakes to convey the fee with full warranties when he in fact has no title, and he subsequently acquires title, such title forthwith inures to the benefit of the grantee to the same extent as if the grantor had had the title at the date of the grant.¹⁶

of the premises; nor will the grantee in a deed poll, having accepted the deed and estate, be permitted to deny his covenants, or that the seal attached is his in an action on the covenants": Bigelow on Estoppel, 5th ed., 356, 357.

¹⁵ *Nicholson v. Hayes*, 174 Fed. 653, 98 C. C. A. 407.

¹⁶ *Vary v. Smith*, 162 Ala. 457, 50 South. 187; *Wheeler v. Aycock*, 109 Ala. 146, 19 South. 497; *Colonial etc. Mtg. Co. v. Lee*, 95 Ark. 253, 129 S. W. 84; *Tupy v. Kocourek*, 66 Ark. 433, 51 S. W. 69; *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112; *Dudley v. Cadwell*, 19 Conn. 218; *Doe v. Dowdall*, 3 Houst. (Del.) 369, 11 Am. Rep. 757; *Knox v. Spratt*, 19 Fla. 817; *O'Bannon v. Paremour*, 24 Ga. 489; *Jones v. Jones*, 213 Ill. 228, 72 N. E. 695; *Whitson v. Grosvenor*, 170 Ill. 271, 48 N. E. 1018; *McAdams v. Bailey* (Ind. App.), 80 N. E. 171; *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; *Whitley v. Johnson*, 135 Iowa, 620, 113 N. W. 550; *Nicodemus v. Young*, 90 Iowa, 423, 57 N. W. 906; *Armstrong v. Portsmouth Bldg. Co.*, 57 Kan. 62, 45 Pac. 67; *Weir v. Weir*, 138 Ky. 788, 129 S. W. 108; *Altamus v. Nickell*, 115 Ky. 506, 103 Am. St. Rep. 333, 74 S. W. 221, 24 Ky. Law Rep. 2401,

2416; *New Orleans v. Riddel*, 113 La. 1051, 37 South. 966; *Benton v. Sentinel*, 50 La. Ann. 869, 24 South. 297; *Haslam v. Jordan*, 104 Me. 49, 70 Atl. 1066; *Powers v. Patten*, 71 Me. 583; *Ayer v. Philadelphia etc. Face Brick Co.*, 159 Mass. 84, 34 N. E. 177; *Knight v. Thayer*, 125 Mass. 25; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. 1113; *Bradley Estate Co. v. Bradley*, 97 Minn. 161, 106 N. W. 110; *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399; *Andrews v. Anderson* (Miss.), 16 South. 346; *Stoepler v. Silverberg*, 220 Mo. 258, 119 S. W. 418; *Johnson v. Johnson*, 170 Mo. 34, 59 L. R. A. 748, 70 S. W. 241; *Hagensick v. Castor*, 53 Neb. 495, 73 N. W. 932; *Fletcher v. Chamberlin*, 61 N. H. 438; *Kimball v. Schoff*, 40 N. H. 190; *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Ross v. Adams*, 28 N. J. L. 160; *Goodhue v. Cameron*, 142 App. Div. 470, 127 N. Y. Supp. 120; *House v. McCormick*, 57 N. Y. 310; *Walker v. Taylor*, 144 N. C. 175, 56 S. E. 877; *Hallyburton v. Slagle*, 130 N. C. 482, 41 S. E. 877, 132 N. C. 947, 44 S. E. 655; *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394; *Broadwell v. Phillips*, 30 Ohio St. 255; *Morrow v. Warner Valley Stock Co.*, 56 Or. 312, 101 Pac. 171; *Tag-*

In such case the grantor and his heirs are precluded from asserting the title as against the grantee and those in privity with him.¹⁷ As in the case of judgments, *only* those who are *parties* to the deed, or who are in *privity* with such parties, are bound by its recitals.¹⁸ No person can rely on an estoppel growing out of a transaction to which he is not a party or privy and which in no manner touches his rights. *Mutuality* is a requisite to all estoppels.¹⁹ It

gart v. Risley, 3 Or. 306, 4 Or. 235; Jordan v. Chambers, 226 Pa. 573, 134 Am. St. Rep. 1081, 75 Atl. 956; George v. Brandon, 214 Pa. 623, 64 Atl. 371; Easton's Appeal, 47 Pa. 255; Hodges v. Goodspeed, 20 R. I. 537, 40 Atl. 373; McCusker v. McEvey, 9 R. I. 528, 11 Am. Rep. 295; Du Bose v. Kell, 90 S. C. 196, 71 S. E. 371; Gaffney v. Peeler, 21 S. C. 55; Johnson v. Brauch, 9 S. D. 116, 62 Am. St. Rep. 857, 68 N. W. 173; Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67; Smith v. Burgher (Tex. Civ. App.), 136 S. W. 75; Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; McElroy v. McLeay, 71 Vt. 396, 45 Atl. 898; Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681; Burtners v. Keran, 24 Gratt. (Va.) 42; American etc. Bank v. Helgesen, 64 Wash. 54, Ann. Cas. 1913A, 262, 116 Pac. 837; Brazee v. Schofield, 2 Wash. Ter. 209, 3 Pac. 265; Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119; Summerfield v. White, 54 W. Va. 311, 46 S. E. 154; Myrick v. Kahle, 120 Wis. 57, 97 N. W. 506; Wiesner v. Zaun, 39 Wis. 188; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434; Jenkins v. Collard, 145 U. S. 546, 36 L. Ed. 812, 12 Sup. Ct. Rep. 868; Ryan v. United States, 136 U. S. 68, 34 L. Ed. 447, 10 Sup. Ct. Rep. 913; Irvine v. Irvine, 9 Wall. (U. S.) 625, 19 L. Ed. 800;

Tolliver v. Great Northern R. Co., 187 Fed. 795, 109 C. C. A. 643; Treviban v. Lawrence, 2 Ld. Raym. 1036, 92 Eng. Reprint, 188, 6 Mod. 256, 87 Eng. Reprint, 1003, 1 Salk. 276, 91 Eng. Reprint, 241; Doe v. Wetmore, 8 New Brunsw. 140. See notes to Trull v. Eastman, 37 Am. Dec. 129, and Comstock v. Smith, 23 Am. Dec. 673.

¹⁷ See cases last cited. But this is not so if the instrument is a mere release or quitclaim deed: Bell v. Twilight, 26 N. H. 401; Jackson v. Wright, 14 Johns. (N. Y.) 193; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Kinsman v. Loomis, 11 Ohio, 475; Pike v. Galvin, 29 Me. 183; Harriman v. Gray, 49 Me. 537; Derris v. Smith, 7 Or. 267; Graham v. Graham, 55 Ind. 23; McAllister v. Devane, 76 N. C. 57. See note to Trull v. Eastman, 37 Am. Dec. 130.

¹⁸ Allen v. Allen, 45 Pa. 468; Sunderlin v. Struthers, 47 Pa. 411; Carver v. Jackson, 4 Pet. (U. S.) 1, 7 L. Ed. 761; Penrose v. Griffith, 4 Binn. (Pa.) 231; Glidden v. Town of Unity, 30 N. H. 104; Buffum v. Hutchinson, 1 Allen (Mass.), 58; Doe v. Errington, 8 Scott, 210, 6 Bing. N. C. 79, 3 Jur. 1126.

¹⁹ Bentley v. Cleaveland, 22 Ala. 814; Gordon v. San Diego (Cal.), 32 Pac. 885; Brewster v. Peter Schoen-

is a corollary to this proposition that if one party seeks to defeat the deed, he releases, so to speak, the estoppel which he might otherwise have claimed against his adversary.²⁰ The rule already stated as to strangers always applies. Hence, the estoppel of a deed does not extend to a *collateral action*, where the cause of action is different, although the subject matter may be the same;²¹ and it is applied only in some proceeding based on the deed in question.²² Although the estoppel does not extend to *strangers to the transaction*, those who act under the authority of the grantee are so connected in interest that they may take advantage of an estoppel.²³ But there is no such privity between *creditor* and *debtor*. The legal relation between them is one of antagonism, rather than of confidence and dependence.²⁴ And where a judgment creditor subsequently acquires a title to land sold at a sheriff's sale, such title neither inures to the purchaser nor is the creditor estopped from setting it up.²⁵ On the same principle there is not such privity between the *grantor* and the *grantee* that the latter is in all cases estopped from setting up a para-

hofen Brewing Co., 66 Ill. App. 276; Freeman v. Thayer, 29 Me. 369; Alexander v. Walter, 8 Gill (Md.), 239, 50 Am. Dec. 688; Blackwood v. Van Vleit, 30 Mich. 118; Stevenson's Heirs v. McReary, 12 Smedes & M. (20 Miss.) 9, 51 Am. Dec. 102; Hempstead v. Easton, 33 Mo. 142; Sparrow v. Kingman, 1 N. Y. 242; Peebles v. Pate, 90 N. C. 348; Longwell v. Bentley, 3 Grant Cas. (Pa.) 177; Bower v. McCormick, 23 Gratt. (Va.) 310; Hughes v. Clarksville, 6 Pet. (U. S.) 369, 8 L. Ed. 430; Deery v. Cray, 5 Wall. (U. S.) 795, 18 L. Ed. 653.

²⁰ Crosby v. Chase, 17 Me. 369; Burr v. Duryee, Fed. Cas. No. 2190, 2 Fish. Pat. Cas. 275.

²¹ Merrifield v. Parritt, 11 Cush. (Mass.) 590; Carpenter v. Buller, 8 Mees. & W. 209, 10 L. J. Ex. 383;

Edmonston v. Edmonston, 13 Hun (N. Y.), 133; King v. Mead, 60 Kan. 539, 57 Pac. 113.

²² Carpenter v. Buller, 8 Mees. & W. 209, 10 L. J. Ex. 393; McFarland v. Goodman, Fed. Cas. No. 8789, 6 Biss. (U. S.) 111; Clafin v. Boston & A. R. Co., 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659. Nor can a deed create an estoppel, unless it has been delivered: Nourse v. Nourse, 116 Mass. 101.

²³ Osgood v. Abbott, 58 Me. 73.

²⁴ Waters' Appeal, 35 Pa. 523, 78 Am. Dec. 354.

²⁵ Rosenthal v. Mounts (Tex. Civ. App.), 130 S. W. 192; Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; 3 Freeman on Executions, § 335.

mount title which he has acquired from another person. Although a grantee cannot dispute his grantor's title at the time of conveyance for the purpose of avoiding payment of the purchase price, and although when two parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title,²⁶ yet one of such parties may secure *title from another source*, and is not estopped to rely on it.²⁷ "A vendee has the right to *fortify his title* by the purchase of any other which may protect him in the quiet enjoyment of his premises."²⁸ So a vendee under a parol contract is entitled to fortify his rights by claiming by adverse possession after payment in full of his purchase money to his vendor. In such case his possession is hostile to any claim of superior title or right by the latter, and although a deed is not executed, the vendee could use his possession, after the statutory period, to defeat the claim of his vendor or anyone else to right of possession because the paper title was vested in them. If the possession is hostile to any claim of right by the former owner, it is adverse to it, and sets the statute running, although the person in possession may be looking to the former owner for his conveyance, and he is not estopped from denying rights created by the vendor by deed.²⁹

§ 283 (285). Qualification as to mere general recitals—Other qualifications of the general rule.—The decisions recognize a distinction between those recitals in a deed which are specific or particular and which must be deemed to have received the deliberate intention of the parties, and those which are general and merely formal. The rule is elsewhere stated that recitals as to consideration, date, quantity and the like do not carry the same conclusive effect as the more specific recitals and statements referred

²⁶ *Martin v. Bentley* (Ky.), 124 S. W. 873.

²⁷ *Robertson v. Pickrell*, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup. Ct. Rep. 407; *Osterhout v. Shoemaker*, 3 Hill (N. Y.), 513.

²⁸ *Osterhout v. Shoemaker*, 3 Hill (N. Y.), 513.

²⁹ *New Domain etc. Co. v. Gaffney Oil Co.*, 134 Ky. 792, 121 S. W. 699; *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453.

to in this discussion. In order to have conclusive effect, recitals should be clear and unambiguous.³⁰ And it has sometimes been said that an estoppel by deed is not created unless there is a distinct and precise admission of a material fact.³¹ General recitals as such, or recitals in the alternative, cannot be relied upon to work an estoppel, chiefly because they cannot be shown as expressive of the intention of the parties that they should be regarded as specific admissions. Particular recitals state some fact definitely, and are conclusive evidence of the material facts stated.³² Thus a recital in a deed that a mortgage is a lien on the land estops the grantee to deny it.³³ The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by recitals, but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance.³⁴ But *general recitals*; if *contractual*

³⁰ Independent School Dist. v. Stone, 106 U. S. 183, 27 L. Ed. 90, 1 Sup. Ct. Rep. 84; Calkins v. Copley, 29 Minn. 471, 13 N. W. 904. See § 468 et seq., *post*.

³¹ Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Thrower v. Wood, 53 Ga. 458; McCorkell v. Herron, 128 Iowa, 324, 111 Am. St. Rep. 201, 103 N. W. 988; Walker v. Sioux City etc. Town Lot Co., 65 Iowa, 563, 22 N. W. 676; Claffin v. Boston etc. R. Co., 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 659; Jackson v. Allen, 120 Mass. 64; Lajoie v. Primm, 3 Mo. 529; Comings v. Wellman, 14 N. H. 287; Reed v. McCourt, 41 N. Y. 435; Brinegar v. Chaffin, 14 N. C. 108, 22 Am. Dec. 711; Muhlenberg v. Druck-

enmiller, 103 Pa. 631; East Tennessee etc. R. Co. v. Nashville etc. R. Co. (Tenn. Ch. App.), 51 S. W. 202; Bartell v. Kelsey (Tex. Civ. App.), 59 S. W. 631; Stillman v. Barney, 4 Vt. 187.

³² Calkins v. Copley, 29 Minn. 471, 13 N. W. 904; Sutton v. Casselleggi, 5 Mo. App. 111; Kellogg v. Dennis, 38 Misc. Rep. 82, 77 N. Y. Supp. 172.

³³ Kennedy v. Brown, 61 Ala. 296; Johnson v. Thompson, 129 Mass. 398; Smith v. Graham, 34 Mich. 302; Parkinson v. Shermon, 74 N. Y. 88, 30 Am. Rep. 268.

³⁴ Northern Nat. Bank v. Trustees of Porter Township, 110 U. S. 608, 28 L. Ed. 258, 4 Sup. Ct. Rep. 254.

in their nature, may also constitute an estoppel. And it is to be determined from the entire agreement whether it was the intention of the parties that the recital should be conclusive in its effect.³⁵ Nor is it essential to the estoppel in all cases that the admission should be made in terms. It is enough if the intention of the parties to place the existence of a fact beyond question or make it the basis of the contract is so clearly expressed as to leave no room for doubt.³⁶ It must always be borne in mind that a recital is a narration of such deeds, agreements or facts as are necessary to explain the grantor's title and the motives and reasons upon which the deed is founded and entered into. The operation of deeds is a question of intention, and will not be carried further than the parties appear from the tenor of the whole instrument to have agreed; and the doctrine of estoppel is no exception to this general principle. Accordingly, the introduction of a statement into a sealed instrument will not render it conclusive, unless there is sufficient reason for believing that such was the design, or some injustice would result from allowing it to be contradicted. And so it has been held that formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was ever deceived or induced to alter his position, are not conclusive. And as estoppels are founded on intention, they will be limited by it, and will not extend to objects that the parties cannot reasonably be supposed to have had in view.³⁷ It is another familiar limitation that, when the *truth appears on the face of the instrument*, there is no estoppel. The whole instrument is to be construed together and, if a recital in one part is contradicted or quali-

³⁵ Bower v. McCormick, 23 Gratt. (Va.) 310; Southeastern Ry. Co. v. Warton, 6 Hurl. & N. 520, 31 L. J. Ex. 515; Carpenter v. Buller, 8 Mees. & W. 209, 10 L. J. Ex. 393; Stroughill v. Buck, 14 Q. B. 781, 117 Eng. Reprint, 301; Young v. Raincock, 7 Com. B. 310, 18 L. J. C. P. 193, 13

Jur. 539; Blackhall v. Gibson, 2 L. R. Ir. 49.

³⁶ Billingsley v. State, 14 Md. 369; Farrar v. Christy, 24 Mo. 453; Holt v. Ruleau, 83 Vt. 151, 21 Ann. Cas. 1059, 74 Atl. 1005.

³⁷ McCullough v. Dashiell, 78 Va. 634.

fied by a recital in another part, there is estoppel against estoppel, which leaves the matter open to proof.³⁸ Other qualifications are that the deed *must be delivered*;³⁹ that it must be a valid instrument,⁴⁰ and not in violation of

38 *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Wheelock v. Henshaw*, 19 Pick. (Mass.) 341; *Carpenter v. Thompson*, 3 N. H. 204, 14 Am. Dec. 348; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Langley v. Kesler*, 57 Or. 281, 110 Pac. 401, 111 Pac. 246; *Frick v. Fiscus*, 164 Pa. 623, 30 Atl. 515; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *Pargeter v. Harris*, 7 Q. B. 708, 115 Eng. Reprint, 656; *Cuthbertson v. Irving*, 4 Hurl. & N. 742, 28 L. J. Ex. 306. See, also, *Bigelow on Estoppel*, 5th ed., 361, 362.

39 But it does not lie in the mouth of the grantee who has accepted the deed to impeach it for nondelivery: *Clark v. Bird* 158 Ala. 278, 132 Am. St. Rep. 25, 48 South. 359; *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 South. 212; *Josey (Kendall) v. Davis* (Ark.), 18 S. W. 185; *Tewksbury v. O'Connell*, 21 Cal. 60; *Winsted Sav. Bank etc. Assn. v. Spencer*, 26 Conn. 195; *Van Dyke v. Van Dyke*, 118 Ga. 830, 47 S. E. 192; *Dougherty County v. Tift*, 75 Ga. 815; *St. Louis etc. R. Co. v. Belleville*, 122 Ill. 376, 12 N. E. 680; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393; *Mosier v. Allenbaugh* (Carter v. Mosier), 84 Kan. 361, 35 L. R. A., N. S., 1182, 114 Pac. 226; *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428; *Kercheval v. Triplett*, 1 A. K. Marsh. (Ky.) 493; *Levy v. Wise*, 15 La. Ann. 38; *Monson v. Tripp*, 81 Me. 24, 10 Am. St. Rep. 235, 16 Atl. 327; *Tucker v. State*, 11 Md. 322; *Pells v.*

Webquish, 129 Mass. 469; *Nourse v. Nourse*, 116 Mass. 101; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830; *Fairley v. Fairley*, 34 Miss. 18; *Sturgeon v. Hampton*, 88 Mo. 203; *Wooden v. Shotwell*, 24 N. J. L. 789; *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Smith v. Ingram*, 130 N. C. 100, 61 L. R. A. 878, 40 S. E. 984; *Wallace v. Miner*, 6 Ohio, 366; *Wallace v. Minor*, 7 Ohio, 249; *McGeary's Appeal*, 72 Pa. 365; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 28 L. R. A. 42, 19 S. E. 963, 20 S. E. 64; *Hingtgen v. Thackery*, 23 S. D. 329, 121 N. W. 839; *McSpadden v. Starrs Mountain Iron Co.* (Tenn. Ch. App.), 42 S. W. 497; *Breen v. Morehead* (Tex. Civ. App.), 126 S. W. 650; *Glover v. Thomas*, 75 Tex. 506, 12 S. W. 684; *Hickman v. Stewart*, 69 Tex. 255, 5 S. W. 833; *Cecil v. Early*, 10 Gratt. (Va.) 198; *Calfee v. Burgess*, 3 W. Va. 274; *Noonan v. Ilsley*, 22 Wis. 27; *Smith v. Smith*, 5 Ont. 690.

40 *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Conant v. Newton*, 126 Mass. 105; *Pells v. Webquish*, 129 Mass. 469; *James v. Wilder*, 25 Minn. 305; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830; *Shevlin v. Whelen*, 41 Wis. 88; *Fairtitle v. Gilbert*, 2 Term Rep. 169, 100 Eng. Reprint, 91. There are instructive cases of deeds falling short of the entire grant as intended, but containing warranties which operate as estoppels to avoid circuitry of action. In *Shaw v. Galbraith*, 7 Pa. 111, we find: "By

statute;⁴¹ but if the deed has been procured by fraud, its validity is open to question.⁴² And if the recital has been inserted by fraud, the grantee is not concluded by it. A clause in a deed of real property by which the grantee is made to assume and agree to pay a mortgage indebtedness existing against the land, and subject to which the conveyance is made, inserted therein by the fraud of the grantor, is not binding upon the grantee.⁴³ It is another qualification that "in order to work an estoppel the *parties to the deed must be sui juris*, competent to make it effectual as a

the *habendum*, in consequence of the omission of the word 'heirs,' a life estate only is conveyed to the grantee; but the deed contains a special warranty, whereby the estate is warranted to the *grantee, his heirs* and assigns, against the claim of the grantor and his heirs, and every person claiming lawfully the same. Now, although a warranty, in favor of the heirs, may not enlarge the estate, yet it would be against every principle of construction to reject it as surplusage. . . . The question then is, whether, to prevent circuitry of action, the defendants may not plead an equitable rebuttal, or estoppel, as against the grantor and those claiming under him. Circuitry of action, as my Lord Coke says, Co. Litt. 265a, is not favored in law. The principle is founded on this consideration, that it would be against equity to allow the grantor to recover the land, thereby breaking his covenant and exposing himself to an action to recover its value." The principle is recognized in several analogous cases: *Jackson v. Wright*, 14 Johns. (N. Y.) 193; *Jackson v. Bradford*, 4 Wend. (N. Y.) 622; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507, 7 Am.

Dec. 654. A covenant of warranty may operate as estoppel by way of rebuttal, where an instrument, void as a conveyance for want of words of grant, contains such covenant, with the names of covenantor and covenantee and a description of the land: *Brown v. Manter*, 21 N. H. 528, 53 Am. Dec. 223.

⁴¹ See cases last cited.

⁴² *Parry v. Parry*, 130 Pa. 94, 13 Atl. 628; *Call v. Shewmaker* (Ky.), 69 S. W. 749.

⁴³ *Cook v. Prindle*, 97 Iowa, 464, 59 Am. St. Rep. 424, 66 N. W. 781; *Demaris v. Rodgers*, 110 Minn. 49, 124 N. W. 457; *Graham v. Olson*, 116 Mo. App. 272, 92 S. W. 728; *Porter v. Nelson*, 4 N. H. 130; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Taylor v. Swafford*, 122 Tenn. 303, 25 L. R. A., N. S., 442, 123 S. W. 350; *Bower v. McCormick*, 23 Gratt. (Va.) 310. As to estoppel from alleging that instrument executed is void, see *Bliss v. Tidrick*, 25 S. D. 533, Ann. Cas. 1912C, 671, 127 N. W. 852. As to cases of honest mistake, see *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072; *Brown v. Cranberry Iron etc. Co.*, 72 Fed. 96, 18 C. C. A. 444.

contract.”⁴⁴ Hence at common law a *married woman* is not estopped by her covenants.⁴⁵ But married women are *sui juris* to the extent of the enlarged capacity to act conferred by statutes; and in those jurisdictions where the statutes have enabled married women to make contracts as though single, there is no reason for the application of the old rule.⁴⁶ The principle that the parties must be *sui juris* applies, of course, to the case of *infants* who are not estopped by recitals in deeds, unless there has been ratification after reaching majority.⁴⁷ So with *licensor* and *licensee*, a license implied from silence or acquiescence with knowledge of the expenditures is not made irrevocable by expenditures made in permanent improvements in reliance thereon, but an express license, under such circumstances, is irrevocable; and we think this is supported by the weight of authority.⁴⁸ “An executed license is treated like a parol agreement in equity; it will not allow the statute

⁴⁴ *Bank of America v. Banks*, 101 U. S. 240, 247, 25 L. Ed. 850.

⁴⁵ *Bank of America v. Banks*, 101 U. S. 240, 25 L. Ed. 850; *Goodenough v. Fellows*, 53 Vt. 102; *Trentman v. Eldridge*, 98 Ind. 525; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Lowell v. Daniels*, 2 Gray (Mass.), 161, 61 Am. Dec. 448; *Wight v. Shaw*, 5 Cush. (Mass.), 56; *Barker v. Circle*, 60 Mo. 258; *Wood v. Terry*, 30 Ark. 385; *Harden v. Darwin*, 77 Ala. 472; *Patterson v. Lawrence*, 90 Ill. 174, 32 Am. Rep. 22; *McLeery v. McLeery*, 65 Me. 172, 20 Am. Rep. 683; *Taylor v. Swafford*, 122 Tenn. 303, 25 L. R. A., N. S., 442, 123 S. W. 350.

⁴⁶ *Knight v. Thayer*, 125 Mass. 25; *Bodine v. Killeen*, 53 N. Y. 93; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362. Married women, like other persons, may be estopped by their deliberate acts on grounds of equitable estoppel: *Norton v. Nichols*,

35 Mich. 148; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362; *Sharpe v. Foy*, 4 Ch. App. 35; *In re Lush's Trusts*, 4 Ch. App. 591. Where the covenants of a married woman in a joint mortgage do not operate to bind her personally, or her separate estate, they do not operate to estop her from claiming an interest in the property described in the mortgage, lawfully acquired by her after the date of the mortgage freed from its lien: *Burns v. Cooper*, 140 Fed. 273, 72 C. C. A. 25.

⁴⁷ *Cook v. Toumbs*, 36 Miss. 685; *Houston v. Turk*, 7 Yerg. (Tenn.) 13.

⁴⁸ *Ruthven v. Farmers' Co-operative Creamery Co.*, 140 Iowa, 570, 118 N. W. 915; *Gyra v. Windler*, 40 Colo. 366, 13 Ann. Cas. 841, 91 Pac. 36; *Shaw v. Proffitt*, 57 Or. 192, Ann. Cas. 1913A, 63, 109 Pac. 584, 110 Pac. 1092.

to be used as a cover for fraud; it will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent, when it was given or had the effect to influence the conduct of another and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. The ground of the jurisdiction is to prevent injustice or fraud.”⁴⁹

§ 284 (286). **As between landlord and tenant.**—The estoppel of the parties to a tenancy, and especially that of the tenant, has come to us almost unaltered since its feudal origin, and although the reasons for its adoption have long since ceased, “yet reasons of general policy have caused the rule to be preserved in its original vigor, wherever the relation of landlord and tenant exists by positive contract.”⁵⁰ While the lessor is equally bound with the lessee in the estoppel to the extent of his interest and is estopped from denying that he has a smaller interest than that leased to the tenant, he is not estopped from alleging a greater one.⁵¹ It is a familiar rule in the law of landlord and tenant that one who as tenant has entered into the possession of land under the permission of his landlord cannot in equity and good conscience be heard to prove, while in such possession, that his landlord had no title. Said

⁴⁹ *Curtis v. La Grande etc.* Water Co., 20 Or. 34, 10 L. R. A. 484, 23 Pac. 808, 25 Pac. 378. There is a conflict as to the revocability of such licenses, but the weight of authority is with the text. There are admirable reviews of them in notes to *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, to *Gyra v. Windler*, 40

Colo. 366, 91 Pac. 36, 13 Ann. Cas. 841, and to *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497.

⁵⁰ 1 Greenl. on Ev., § 25; *Vance v. Johnson*, 10 Humph. (Tenn.) 214; *Cravener v. Bowser*, 4 Pa. 259.

⁵¹ *Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793.

Lord Denman: "No general rule, when rightly understood, is more important or more strictly to be observed than that which precludes the tenant from disputing the title of his landlord."⁵² A tenant who is holding over after his term has expired must surrender possession before he can

⁵² As to the general principles, see *Duncan v. Guy*, 159 Ala. 524, 49 South. 229; *Littleton v. Clayton*, 77 Ala. 571; *Mantooth v. Burke*, 35 Ark. 540; *Sawyer v. Sargent*, 2 Cal. Unrep. 480, 7 Pac. 120; *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927; *Eckles v. Booco*, 11 Colo. 522, 19 Pac. 465; *Murphy v. Schwaner*, 84 Conn. 420, 80 Atl. 295; *Holmes v. Kennedy*, 1 Root (Conn.), 77; *Loscolzo v. Eggner*, 7 Penne. (Del.) 260, 78 Atl. 607; *Reed v. Todd*, 1 Harr. (Del.) 138; *Morris v. Wheat*, 11 App. Cas. (D. C.) 201; *Griffing Co. v. Winfield*, 53 Fla. 589, 43 South. 687; *Williams v. Cash*, 27 Ga. 507, 73 Am. Dec. 739; *Patterson v. Patterson*, 251 Ill. 153, 95 N. E. 1051; *Owen v. Brookport*, 208 Ill. 35, 69 N. E. 952; *Turner v. Gilliland*, 4 Ind. Ter. 606, 76 S. W. 253; *Chambers v. Irish*, 132 Iowa, 319, 109 N. W. 787; *Bowdish v. Dubuque*, 38 Iowa, 341; *Millikin v. Lockwood*, 80 Kan. 600, 103 Pac. 124; *Pettigrew v. Mills*, 36 Kan. 745, 14 Pac. 170; *McGuire v. Lovelace* (Ky.), 128 S. W. 309; *Hardwick v. Karn*, 33 Ky. Law Rep. 776, 111 S. W. 293; *Hodges v. Shields*, 18 B. Mon. (Ky.) 828; *Campbell v. Hart*, 118 La. 871, 43 South. 533; *Hanson v. Allen*, 37 La. Ann. 732; *Moshier v. Reding*, 12 Me. 478; *Giles v. Ebsworth*, 10 Md. 33; *Gage v. Campbell*, 131 Mass. 566; *Binney v. Chapman*, 5 Pick. (Mass.) 124; *Nims v. Sherman*, 43 Mich. 45, 4 N. W. 434; *Bertram v. Cook*, 32 Mich. 518; *Frazer v. Robinson*, 42 Miss. 121; *Green v. Missouri Pac. Ry. Co.*, 82 Mo. 653; *Bartlett v. Robinson*, 52 Neb. 715, 72 N. W. 1053; *Mosher v. Cole*,

50 Neb. 636, 70 N. W. 275; *Hatch v. Bullock*, 57 N. H. 15; *Plumer v. Plumer*, 30 N. H. 558; *Zabriskie v. Sullivan*, 80 N. J. L. 673, 77 Atl. 1075; *Betts v. Wurth*, 32 N. J. Eq. 82; *Horner v. Leeds*, 25 N. J. L. 106; *Kibbe v. Crossman*, 139 App. Div. 338, 124 N. Y. Supp. 3; *Van Vleck v. White*, 66 App. Div. 14, 72 N. Y. Supp. 1026; *Territt v. Cowenhoven*, 79 N. Y. 400; *Whalin v. White*, 25 N. Y. 462; *Hamer v. McCall*, 121 N. C. 196, 28 S. E. 297; *Moore v. Beasley*, 3 Ohio, 294; *Pappe v. Trout*, 3 Okl. 260, 41 Pac. 397; *Coquille Mill etc. Co. v. Johnson*, 52 Or. 386, 132 Am. St. Rep. 716, 98 Pac. 132; *Townsend v. Boyd*, 217 Pa. 386, 12 L. R. A., N. S., 1148, 66 Atl. 1099; *Elliott v. Smith*, 23 Pa. 131; *Givens v. Mullinax*, 4 Rich. (S. C.) 590, 55 Am. Dec. 706; *Rogers v. Waller*, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758; *McIntire v. Patton*, 9 Humph. (Tenn.) 447; *King v. Maxey* (Tex. Civ. App.), 28 S. W. 401; *Hulett v. Platt*, 49 Tex. Civ. App. 377, 109 S. W. 207; *Steen v. Wardsworth*, 17 Vt. 297; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802; *Bodkin v. Arnold*, 45 Va. 90, 30 S. E. 154; *Green Bay etc. Canal Co. v. Telulah Paper Co.*, 140 Wis. 417, 122 N. W. 1062; *Ricketson v. Galligan*, 89 Wis. 394, 62 N. W. 87; *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 486; *Walden v. Bodley*, 14 Pet. (U. S.) 156, 10 L. Ed. 398; *Cook v. Whellock*, 24 Q. B. D. 658, 59 L. J. Q. B. 329, 62 L. T., N. S., 675; *Doe v. Barton*, 11 Ad. & E. 307, 113 Eng. Reprint, 432; *Doe v. Smythe*, 4 Maule & S. 347, 105 Eng. Reprint, 862;

deny his landlord's title. And this applies to all tenancies,⁵³ inasmuch as the estoppel rests on the possession and lives with it, and not on the contract creating the tenancy;⁵⁴ that is to say, the moment the tenant takes possession from or under his landlord and becomes a tenant in fact the estoppel is called into being.⁵⁵ The tenant may, however, show that the landlord's title has expired or been conveyed to another or to himself.⁵⁶ And since the estoppel rests on grounds of public policy, it does not apply when its allowance would contravene a public policy expressed in a positive statute.⁵⁷ The tenant is not estopped to deny

Clary v. Lake Superior Corp., 11 Ont. W. R. 381; White v. Nelles, 11 Can. Sup. Ct. 587.

⁵³ Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646; McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729.

⁵⁴ Hussman v. Wilke, 50 Cal. 250.

⁵⁵ Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Cody v. Quarterman, 12 Ga. 386; Reese v. Caffee, 133 Ind. 14, 32 N. E. 720; Newman v. Mackin, 13 Smedes & M. (Miss.) 383; Davis v. Delaware etc. Canal Co., 109 N. Y. 47, 4 Am. St. Rep. 418, 15 N. E. 873; Ragers v. Stevenson (Tex. Civ. App.), 117 S. W. 472.

⁵⁶ Farris v. Houston, 74 Ala. 162; Otis v. McMillan, 70 Ala. 46; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Lawrence v. Webster, 44 Cal. 385; Rodgers v. Palmer, 33 Conn. 155; Winn v. Strickland, 34 Fla. 610, 16 South. 606; Raines v. Hindman, 136 Ga. 450, Ann. Cas. 1912C, 347, 38 L. R. A., N. S., 863, 71 S. E. 738; Worthy v. Tate, 44 Ga. 152; Doty v. Burdick, 83 Ill. 473; Kinney v. Doe, 8 Blackf. (Ind.) 350; Stout v. Merrill, 35 Iowa, 47; Fry v. Boman, 67 Kan. 531, 73 Pac. 61; Casey v. Gregory, 13 B. Mon. (Ky.), 505, 56 Am. Dec. 591; Gregory v. Crab, 2 B. Mon. (Ky.) 234; Ryder v. Mansell, 66 Me. 167; Presstman v. Silljacks, 52 Md. 647; Chamberlain v. Perry, 138 Mass.

546; Sherman v. Fisher, 138 Mich. 391, 101 N. W. 572; Snyder v. Hemmingway, 47 Mich. 549, 11 N. W. 381; Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. 1039; Brown v. Board of Supervisors, 54 Miss. 230; Dale v. Parker, 143 Mo. App. 492, 128 S. W. 510; Robinson v. Troup Min. Co., 55 Mo. App. 662; Higgins v. Turner, 61 Mo. 249; Russell v. Allard, 18 N. H. 222; Horner v. Leeds, 25 N. J. L. 106; Kibbe v. Crossman, 139 App. Div. 338, 124 N. Y. Supp. 3; Barson v. Mulligan, 198 N. Y. 23, 90 N. E. 1127; Bigler v. Furman, 58 Barb. (N. Y.) 545; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Murrell v. Roberts, 11 Ired. (33 N. C.) 424, 53 Am. Dec. 419; Devacht v. Newsam, 3 Ohio, 57; Welch v. Johnson, 27 Okl. 518, 112 Pac. 989; Indian Land & T. Co. v. Clement, 22 Okl. 40, 109 Pac. 1089; Harvey v. Harvey, 26 S. C. 608, 2 S. E. 3; Bowser v. Bowser, 10 Humph. (Tenn.) 49; Franklin v. Hurlbert, 1 Tex. App. Civ. Cas., § 816; Chase v. Dearborn, 21 Wis. 57; Hopcraft v. Keys, 9 Bing. 613, 131 Eng. Reprint, 744; Downs v. Cooper, 2 Q. B. 256, 1 G. & D. 573, 6 Jur. 622, 11 L. J. Q. B. 2, 114 Eng. Reprint, 100; Thatcher v. Bowman, 18 Ont. 265. See note to Smith v. Newman, 53 L. R. A. 934.

⁵⁷ Smythe v. Henry, 41 Fed. 705.

a claim for rent, when he has been ousted or evicted by *title paramount*,⁵⁸ or when the *lease* was in fact *void*, and the relation of landlord and tenant never in fact existed.⁵⁹ That is the position which is always to be ascertained. The point to be sought in such cases is, has the relation of landlord and tenant been created. For example, a tenant may be in possession under a void lease, but so long as he is not disturbed in his possession what cause for complaint can he legally raise, assuming always no fraud is alleged? In such case he, at all events, is estopped from denying that he went into possession recognizing his landlord, irrespective of the lease.⁶⁰ Where a lease is void, under the statute of frauds, but the tenant takes possession of the property leased and occupies and enjoys the benefits thereof under such void lease, he must pay the

⁵⁸ *Farris v. Houston*, 74 Ala. 162; *Tewksbury v. Magraff*, 33 Cal. 237; *Camp v. Scott*, 47 Conn. 366; *Wilborn v. Whitfield*, 44 Ga. 51; *Doty v. Burdick*, 83 Ill. 473; *Stout v. Merrill*, 35 Iowa, 47; *Foster v. Morris*, 3 A. K. Marsh. (Ky.) 609, 13 Am. Dec. 205; *Sneed v. Jenkins*, 8 Ired. (30 N. C.) 27; *Pendleton v. Dyett*, 4 Cow. (N. Y.) 581; *Hunt v. Cope*, 1 Cowp. 242, 98 Eng. Reprint, 1065.

⁵⁹ *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Keller v. Klopfer*, 3 Colo. 132; *Tribble v. Anderson*, 63 Ga. 31; *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800; *Andrews v. Woodcock*, 14 Iowa, 397; *Dyer v. Curtis*, 72 Me. 181; *Holmes v. Turner's Falls Co.*, 142 Mass. 590, 8 N. E. 646; *Bain v. Matteson*, 54 N. Y. 663; *Weaver v. Sturtevant*, 12 R. I. 537; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463; *Furlong v. Garrett*, 44 Wis. 111; *Hughes v. Clarksville*, 6 Pet. (U. S.) 369, 3 L. Ed. 430. There are several cases noted apparently in conflict with the text, but examination will reveal they need not be so considered. They are cited for reference: *Sharpe v. Kel-*

ley, 5 Denio (N. Y.), 431; *Henley v. Branch Bank*, 16 Ala. 552; *Norton v. Sanders*, 1 Dana (Ky.), 14; *Drane v. Gregory*, 3 B. Mon. (Ky.) 619; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

⁶⁰ *Emrich v. Union Stock Yard Co.*, 86 Md. 482, 38 Atl. 943; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787 (lease executed and possession given on Sunday); *Crawford v. Jones*, 54 Ala. 459; *Jaspar Township v. Martin*, 161 Mich. 336, 137 Am. St. Rep. 508, 126 N. W. 437; *Little v. Martin*, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; *King v. Murray*, 28 N. C. 62; *Dobbs v. Atlas Elevator Co.*, 25 S. D. 177, 126 N. W. 250. The following cases have sometimes inaccurately been cited as in conflict with the rule as to estoppel under void leases: *Chicago etc. R. Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33; *Schenck v. Stumpf*, 6 Mo. App. 381. In these cases, however, there was no proof of possession; hence no estoppel. In *Crockett v. Althouse*, 35 Mo. App. 404, the lease had been "fraudulently put upon" the lessees.

rent under the terms and conditions of the void contract. Having received the benefits under such void contract, he will be estopped from asserting the invalidity thereof, and its stipulations concerning rent govern the parties so long as possession is retained. While the rule may not be logical, it is the rule established by the authorities.⁶¹ In a recent Michigan case,⁶² when the lessee sought to set up adverse possession grounded on a void lease given forty years previously, of which the lessee was ignorant until it discovered the lease among some old papers, the court summarily dismissed the claim, saying, "It was a void lease, but there was recognition of the lessor's superior title by the agreement to pay rent. Defendant is estopped from saying it did not agree to pay such rent. Such holding cannot ripen into a hostile holding. It entered as a tenant, and not as owner." We have excepted from consideration those leases void as being contrary to public policy, in which case of course there is no estoppel. A lease of premises for the purpose of prostitution or for any other immoral object is a contract against good morals and absolutely void, and the same is true of leases that contemplate the doing of an act in violation of law and the settled public policy of the country.⁶³ The tenant may also show *fraudulent representations*,⁶⁴ *duress* practiced by the land-

⁶¹ Marr v. Ray, 151 Ill. 340, 26 L. R. A. 779, 37 N. E. 1029; Taylor, Landlord & Tenant, § 80; Evans v. Winona Lumber Co., 30 Minn. 515, 16 N. W. 404; Brahn v. Jersey City Forge Co., 38 N. J. L. 74.

⁶² Jasper Township v. Martin, *supra*.

⁶³ Dupas v. Wassell, Fed. Cas. No. 4182, 1 Dill. 213; Taylor, Landlord & Tenant, § 511; Welder v. McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

⁶⁴ Strauss v. Harrison, 79 Ala. 324; Peralta v. Ginochio, 47 Cal. 459; Tison v. Yawn, 15 Ga. 491, 60 Am. Dec. 708; Carter v. Marshall, 72 Ill.

609; Harvin v. Blackman, 108 La. 426, 32 South. 452; Suddarth v. Robertson, 118 Mo. 286, 23 S. W. 151; Jackson v. Cuerden, 2 Johns. Cas. (N. Y.) 353; Miller v. McBrier, 14 Serg. & R. (Pa.) 382; Boyer v. Smith, 5 Watts (Pa.), 55; Jenches v. Cook, 9 R. I. 520; Givens v. Mullinax, 4 Rich. (S. C.) 590, 55 Am. Dec. 706; Redmond v. Bowles, 5 Sneed (Tenn.), 547, 73 Am. Dec. 153; Hammons v. McClure, 85 Tenn. 65, 2 S. W. 37; Hammers v. Hanrick, 69 Tex. 412, 7 S. W. 345; Swift v. Dean, 11 Vt. 323, 34 Am. Dec. 693. See note to Camp v. Camp, 13 Am. Dec. 69.

lord,⁶⁵ or *mistake* on the part of the tenant,⁶⁶ but the clear burden of proof is on the tenant primarily to show such fraud or mistake, which must be sufficient in order to have set aside the lease in such a suit.⁶⁷ Payment of rent is evidence of possession by permission and, unless explained, establishes the relation of landlord and tenant.⁶⁸ The estoppel arises not only against the tenant, but against all holding under him or in *privity* with him, and in favor of all persons claiming under the lessor.⁶⁹ It continues *after the lease has expired*; and the tenant cannot deny his landlord's title without surrendering possession to the landlord or attorney, or at least giving notice that he shall claim under another and better title.⁷⁰

⁶⁵ *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Brown v. Dysinger*, 1 Rawle (Pa.), 408; *Hall v. Benner*, 1 Penr. & W. (Pa.) 402, 21 Am. Dec. 394; *Gravenor v. Woodhouse*, 1 Bing. 38, 130 Eng. Reprint, 16. See note to *Camp v. Camp*, 13 Am. Dec. 69.

⁶⁶ *Tewksbury v. Magraff*, 33 Cal. 237; *Wiggin v. Wiggin*, 58 N. H. 235; *Lakin v. Dolly*, 53 Fed. 333. See cases cited in note 64, *supra*.

⁶⁷ *Kinney v. Doe*, 8 Blackf. (Ind.) 350; *Howell v. Ashmore*, 22 N. J. L. 261; *Beatty v. Fishel*, 100 Mass. 448; *People's Loan etc. Assn. v. Whitmore*, 75 Me. 117; *Williams v. Wait*, 2 S. D. 210, 39 Am. St. Rep. 768, 49 N. W. 209.

⁶⁸ *People v. Simpson*, 50 Cal. 304; *Leitch v. Boyington*, 84 Ill. 179; *Rothschild v. Williamson*, 83 Ind. 387; *Jones v. Howard*, 3 Allen (Mass.), 223; *Dunshee v. Grundy*, 15 Gray (Mass.) 314; *Whalin v. White*, 25 N. Y. 462; *McFarlan v. Watson*, 3 N. Y. 286; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Doe v. Wilkinson*, 3 Barn. & C. 413, 107 Eng. Reprint, 787.

⁶⁹ *Bishop v. Lalouette*, 67 Ala. 197; *Earle v. Hale*, 31 Ark. 470; *Standley v. Stephens*, 66 Cal. 541, 6 Pac. 420;

White v. Barlow, 72 Ga. 887; *Hardin v. Jones*, 86 Ill. 313; *Worthington v. Lee*, 61 Md. 530; *Page v. McGlinch*, 63 Me. 472; *Coburn v. Palmer*, 8 Cush. (Mass.) 124; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; *Bannon v. Brandon*, 34 Pa. 263, 75 Am. Dec. 655; *Doak v. Donelson*, 2 Yerg. (Tenn.) 249, 24 Am. Dec. 485; *Emerick v. Travener*, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; *Willison v. Watkins*, 3 Pet. (U. S.) 43, 7 L. Ed. 596.

⁷⁰ *Miller v. Lang*, 99 Mass. 13; *Hilbourn v. Fogg*, 99 Mass. 11; *Morse v. Goddard*, 12 Met. (Mass.) 177, 46 Am. Dec. 728; *Boston v. Binney*, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; *Zeller v. Eckert*, 4 How. (U. S.) 290, 11 L. Ed. 979. In *Robinson v. Holt*, 90 Ala. 115, 7 South. 441, there was no notice of claim under another title. The tenant merely "repudiated the relationship." In *Boyer v. Smith*, 3 Watts (Pa.), 449, there was a fraudulent surrender by the tenant, who was properly held estopped.

§ 285 (287). **As between others holding subordinate title—Bailees, etc.**—It will readily be recognized that the application of the doctrine of estoppel is not confined to the cases just enumerated. The principle under discussion not only applies in the case of landlord and tenant, but to those holding a subordinate title and parties to contracts generally. Thus, one who holds land as a *licensee* cannot question the title of him by whose consent he obtained possession;⁷¹ one who manufactures goods by consent of and under agreement with the patentee cannot be allowed to prove the invalidity of the patent.⁷² The United States supreme court in an oft-quoted case said, "Having actually received profits from sales of the patented machine, which profits the defendants do not show have been or are in any way liable to be affected by the invalidity of the patent, its validity is immaterial. Moreover, we think the defendants are estopped from alleging that invalidity. They have made and sold these machines under the complainant's title, and for his account; and they can no more be allowed to deny that title and retain the profits to their own use, than an *agent*, who has collected a debt for his *principal*, can insist on keeping the money, upon an allegation that the debt was not justly due."⁷³ And a licensee in a suit

⁷¹ Glynn v. George, 20 N. H. 114; Towne v. Butterfield, 97 Mass. 105; Wilson v. Maltby, 59 N. Y. 126; Dills v. Hampton, 92 N. C. 565.

⁷² Jackson v. Allen, 120 Mass. 64; Fornerook v. Barnum, 54 Mich. 552, 20 N. W. 582; Marston v. Swett, 82 N. Y. 526; Marsh v. Marris Mfg. Co., 63 Wis. 276, 22 N. W. 516; Jones v. Burnham, 67 Me. 93, 24 Am. Rep. 10; Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. Ed. 385; Eureka Co. v. Bailey Co., 11 Wall. (U. S.) 488, 20 L. Ed. 209; Noton v. Brooks, 7 Hurl. & N. 499, 8 Jur., N. S., 155, 10 W. R. 111; Crossley v. Dixon, 10 H. L. Cas. 293, 11 Eng. Reprint, 1039.

⁷³ Kinsman v. Parkhurst, *supra*. The invalidity of the patent does not

render the sales of the machine illegal, so as to taint with illegality the obligation of the defendants to account. Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him. Thus, where a vessel engaged in an illegal trade carried freight which came into the hands of one of the part owners, and on a bill filed by the other part owner for an account, the defendant relied on the illegality of the trade, it was held to be no defense: Sharp v. Taylor, 2 Phil. Ch. 801. So

for royalties agreed to be paid cannot set up and prove as a defense the invalidity of the patent, assuming there is no outstanding decision against its validity.⁷⁴ A *bailee* intrusted with the care of goods is estopped to claim that the bailor had no title at the time of the bailment,⁷⁵ or to set up the title of a third person, unless the bailment is determined by what is equivalent to an eviction by title paramount.⁷⁶ But while the *bailee* cannot avail himself of the

in *Tenant v. Elliott*, 1 B. & P. 3, 4 R. R. 526, the defendant, an insurance broker, having effected an illegal insurance for the plaintiff, and received the amount of a loss, endeavored to defend against the claim of his principal by showing the illegality of the insurance, but the plaintiff recovered. See, also, *McBlair v. Gibbes*, 17 How. (59 U. S.) 232, 15 L. Ed. 132.

⁷⁴ *United States v. Harvey Steel Co.*, 196 U. S. 310, 49 L. Ed. 492, 25 Sup. Ct. Rep. 240; *Kinsman et al. v. Parkhurst*, 18 How. (U. S.) 289, 293, 15 L. Ed. 385; *Eureka Company v. Bailey Company*, 11 Wall. (U. S.) 488, 20 L. Ed. 209; *Victor Talking Mach. Co. v. American Graphophone Co.*, 189 Fed. 359.

⁷⁵ *Estes v. Boothe*, 20 Ark. 583; *Bondy v. American Transfer Co.*, 15 Cal. App. 746, 115 Pac. 965; *Wetherly v. Strauss*, 93 Cal. 283, 28 Pac. 1045; *Jensen v. Eagle Ore Co.*, 47 Colo. 306, 19 Ann. Cas. 519, 33 L. R. A., N. S., 681, 107 Pac. 259; *Moses v. Taylor*, 6 Mackey (D. C.), 255; *Davis v. Williams*, 8 Ga. App. 86, 68 S. E. 558; *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Reed v. Reed*, 13 Iowa, 5; *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47; *Stephens v. Vaughan*, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216; *Roberts v. Noyes*, 76 Me. 590; *Casey v. Suter*, 36 Md. 1; *Osgood v. Nichols*, 5 Gray

(Mass.), 420; *Sinclair v. Murphy*, 14 Mich. 392; *Oehmen v. Portman*, 153 Mo. App. 240, 133 S. W. 104; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Hendricks v. Mount*, 5 N. J. L. 864, 8 Am. Dec. 623; *Mulins v. Chickering*, 110 N. Y. 513, 1 L. R. A. 463, 18 N. E. 377, 18 N. Y. St. 606; *Lain v. Gaither*, 72 N. C. 234; *McCafferty v. Brady* (Pa.), 9 Atl. 37; *Manning v. Norwood*, 2 Mill. Const. (S. C.) 374; *Moore v. Aldrich*, 25 Tex. Supp. 276; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Kelly v. Patchell*, 5 W. Va. 585; *Nudd v. Montanye*, 38 Wis. 511, 20 Am. Rep. 25; *Hentz v. The Steamship Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Wilson v. Anderton*, 1 Barn. & Ad. 450, 9 L. J. K. B. 48, 20 Eng. Com. L. 555, 109 Eng. Reprint, 855.

⁷⁶ *Riddle v. Blair*, 163 Ala. 314, 5 South. 14; *Jensen v. Eagle Ore Co.*, 47 Colo. 306, 19 Ann. Cas. 519, 33 L. R. A., N. S., 681, 107 Pac. 259; *Barker v. S. A. Lewis Storage etc. Co.*, 79 Conn. 342, 118 Am. St. Rep. 141, 65 Atl. 143; *Seneca Board of Supervisors v. Allen*, 99 N. Y. 532, 2 N. E. 459; *Pulliam v. Burlingame*, 81 Mo. 11, 51 Am. Rep. 229; *Moses v. Taylor*, 6 Mackey (D. C.), 255; *Dougherty v. Chapman*, 29 Mo. App. 233; *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Pitt v. Albritton*, 34 N. C. 74; *Kelly v. Pat-*

title of a third person, though that third person be the true owner, for the purpose of keeping the property for himself, yet he may show as a defense against the bailor that he *has actually delivered* the property to the true owner, who had the right to possession upon demand by the latter, even before legal proceedings have been commenced.^{76a} Such demand by the true owner is equivalent to eviction by title paramount. Stephen thus states somewhat differently the general rule: "No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were intrusted to any of them respectively was entitled to those goods at the time when they were so intrusted. Provided that any such bailee, agent, or licensee, may show, that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee."⁷⁷ But if the bailment is accepted with knowledge that another than the bailor claims the subject matter of it, the bailee cannot set up the claim of such third person against the bailor.⁷⁸ As to estoppel under contract to pur-

chell, 5 W. Va. 585; *Hentz v. The Steamship Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Cheesman v. Exall*, 6 Ex. 341, 20 L. J. Ex. 209; *Shelsbury v. Scotsford*, 1 Yelv. 23; *Biddle v. Bond*, 34 L. J. Q. B. 137, 6 B. & S. 225, 11 Jur., N. S., 425; *Betteley v. Reed*, 4 Q. B. 511.

^{76a} *Hentz v. The Steamship Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Western Transp. Co. v. Barber*, 56 N. Y. 544.

⁷⁷ *Reynolds' Steph. Ev.*, art. 105; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *King v. Richards*, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; *Hentz v. The Steamship Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Crossley v. Dixon*, 10 H. L. Cas. 293, 11

Eng. Reprint, 1039; *Gosling v. Birnie*, 7 Bing. 339, 131 Eng. Reprint, 131; *Biddle v. Bond*, 34 L. J. Q. B. 137, 6 B. & S. 225, 11 Jur., N. S., 425; *Wilson v. Anderton*, 1 Barn. & Ad. 450, 109 Eng. Reprint, 855.

⁷⁸ *Ex parte Davies*, 19 Ch. D. 86. In this case, *Jessel, M. R.*, said: "There are, no doubt, cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount, and, if there has been no fault on the part of the bailee, it has been held that this a good excuse to him as against his bailor. An illustration of this is the old case of *Shelbury v. Scotsford*, Yelv. 23, 80 Eng. Reprint, 17,

chase, Bigelow⁷⁹ says that the relation which the purchaser of land not fully paid for, or bought subject to condition, bears to the vendor is held to be the same in effect in equity as that between landlord and tenant so far as the doctrine of estoppel is concerned;⁸⁰ and that until the grantee has paid for the land, he holds in respect of the *payment* a relation of duty to the grantor similar to that of a tenant to his landlord.⁸¹ The same learned author collects the authorities for the proposition that "the relation of landlord and tenant is also virtually created, so far as the question of estoppel is concerned, where a party enters into possession of land under a contract to purchase it; and such a person, until ousted or disturbed in possession by one having a paramount title, will not be permitted in an action for possession by the party under whom he entered to set up a title inconsistent with his."⁸²

in which a stolen horse had been bailed by the thief and had been forcibly taken away from the bailee by the rightful owner, and it was held that the thief could not maintain an action of trover for the value of the horse against the bailee, on the ground that the eviction of the horse out of his possession was a discharge in law of his promise to return it to his bailor. But, in order that the bailee may be able to avail himself of such a defence, he must himself have been in no default. If the bailee, knowing of the adverse claim, has said to his bailor, 'I will sell the horse for you if you will let me have a commission, and I will hand over the proceeds to you,' he could not have afterward set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open"; and Lush, L. J., added: "I am of opinion that when a person in such a position, knowing of two adverse claims to goods elects to take the

part of one of the claimants and to sell the goods as his, he is estopped from afterward denying that claimant's title. If he had not taken this course he would have been entitled to show that there was a better title in the bill of sale holder; there might have been what is called an eviction of the trustee by title paramount."

⁷⁹ Bigelow on Estoppel, 5th ed., 545-547.

⁸⁰ Bush v. Marshall, 6 How. (U. S.) 284, 12 L. Ed. 440; Galloway v. Finley, 12 Pet. (U. S.) 264, 9 L. Ed. 1079.

⁸¹ The case cannot be considered as holding that the relation exists beyond the duty to pay the purchase price: Bigelow, quoted in Crumb v. Wright, 97 Mo. 13, 10 S. W. 74.

⁸² Tennessee & C. R. Co. v. East Alabama Ry. Co., 75 Ala. 516, 51 Am. Rep. 475; Fitzgerald v. Spain, 30 Ark. 95; Leshar v. Sherwin, 86 Ill. 420; Pershing v. Canfield, 70 Mo.

§ 286 (288). **Acceptance of bills of exchange.**—The principle of estoppel is frequently applied in the case of the acceptance of bills of exchange. The acceptor by such act admits the genuineness of the signatures of the drawers and the competency of the drawers to assume that responsibility.⁸³ The rule is thus stated by Stephen: "No acceptor of a bill of exchange is permitted to deny the signature of the drawer, or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to indorse the bill, though he may deny the fact of the indorsement, nor, if the bill be drawn by procuration, the authority of the agent by whom it purports to be drawn in the name of the principal, though he may deny his authority to indorse it. If the bill is accepted in blank, the acceptor may not deny the fact that the drawer indorsed it."⁸⁴ But by

140; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117; *Lacy v. Johnson*, 58 Wis. 414, 17 N. W. 246.

⁸³ *First Nat. Bank of Chicago v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247, 26 L. R. A. 289, 38 N. E. 739; *Whitney v. Bunnell*, 8 La. Ann. 429; *Williams v. Drexel*, 14 Md. 566; *Title Guarantee etc. Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305; *National Park Bank v. New York Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *Levy v. United States Bank*, 1 Binn. (Pa.) 27, 4 Dall. (Pa.) 234, 1 L. Ed. 814; *Cowton v. Wickersham*, 54 Pa. 302; *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181, 20 L. Ed. 366; *Phillips v. Im Thurn*, L. R. 1 C. P. 463, 35 L. R. C. P. 220, 14 L. T. 406; *McKenzie v. Fraser*, 2 Rev. Leg. 30. In *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310, the rule was thus stated: "For more than a century it has been held and decided, without question,

that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and, if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid." And, speaking of *Price v. Neal*, 3 Burr. 1354, 97 Eng. Reprint, 871, it was said: "But as applied to the case of a bill to which the signature of the drawer is forged, accepted, or paid, by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterward paid."

⁸⁴ *Reynolds' Steph. Ev.*, art. 104; *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181, 20 L. Ed. 366; *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Garland v. Jacob*,

accepting and paying a bill the drawee is not held to a knowledge of a *want of genuineness* of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder.⁸⁵ Where indorsements are made on a bill before it has left the drawer's hands the acceptor is estopped from denying the genuineness of the indorsement;⁸⁶ and conversely is not so estopped where the indorsements are made after the drawer has parted with the instrument.⁸⁷

§ 287 (289). **Admissions implied by conduct.**—We have already seen that admissions are not limited to any particular form. They may not only be in the form of declarations, verbal or written, but may be implied from the *conduct* or acts of parties as well as from their language. Thus, the payment of interest or a part of a debt is an admission of the debt.⁸⁸ Where a *landlord* stands by without objection and sees a *tenant* make alterations beyond his right, it is an admission that the landlord means to be bound by the tenant's acts;⁸⁹ and if a landlord makes repairs, it is an admission that it is his duty and not that of the tenant.⁹⁰ When an *account is rendered* and no objection is made within a reasonable time, this is an admission *prima facie* by the party charged that the account is correct;⁹¹ but, of course, the presumption of assent may be

L. R. 8 Ex. 216; *Sanderson v. Collman*, 4 Man. & G. 209, 4 Scott (N. R.) 638; *Robinson v. Yarrow*, 7 Taunt. 445, 1 Moore, 150, 18 R. R. 537.

⁸⁵ *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604, 21 L. Ed. 947; *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181, 192, 20 L. Ed. 366. See, also, *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610.

⁸⁶ *Hortsman v. Henshaw*, 11 How. (U. S.) 177, 13 L. Ed. 653; *Coggill v. American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310, 4 How. Pr. 183.

⁸⁷ *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287. See generally on this subject the interesting cases collected in Bigelow, 5th ed., c. 16.

⁸⁸ *Washer v. White*, 16 Ind. 136. In general, see § 275, *ante*. The following Canadian cases are illustrative: *Doull v. Keefe*, 34 N. S. R. 15; *Brown v. Cockburn*, 37 U. C. R. 592; *Allan v. Rowe*, 1 Eq. 41; *Moody v. Jones*, 19 S. C. R. 266.

⁸⁹ *Doe v. Pye*, 1 Esp. 366.

⁹⁰ *Readman v. Conway*, 126 Mass. 374.

⁹¹ *Willis v. Jernegan*, 2 Atk. 252, 26 Eng. Reprint, 555; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569;

rebutted.⁹² *Assuming to act as an officer* is an admission by the person so acting that he is such officer, and that he is subject to the liabilities incident to the office.⁹³ "So where one has recognized the official character of another by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party thus recognizing it."⁹⁴ Where a party omits to assert a claim to a sum of money when all his demands are submitted to an arbitrator, such conduct is construed as an admission against him when he subsequently asserts a claim to the same money.⁹⁵ Where the party claimed certain property, the property tax list made out and sworn to by him omitting such property was competent as an admission inconsistent with his claim.⁹⁶ Settlement of an account for maintaining a pauper has been construed as an admission of the liability of the settler and a recognition that such pauper's maintenance belonged as of duty to the settler.⁹⁷ Where a party accepts the benefits of an agreement without protest or intimation that he would not be bound thereby, his act estops him from afterward changing his position.⁹⁸ Where a judgment creditor executes a satisfaction piece and in consequence thereof the debtor abandons an appeal against the judgment, the creditor is estopped from proceeding when he discovers the release to be void; but if it be shown the satisfaction piece was improperly procured, the doctrine of estoppel would not

Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 885; Guernsey v. Rexford, 63 N. Y. 631.

⁹² Guernsey v. Rexford, 63 N. Y. 631.

⁹³ Trowbridge v. Baker, 1 Cow. (N. Y.) 251 (action against a toll-gatherer); Rex v. Borrett, 6 Car. & P. 124 (criminal action against a letter-carrier); Lister v. Priestly, Wightw. 67 (action against a collector of taxes).

⁹⁴ 1 Greenl. Ev., § 195, and cases cited; Peacock v. Harris, 10 East,

104, 103 Eng. Reprint, 715; Radford v. McIntosh, 3 Term Rep. 632, 100 Eng. Reprint, 773; Pritchard v. Walker, 3 Car. & P. 212; Dickinson v. Coward, 1 Barn. & Ald. 677, 106 Eng. Reprint, 249.

⁹⁵ Moore v. Dunn, 42 N. H. 471.

⁹⁶ Lefever v. Johnson, 79 Ind. 554.

⁹⁷ Town of Sharon v. Town of Salisbury, 29 Conn. 113.

⁹⁸ Wright v. Lieth, 146 Iowa, 290, 125 N. W. 220; Sioux City v. Chicago etc. Ry. Co., 129 Iowa, 694, 113 Am. St. Rep. 500, 106 N. W. 183.

apply.⁹⁹ Where a defendant gives a statement of particulars to a plaintiff under an order of court and plaintiff relies on them, the defendant is estopped from denying their accuracy.¹⁰⁰ When a property was yielded to an administrator in his representative capacity by a relative of his decedent as belonging to the estate and dealt with by him accordingly, the relative is estopped from afterward asserting a personal claim to such property.¹ The failure of an honest grantee to place his deed of record is sometimes held to operate as an estoppel upon the grantee in favor of the creditors of the grantor. In such cases the estoppel is founded upon the negligent conduct of the grantee, which is held to constitute a constructive fraud upon the creditors of the grantor. But the doctrine of constructive fraud, as applied to the case of the merely negligent failure of a grantee to record his conveyance, does not render the deed itself void, but only estops the grantee from claiming his rights under the deed, to the prejudice of the creditors of the grantor.² A very strong case comes from Utah.³ A husband and wife were, as they thought, divorced. The wife married again. The first husband continued to live in the same town as a single man and disposed of his property *bona fide* as such. A few months before her first husband's death, the woman learned she was not legally divorced from him, but she continued with the second husband and joined in his conveyances as his wife. She claimed her dower out of the first husband's estate as against innocent purchasers for value and was held estopped by her conduct. It is an established rule in California that when one lays out a tract of land into lots and streets, and sells the lots by reference to a

⁹⁹ Hunter v. Wabash Ry. Co., 149 Mo. App. 243, 130 S. W. 103.

¹⁰⁰ Mudgett v. Grand Trunk Ry. of Canada, 65 Misc. Rep. 304, 119 N. Y. Supp. 843. This is, however, as much in the nature of a judicial admission as an admission by conduct.

¹ Mayer v. McCracken, 245 Ill. 551, 92 N. E. 355.

² Smith v. Cleaver, 25 S. D. 351, 126 N. W. 589.

³ Hilton v. Sloan, 37 Utah, 359, 108 Pac. 689, in which the opinion of Frick, J., is a monument of industry and sound law.

map which exhibits them as they lie with relation to each other, the purchasers have a private easement, not only in the streets and ways abutting on their lots and leading therefrom to some public place or highway, but also in the streets and ways leading therefrom to other lots, and this private easement in such streets or ways, is entirely independent of any dedication thereof to public use, but constitutes a private appurtenance to the lots so sold, of which the owner cannot be deprived except by due process of law.⁴ Where a stockholder, having bought property on his own credit for a corporation, deceitfully caused the creditor to assign his debt, and for his own protection procured the assignee to sue the corporation and obtain judgment, he was himself estopped when he was sued by the creditor from urging that the creditor was estopped by the judgment. He was estopped to allege estoppel.⁵ Any indications which show or tend to show a *consciousness of guilt* by a person suspected or charged with crime or wrongdoing, who may after such indications be suspected or charged, are admissible evidence against him. Thus *flight*, living under an *assumed name*, attempt to *escape*, *resistance to arrest*, *concealment*, *failure to appear for trial* when under bonds, are all facts which may tend to show consciousness of guilt and are in common practice received in evidence as relevant.⁶ In like manner the *demeanor* of

⁴ Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87.

⁵ Kamm v. Rees, 177 Fed. 14, 100 C. C. A. 432.

⁶ As to *flight*: Rex v. Hazy, 2 Car. & P. 458; Allen v. United States, 164 U. S. 492, 41 L. Ed. 528, 17 Sup. Ct. Rep. 154; Basham v. Commonwealth, 87 Ky. 440, 9 S. W. 284; State v. Lyons, 7 Idaho, 530, 64 Pac. 236; State v. Seymour, 94 Iowa, 699, 63 N. W. 661; Baker v. Commonwealth (Ky.), 17 S. W. 625; State v. (Kent) Pancoast, 5 N. D. 516, 35 L. R. A. 518, 67 N. W. 1052; State v. Baptiste, 105 La. 661, 30 South. 147; living

under an *assumed name*: People v. Winthrop, 118 Cal. 85, 50 Pac. 390; Jackson v. State, 106 Ala. 12, 17 South. 333; Barron v. People, 73 Ill. 256; State v. Stewart, 65 Kan. 371, 69 Pac. 335; *attempt to escape*: Clark v. Commonwealth (Ky.), 32 S. W. 131; Fanning v. State, 14 Mo. 386; Anderson v. Commonwealth, 100 Va. 860, 42 S. E. 865; *resistance to arrest*: People v. Flannelly, 128 Cal. 83, 60 Pac. 670; Carr v. State, 45 Fla. 11, 34 South. 892; Anderson v. State, 147 Ind. 445, 46 N. E. 901; Probasco v. Cook, 39 Mich. 714; *concealment*: Flanagan v. State, 25 Ark.

a party at the trial tending to show consciousness of wrongdoing, *false* or deceptive explanation, and *suborning, fabricating, or suppressing* testimony, may be shown.⁷ It is even held that the refusal to submit to a superstitious test, as placing the hand upon the body of the murdered man, may be proved.⁸ Of course, the weight of the testimony of the character mentioned in this section must depend upon all the circumstances of the case, and it is always open to explanations. It frequently happens that as part of the *res gestae*, conduct of a party indicating *consciousness of innocence* will be relevant; and even when not part of the *res gestae* such testimony has in a few instances been received, but often it is rejected.⁹

92; Commonwealth v. Tolliver, 119 Mass. 312; People v. Pitcher, 15 Mich. 397; *failure to appear for trial*: Barton v. State, 154 Ind. 670, 57 N. E. 515; Saylor v. Commonwealth (Ky.), 57 S. W. 614; Barron v. People, 73 Ill. 256. *Failure of accused to attempt escape*: See note to Lingerfelt v. State, 5 Ann. Cas. 311, and note 9, *post*.

⁷ As to *demeanor*: Boykin v. People, 22 Colo. 496, 45 Pac. 419; but in Purdy v. People, 140 Ill. 46, 29 N. E. 700, this was limited to his demeanor on the witness-stand; *falsehood*: Jones v. State, 59 Ark. 417, 27 S. W. 601; Commonwealth v. Devaney, 182 Mass. 33, 64 N. E. 402; State v. Furgerson, 162 Mo. 668, 63 S. W. 101; Coleman v. People, 58 N. Y. 555; *subornation*: Egan v. Bowker, 5 Allen (Mass.), 449; McHugh v. McHugh, 186 Pa. 197, 65 Am. St. Rep. 849, 41 L. R. A. 805, 40 Atl. 410; United States Brewing Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799; *fabrication or suppression of testimony*: People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; State v. Hogan, 67

Conn. 581, 35 Atl. 508; Keesier v. State, 154 Ind. 242, 56 N. E. 232; Adams v. Swift, 172 Mass. 521, 52 N. E. 1068; State v. Rozum, 8 N. D. 548, 80 N. W. 477; Snell v. Bray, 56 Wis. 156, 14 N. W. 14. See § 17, *ante*.

⁸ State v. Wisdom, 119 Mo. 539, 24 S. W. 1047.

⁹ Evidence of *voluntary surrender* or refusal to escape, *admitted*: White v. State, 111 Ala. 92, 21 South. 330; Boston v. State, 94 Ga. 590, 21 S. E. 603; *rejected*: Dorsey v. State, 110 Ala. 38, 20 South. 450; Vaughn v. State, 130 Ala. 18, 30 South. 669; People v. Shaw, 111 Cal. 171, 43 Pac. 593; Kennedy v. State, 101 Ga. 559, 28 S. E. 979; State v. McLaughlin, 149 Mo. 19, 50 S. W. 315; State v. Wilcox, 132 N. C. 1120, 44 S. E. 625; State v. Bickle, 53 W. Va. 597, 45 S. E. 917. The question of how the testimony was obtained does not affect its admissibility, except, of course, in cases of duress, etc. See excellent note on this subject to State v. Turner, 136 Am. St. Rep. 135.

§ 288 (290). Same—Repairing defective machinery or highways.—The question naturally arises, as to what the person charged with the responsibility of property is to do with such property after an accident upon it on which an action of negligence may be based. Is he to leave it in the same condition as when the injury was occasioned or is he to repair or renew it? It surely admits of no argument. Take a familiar case,—the breaking of the planking of a wooden platform. Is the party to leave the broken plank by reason of the possible suggestion that his repairing it will create a presumption of prior negligence? Is he to run the risk of a subsequent action for negligence by reason of leaving the defect so known to him? Nevertheless, the attempt has often been made to draw an inference of prior negligence from the fact that, since the act complained of, the defendant has repaired the alleged defect or adopted some new precaution.¹⁰ A few exceptional cases under peculiar circumstances admit such evidence, but the great weight of authority holds that it is incompetent. In some instances evidence of this character has been rejected on the ground that persons making the change were not shown to have authority to make admissions for or to charge the defendant by such acts.¹¹ But evidence of this character is clearly open to a much more serious objection, as was

¹⁰ *Pennsylvania Ry. Co. v. Henderson*, 51 Pa. 315; *McKee v. Bidwell*, 74 Pa. 218; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Kansas Pac. Ry. Co. v. Miller*, 2 Colo. 442; *Hemmi v. Chicago etc. Ry. Co.*, 102 Iowa, 25, 70 N. W. 746. These cases have all been practically overruled by later decisions. On the general subject of this section see notes to *St. Louis etc. Ry. Co. v. Weaver*, 57 Am. Rep. 183–187, and *Terre Haute etc. R. Co. v. Clem*, 18

Am. St. Rep. 307–310. See, also, § 163 et seq., *ante*.

¹¹ *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423; *Terre Haute Ry. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303, 7 L. E. A. 588, 23 N. E. 965; *Hudson v. Chicago Ry. Co.*, 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Cramer v. Burlington*, 45 Iowa, 627; *Ely v. St. Louis etc. Ry. Co.*, 77 Mo. 34; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488; *Dale v. Delaware L. & W. Ry. Co.*, 73 N. Y. 468; *Jennings v. Town of Albion*, 90 Wis. 22, 62 N. W. 926.

well stated in a Minnesota case: "Such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct and virtually holds out an inducement for continued negligence."¹² The law is now settled and the courts, both of the United States and of the various states, including Kansas and Pennsylvania, which may now be said to have come into line with the others,¹³ have pronounced in no uncertain voice that no such inference arises, and therefore evidence of subsequent repairs is inadmissible. The United States supreme court says in a case wherein the question was directly presented whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction: "Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions

¹² *Morse v. Minneapolis Co.*, 30 Minn. 465, 16 N. W. 358, overruling previous decisions.

¹³ In *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 Atl. 979, Fell, J., is at considerable pains to disavow the impression which some of the earlier cases conveyed to the contrary, and in *Kansas v. Cherokee etc. Min. Co. v. Britton*, 3 Kan. App. 292,

45 Pac. 100, it is laid down in an action for injuries caused by falling rock, that it is not competent, on the trial of an action for damages for causing the death of another by negligence, to permit the plaintiff on the trial, to prove that soon after the accident occurred the company repaired the roof of the mine at the point where the loose rock fell from.

against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."¹⁴ This ruling has been adopted in a large number of illustrative cases.¹⁵ In an action by the government for damages to a breakwater by collision, evidence of notice to mariners issued by the government three months after the accident describing the breakwater and calling attention to lights is incompetent.¹⁶ Arguments and charges based on the assumption that after a fire alleged to have been caused by the failure to equip a mill with a proper spark-arrester, defendant made changes in the arrester, and that such changes evidenced prior defective conditions, are erroneous.¹⁷ In an action against a city for injuries caused by a defective sidewalk, evidence that after the injury the city notified abutting owners to repair and afterward itself repaired it is inadmissible.¹⁸ In an action by a town against a street railroad to recover the amount of a judgment, which the town had been compelled to pay for personal injuries caused by a defective highway, where the defect was alleged to have been caused by defendant's negligence in taking down a railing, evidence of replacement as an admission of previous neglect was inadmissible.¹⁹ Where a railway clerk had been injured by a mail-car coming in contact with a post, evidence that the post had been moved since the occurrence was rejected. That after an occurrence resulting in injury to one person, another who is sought to be held accountable

¹⁴ *Columbia etc. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405, 12 Sup. Ct. Rep. 591. Approved in *Southern Pac. Co. v. Hall*, 100 Fed. 760, and in *Stevens v. Boston Elevated Ry. Co.*, 184 Mass. 476, 69 N. E. 338, although the last-named case dealt with a disobedience of an established rule.

¹⁵ Notes to United States Reports

(L. C. Thompson), Supplement 3, 220; Supplement 5, 330.

¹⁶ *Davidson S. S. Co. v. United States*, 142 Fed. 315, 73 C. C. A. 425.

¹⁷ *Wager v. Lamont*, 135 Mich. 521, 98 N. W. 1.

¹⁸ *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182.

¹⁹ *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152, 50 Atl. 3.

therefor took additional precautions to prevent others from being likewise injured, can neither justly nor logically be regarded as an admission on his part that he was negligent in not sooner observing such precautions.²⁰ The rule has been applied where a well was filled up after a child had been injured by falling in.²¹ In an action by an employee for injuries alleged to have been caused by the negligent arrangement of machinery, evidence that after the accident the machinery was moved to another part of the room is incompetent.²² In an action for injuries caused by the explosion of a boiler alleged to be improperly supported, and imprudently allowed to cool while connected with boilers in operation, evidence that the replacing boiler was differently supported and the other boilers thereafter disconnected while cooling is inadmissible.²³ Evidence of a change in the position of a guard on a mangle after an injury to a girl working the mangle is not admissible.²⁴ So evidence of the repair of a railway depot platform,²⁵ of alleged defects in machinery,²⁶ and the fact that a city filled up an excavation in a sidewalk after an accident,²⁷ are equally inadmissible. The whole trend of the decisions is to exclude such testimony in support of the allegations of negligence.²⁸ In England the rule is equally certain.

²⁰ *Georgia Southern etc. Ry. Co. v. Cartledge*, 116 Ga. 164, 59 L. R. A. 118, 42 S. E. 405, reversing and overruling prior decisions.

²¹ *Holt v. Spokane etc. Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

²² *Myers v. Concord Lumber Co.*, 129 N. C. 252, 39 S. E. 960.

²³ *Baran v. Reading Iron Co.*, 202 Pa. 274, 51 Atl. 979.

²⁴ *Morancy v. Hennessey*, 24 R. I. 205, 52 Atl. 1021.

²⁵ *Railroad v. Wyatt*, 104 Tenn. 432, 78 Am. St. Rep. 926, 58 S. W. 308.

²⁶ *Virginia etc. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

²⁷ *Carter v. Scattle*, 21 Wash. 585, 59 Pac. 500.

²⁸ *Going v. Alabama Steel etc. Co.*, 141 Ala. 537, 37 South. 784; *Ft. Smith Light etc. Co. v. Soard*, 79 Ark. 388, 96 S. W. 121; *Parkin v. Grayson-Owen Co.*, 157 Cal. 41, 106 Pac. 210; *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710; *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922; *Anson v. Evans*, 19 Colo. 274, 35 Pac. 47; *Colorado Elec. Co. v. Lubbers*, 11 Colo. 505, 7 Am. St. Rep. 255, 19 Pac. 479; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Louisville etc. R. Co. v. Barnwell*, 131 Ga. 791, 63 S. E. 501; *Georgia Southern etc. R. Co. v. Cartledge*, 116 Ga. 164, 59 L. R. A. 118, 42 S. E. 405; *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Howe*

In the court of exchequer Baron Bramwell thus expressed the same view: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it grows older, therefore it was foolish before."²⁹ But evidence of this character may be competent for the purpose of showing that the place of accident was *under the control of the defendant*, if this

v. Medaris, 183 Ill. 288, 55 N. E. 724; Terre Haute Ry. Co. v. Clem, 123 Ind. 15, 18 Am. St. Rep. 303, and note, 7 L. R. A. 588, 23 N. E. 965; Beard v. Guild, 107 Iowa, 476, 78 N. W. 201; Cherokee Coal etc. Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100; Standard Oil Co. v. Tierney, 92 Ky. 367, 36 Am. St. Rep. 595, 14 L. R. A. 677, 17 S. W. 1025, 13 Ky. Law Rep. 626; Consolidated Gas. etc. Co. v. State, 109 Md. 186, 72 Atl. 651; Ziehm v. United Electric Light etc. Co., 104 Md. 48, 62 Atl. 61; Stevens v. Boston El. R. Co., 184 Mass. 476, 69 N. E. 338; Wager v. Lamont, 135 Mich. 521, 98 N. W. 1; Woodbury v. Owosso, 64 Mich. 239, 31 N. W. 130; Lally v. Crookston Lumber Co., 82 Minn. 407, 85 N. W. 157; Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182; Pribbeno v. Chicago etc. R. Co., 81 Neb. 657, 116 N. W. 494; Aldrich v. Concord etc. R. Co., 67 N. H. 250, 29 Atl. 408; Davenport v. Matthews, 130 App. Div. 257, 114 N. Y. Supp. 715; Clapper v. Waterford, 131 N. Y. 382, 30 N. E. 240; Getty v. Hamlin, 127 N. Y. 636, 27 N. E. 399; Lowe v. Elliott, 109 N. C. 581, 14 S. E. 51; Toledo etc. R. Co. v. Beard, 20 Ohio C. C. 681, 11 Ohio Cir. Dec. 406; Ferrari v. Beaver Hill Coal Co., 54 Or. 210,

94 Pac. 181, 102 Pac. 175, 1016; Elias v. Lancaster, 203 Pa. 638, 53 Atl. 507; McGarr v. National etc. Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749, 60 L. R. A. 122, 53 Atl. 320; Farley v. Charleston Basket etc. Co., 51 S. C. 222, 28 S. E. 193, 401; Illinois Cent. R. Co. v. Wyatt, 104 Tenn. 432, 78 Am. St. Rep. 926, 58 S. W. 308; Texas Trunk R. Co. v. Ayres, 83 Tex. 268, 18 S. W. 684; Missouri Pac. Ry. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Place v. Grand Trunk R. Co., 82 Vt. 42, 71 Atl. 836; Richardson v. Royalton etc. Turnpike Co., 6 Vt. 496; Carter v. Seattle, 21 Wash. 585, 59 Pac. 500; Kreider v. Wisconsin R. P. & P. Co., 110 Wis. 645, 86 N. W. 662; Green v. Ashland Water Co., 101 Wis. 258, 70 Am. St. Rep. 911, 43 L. R. A. 117, 77 N. W. 722; Columbia etc. R. Co. v. Hawthorne, 144 U. S. 202, 36 L. Ed. 405, 12 Sup. Ct. Rep. 591; Hollenback v. Hand, 189 Fed. 929; Cole v. Canadian Pac. R. Co., 19 Ont. Pr. 104; Hart v. Lancashire etc. R. Co., 21 L. T., N. S., 261. See, also, cases last cited and extended note to Terre Haute etc. R. Co. v. Clem, 18 Am. St. Rep. 307-310.

²⁹ Hart v. Lancashire & Yorkshire Ry. Co., 21 L. T., N. S., 261-263.

becomes an issue,³⁰ or that the place or machinery complained of is *not at the time of the trial in the same condition* as at the time of the accident.³¹ For example, in a railway accident case, where the railway company had erected gates at a crossing after the occurrence, and the jury had been upon the ground and had seen the gates there, it was proper to inform them when they were erected, to rebut the inference that the gates were there at the time of the accident.³² There are some cases reported as holding that evidence of repairs is admissible to show the abatement of the cause of complaint. As an admission of negligence such evidence is incompetent, but viewed in the light of actual results from the change effected indicating that without such change the condition of former complaint would recur, they have been received. Thus where injury was caused by low smokestacks emitting foul and dense smoke and after action brought the stacks were raised, the court said: "We hold that the evidence offered, to the effect that the smokestacks were raised after suit was brought and that the nuisance was thereby largely, if not entirely, abated, though incompetent as an admission of negligence, was competent as tending to show that the lowness of the stacks caused the damage complained of in

³⁰ *Lafayette v. Weaver*, 92 Ind. 477; *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046; *Spooner v. Delaware etc. R. Co.*, 115 N. Y. 22, 21 N. E. 696; *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016.

³¹ *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Chicago etc. Ry. Co. v. Lewis*, 48 Ill. App. 274; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Nesbit v. Graner*, 75 Iowa, 314, 9 Am. St. Rep. 486, 1 L. R. A. 152, 39 N. W. 516; *Kuhns v. Wisconsin etc. R. Co.*, 76 Iowa, 67 40 N. W. 92; *Atchison etc. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *Louisville etc. R. Co. v. Wood-*

ward, 15 Ky. Law Rep. 445; *Consolidated Gas etc. Co. v. State*, 109 Md. 186, 72 Atl. 651; *Ainsworth v. Hover*, 162 Mich. 135, 127 N. W. 325; *Stone v. Poland*, 81 Hun, 132, 30 N. Y. Supp. 748; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Hirsch v. Buffalo*, 107 N. Y. 671, 14 N. E. 608, 36 Hun, 638; *North Amherst Home Tel. Co. v. Jackson*, 26 Ohio C. C. 89; *St. Louis etc. R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104; *Stewart v. Everts*, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092; *Choctaw etc. R. Co. v. McDade*, 112 Fed. 888, 50 C. C. A. 591.

³² *Lederman v. Pennsylvania R. Co.*, 165 Pa. 118, 44 Am. St. Rep. 644, 30 Atl. 725.

the declaration.”³³ So where injury was caused by the obstruction of a ditch, and when it was removed the damage ceased, the court, in permitting the evidence, said: “Appellees alleged in their petition that the overflow of their premises was caused by the obstruction of the ditch, and that as soon as said obstruction was removed the water ran off. The issue in the case was not whether or not the obstruction existed, but whether or not it was the cause of the overflow of appellees’ premises. It would certainly have been permissible for appellant to have shown on this issue that after the obstruction of the ditch had been removed water continued to accumulate upon appellees’ premises, and thereby demonstrate that said obstruction was not the cause of the overflow, and we think it was equally permissible for the appellees to show that the removal of the obstruction caused the water to recede from their premises. We do not think the admission of the testimony contravenes the well-established rule that proof of subsequent repairs is not admissible for the purpose of proving prior negligence. As before stated, the evidence was not admitted for the purpose of showing negligence, but to show that the condition of the ditch was the cause of the overflow of appellees’ premises.”³⁴ The evidence of changes and repairs has also been admitted in rebuttal when the evidence for the defendant has given occasion for it.³⁵ Thus, when the plaintiff’s foot was caught in a guard-rail and he was struck by a locomotive and injured before he could extricate it, it was negligence as a matter of law that there was no block in the place where the foot was caught. The defendant introduced evidence to show that a block which would have prevented the injury would have been inconsistent with the safe running of trains, and contended that the statute did not require such an im-

³³ Kuhn v. Illinois etc. C. R. R. Co., 111 Ill. App. 323.

³⁴ Texas etc. R. Co. v. Anderson (Tex. Civ. App.), 61 S. W. 424.

³⁵ Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548; Fordyce v. Withers, 1

Tex. Civ. App. 540, 20 S. W. 766; Walker v. Westerfield, 39 Vt. 246; Choctaw etc. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. Rep. 24.

possible precaution. To meet this evidence and contention, the plaintiff introduced evidence to show that there was a block, sufficient to have prevented this accident, put into the guard-rail after the accident, which did not interfere with the running of trains. The court held the evidence was admissible.³⁶

§ 289 (291). Admissions may be implied from silence.—As some of the cases already cited illustrate, admissions may sometimes be implied from the mere silence of a party. The rule is well settled that conversations between parties to a controversy, in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiescence, of the truth of the statement. The weight of the admissions varies with the circumstances of the case, and the strength of the probability that the statement, if untrue, would have evoked a denial, and is always for the jury, guided by a proper caution of the court as to the theory upon which such conversations are admitted.³⁷ Thus, the declarations made by one party to the other relative to the subject matter in controversy, and *not denied* by him, are admissible as evidence for the former.³⁸ Such

³⁶ *Cincinnati etc. R. Co. v. Van Horne*, 69 Fed. 139, 16 C. C. A. 182. Referring to the ruling case the court added: "Nor does the case of *Columbia etc. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591, 36 L. Ed. 405, decide that the character of evidence therein held to be incompetent for the purpose of showing an admission of negligence might not be admissible for some other purpose. On the contrary, in that case the supreme court expressly distinguished a case from *Massachusetts*,—that of *Readman v. Conway*, 126 Mass. 374,—where such evidence was admitted to show, not an admission of negligence by the de-

fendant, but an admission that the instrumentality, the defect in which was charged to have caused the accident, was under the control of the defendant company. So here this evidence was competent to show that a block could be used which would not interfere with the running of trains, and yet which would have prevented the accident which here occurred."

³⁷ *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Commonwealth v. Harvey*, 1 Gray (Mass.), 487; *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553.

³⁸ *Chambers v. Morris*, 159 Ala. 606, 48 South. 687; *Wisdom v. Reeves*, 110 Ala. 418, 18 South. 13;

evidence cannot be rebutted by proof of different declarations subsequently made by the same person. But a party is not bound to make reply to a stranger or to one who has no right to the information sought by the statement propounded. It applies nevertheless to certain *declarations of a third person addressed to a party* and not denied.³⁹ Although it is constant practice to receive evidence of this character, following the familiar maxim *qui tacet consentire videtur*, there are important limitations which should be observed. The testimony is generally, and not improperly, received on the theory that the failure to deny what is asserted in the presence of a party is an *implied admis-*

Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; Sullivan v. McMillan, 26 Fla. 543, 8 South. 450; Holston v. Southern R. Co., 116 Ga. 656, 43 S. E. 29; Block v. Hicks, 27 Ga. 522; Kozlowski v. Chicago, 113 Ill. App. 513; Mix v. Osby, 62 Ill. 193; Hagenbaugh v. Crabtree, 33 Ill. 225; Springer v. Byram, 137 Ind. 15, 45 Am. St. Rep. 159, 23 L. R. A. 244, 36 N. E. 361; Dean v. Carpenter, 134 Iowa, 275, 111 N. W. 815; Des Moines Sav. Bank v. Colfax Hotel Co., 88 Iowa, 4, 55 N. W. 67; Justice v. Justice (Ky.), 124 S. W. 351; Thompson v. Thompson, 93 Ky. 435, 20 S. W. 373, 14 Ky. Law Rep. 513; Oliver v. Louisville etc. R. Co., 43 La. Ann. 804, 9 South. 431; Johnson v. Day, 78 Me. 224, 3 Atl. 647; Brooke v. Berry, 1 Gill (Md.), 153; Proctor v. Old Colony R. Co., 154 Mass. 251, 28 N. E. 13; Commonwealth v. Kenney, 12 Met. (Mass.) 235, 46 Am. Dec. 672, and note; Evans v. Montgomery, 95 Mich. 497, 55 N. W. 362; Bathke v. Krassin, 82 Minn. 226, 84 N. W. 796; Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180; State v. Hill, 134 Mo. 663, 36 S. W. 223; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Lathrop v.

Bramhall, 3 Hun (N. Y.), 394; Blackwell v. Durham Tobacco Co. v. McElwee, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676; Stowell v. Hall, 56 Or. 256, 108 Pac. 182; Connolly v. Shannon, 3 Lack. Leg. N. (Pa.), 247; McClenkan v. McMillan, 6 Pa. 366; Wells v. Drayton, 1 Mill Const. (S. C.) 111; Over v. Missouri etc. R. Co. (Tex. Civ. App.), 73 S. W. 535; Hengy v. Missouri etc. R. Co. (Tex. Civ. App.), 109 S. W. 402; Green v. Dodge, 79 Vt. 73, 64 Atl. 499; State v. Magoon, 68 Vt. 289, 35 Atl. 310; Fry v. Stowers, 92 Va. 13, 22 S. E. 500; McCord v. Seattle Electric Co., 46 Wash. 145, 13 L. R. A., N. S., 349, 89 Pac. 491; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553. See § 291, *post*. See, also, the late cases: Wallace v. Wallace, 137 N. Y. Supp. 43; Highsmith v. Page (N. C.), 77 S. E. 294; Lawton etc. R. Co. v. Lawton City, 31 Okl. 458, 122 Pac. 212; Childress v. Tate (Tex. Civ. App.), 148 S. W. 843; Miller v. Pearce (Vt.), 85 Atl. 620.

³⁹ Boston & W. Ry. Corp. v. Dana, 1 Gray (Mass.), 83; Commonwealth v. O'Brien, 179 Mass. 533, 61 N. E. 213; Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052.

sion of the truth of the statement.⁴⁰ But there is no ground for presuming acquiescence in such statements, unless they are of such a character as would naturally call for a response, and unless the party sought to be charged was in such a situation that he would probably have replied to them.⁴¹ A distinction is to be taken, in the application of this maxim, between declarations made by a party interested, and by a stranger. What one party says to another, without contradiction, is admissible; but what a stranger says to a party may, although uncontradicted, not always be evidence; it may be impertinent, and best rebuked by silence. If, however, there is a reply, that is evidence. Thus, what a magistrate, before whom an assault and battery was investigated, said to the parties, was held inadmissible in a subsequent civil action for the same assault.⁴² Generally, the cases in which the party is

⁴⁰ *Batturs v. Sellers*, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492.

⁴¹ *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 South. 425; *Abercrombie v. Allen*, 29 Ala. 281; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Graham v. State*, 118 Ga. 807, 45 S. E. 616; *Chapman v. State*, 109 Ga. 157, 34 S. E. 369; *Slattery v. People*, 76 Ill. 217; *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241; *Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 96; *Churchill v. Fulliam*, 8 Iowa, 45; *Whitney v. Houghton*, 127 Mass. 527; *Drury v. Hervey*, 126 Mass. 519; *O'Neil v. Glover*, 5 Gray (Mass.), 144; *State Bank of St. Johns v. McCabe*, 135 Mich. 479, 98 N. W. 20; *Barry v. Davis*, 33 Mich. 515; *Phillips v. Towler*, 23 Mo. 401; *Stecher Lith. Co. v. Inman*, 175 N. Y. 124, 67 N. E. 213; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814; *Gibney v. Marchay*, 34 N. Y. 301; *State v. Burton*, 94 N. C. 947; *O. S. Paulson Mercantile Co. v. Seaver*, 8 N.

D. 215, 77 N. W. 1001; *Cable v. Bowlus*, 21 Ohio C. C. 53, 11 Ohio Cir. Dec. 526; *McClenkan v. McMillan*, 6 Pa. 366; *Moore v. Smith*, 14 Serg. & R. (Pa.) 388; *Bass v. Tolbert*, 51 Tex. Civ. App. 437, 112 S. W. 1077; *Pond v. Pond*, 79 Vt. 352, 8 L. R. A., N. S. 212, 65 Atl. 97; *Pierce's Admr. v. Pierce*, 66 Vt. 369, 29 Atl. 364; *Brainard v. Buck*, 25 Vt. 573, 60 Am. Dec. 291; *Hersey v. Barton*, 23 Vt. 685; *Turner v. Yates*, 16 How. (U. S.) 14, 27, 14 L. Ed. 824; *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553. As to statements made by a minister in a sermon, which are received in silence: *Johnson v. Trinity Church Soc.*, 11 Allen (Mass.), 123.

⁴² *Carter v. Buchannon*, 3 Ga. 513. *Best, C. J.*, in *Child v. Grace*, 2 Car. & P. 193, upon this subject, holds the following language: "What was said by the defendant to the plaintiff may be evidence, but not what was said by a third person; or if that which was said drew any answer from the plaintiff, then that makes it

held to be affected by his silence will be found to be cases where statements were made of his own actions or his own liabilities, and not where he had no concern in law and no right to reply.⁴³ Such testimony should be *received and applied with caution*, especially when the statements are made, not by a party to the controversy, but by a stranger.⁴⁴ When there is no natural or reasonable inference from the silence of a party that he acquiesced in the truth of the statements, they should be excluded.⁴⁵ There is hardly any ground to infer acquiescence in such cases, unless it appears that the truth or falsehood of the statements made must have been *within the knowledge* of the party sought to be charged.⁴⁶ Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to ascertain what reply the party to be affected makes to them. If he is silent when he ought to have denied, the presumption of acquiescence arises. But it is clearly otherwise when his silence is of a character which does not justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner unable to understand the language employed, he cannot be prejudiced by statements made by others in his presence. Nor is such silence an assent, unless the statements were such as to properly call for a response. The rule in regard to admissions inferred from acquiescence in the verbal statements of others is to be applied with careful dis-

evidence, otherwise it is not. Really, it is most dangerous evidence. I never will receive such evidence unless, as my Lord Kenyon used to say, the twelve judges in the House of Lords tell me that I must." "Nothing," says Duncan, C. J., "can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction—some assertion made to a party with

regard to his right, which by his silence he acquiesces in": *Moore v. Smith*, 14 Serg. & R. (Pa.) 388.

⁴³ *Gibney v. Marchay*, 34 N. Y. 301.

⁴⁴ *Larry v. Sherburne*, 2 Allen (Mass.), 34; *Whitney v. Houghton*, 127 Mass. 527.

⁴⁵ *Whitney v. Houghton*, 127 Mass. 527.

⁴⁶ *Hayslep v. Gymer*, 1 Ad. & E. 162, 110 Eng. Reprint, 1169; *Edwards v. Williams*, 3 Miss. 846; *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672.

crimination.⁴⁷ If, however, it is uncertain whether the party heard or understood the statements, this is a question for the jury to determine.⁴⁸ Whether the circumstances are such as to call for a reply is a preliminary question for the court.⁴⁹ The question may resolve itself into one of duty to reply or of one of noninterest or ignorance of interest in the subject matter.⁵⁰ The extent of the rule is that it is for the jury, in the light of all the circumstances, to say whether or not the silence or failure to deny amounts to an admission.⁵¹ With respect to written communication, however, the rule is different, because the failure of one receiving a letter to answer it may be attributed to many causes besides an acquiescence in the truth of what is written, and such a rule would furnish a dangerous weapon in the hand of an unscrupulous party to make evidence in his favor against a careless opponent. It cannot be said, however, to be an unvarying rule that an unanswered letter may not be evidence against the person addressed, because there are cases in which such letters have been admitted.⁵² The better supported rule, probably, is that, on the reasonable grounds above stated, unanswered letters are ordinarily not evidence against the person addressed, as admissions of the truth of state-

⁴⁷ *Tufts v. Charlestown*, 4 Gray (Mass.), 537 (*deafness*); *State v. Perkins*, 3 Hawks (10 N. C.), 377 (*intoxication*); *Lanergan v. People*, 39 N. Y. 39 (where the person sought to be charged was *asleep*); *State v. Epstein*, 25 R. I. 131, 55 Atl. 204 (*in extreme physical pain*); *Dean v. State*, 105 Ala. 21, 17 South. 28 (*unable to speak*); *Wright v. Maseras*, 56 Barb. (N. Y.) 521 (where he was a *foreigner*); *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (*unconscious*, though there was evidence that he was shamming); *Parulo v. Philadelphia etc. R. Co.*, 145 Fed. 664 (*foreigner*).

⁴⁸ *Commonwealth v. Sliney*, 126 Mass. 49.

⁴⁹ *Pierce's Admr. v. Pierce*, 66 Vt. 369, 29 Atl. 364; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *Schilling v. Union Ry. Co.*, 77 App. Div. 74, 78 N. Y. Supp. 1015.

⁵⁰ *Collier v. Dick*, 111 Ala. 263, 18 South. 522; *Ware v. Ware*, 8 Me. (Greenl.) 42; *Brainard v. Buck*, 25 Vt. 573, 60 Am. Dec. 291; *People v. Foo*, 112 Cal. 17, 44 Pac. 453; *Hill v. Aetna etc. Ins. Co.*, 150 N. C. 1, 63 S. E. 124.

⁵¹ *Hagenbaugh v. Crabtree*, 33 Ill. 225.

⁵² *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553; *Fenno v. Weston*, 31 Vt. 345; *Gaskill v. Skene*, 14 Ad. & E., N. S., 668, 117 Eng. Reprint, 256; *Gore v. Hawsey*, 3 Fost. & F. 509;

ments contained therein.⁵³ The true rule to be gathered from the cases is that unanswered statements in letters are seldom to be regarded as admissions by the person addressed, but that exceptional circumstances may justify the court in submitting them to the jury with a proper caution.

§ 290 (292). **Same—No admission from silence at judicial proceedings.**—The rule allowing the silence of a person to be taken as an implied admission of truth of allegations uttered in his presence applies in *criminal*, as well as civil, cases;⁵⁴ but does not apply merely because a party is under *arrest*. There are numerous decisions in which proof has been allowed of statements made to a party under such circumstances where he has remained silent.⁵⁵ Acquiescence in a statement charging a man with crime may be inferred from his silence, when he is free to contradict it; but, if the circumstances render a denial improper, no such inference follows. The silence must be voluntary. Where an officer commanded a man charged with crime to "keep still," it was held that he probably inferred there-

Lucy v. Mouflet, 5 Hurl. & N. 229, 29 L. J. Ex. 110; Roe v. Day, 7 Car. & P. 705. In Fenno v. Weston, *supra*, it was held that the same rule applies where a party omits to reply to statements in a letter about which he has knowledge and which, if not true, he would naturally deny when he replies to other parts of the letter. See, also, the recent cases: Seevers v. Cleveland Coal Co. (Iowa), 138 N. W. 793; Droste v. Wabash R. Co., 153 App. Div. 160, 138 N. Y. Supp. 203; Chicago etc. R. Co. v. Rhodes, 21 Colo. App. 229, 121 Pac. 769; Commercial Nat. Bank v. Flickinger (Iowa), 135 N. W. 416.

⁵³ Morris v. Norton, *supra*; Learned v. Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Talcott v. Harris, 93 N. Y. 567; Fearing v. Kimball, 4 Allen (Mass.), 125, 81 Am. Dec. 690; Percy v. Bib-

ber, 134 Mass. 404; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596. As to silence after accounts rendered, see Hayes v. Kelley, 116 Mass. 300; Wiggins v. Burkham, 10 Wall. (U. S.) 129, 19 L. Ed. 885.

⁵⁴ State v. Reed, 62 Me. 129; Commonwealth v. Galavan, 9 Allen (Mass.), 271; Erb v. Commonwealth, 98 Pa. 338; Jewett v. Banning, 21 N. Y. 27; Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342.

⁵⁵ Smith v. Duncan, 181 Mass. 435, 63 N. E. 938; People v. Wennerholm, 166 N. Y. 567, 60 N. E. 259; Green v. State, 97 Tenn. 50, 36 S. W. 700. *Cases excluding such testimony:* State v. Dickey, 46 W. Va. 319, 33 S. E. 231; Funderburk v. State (Tex.), 61 S. W. 393; State v. McCullum, 18 Wash. 394, 51 Pac. 1044.

from that he was to keep silent.⁵⁶ It does not, however, apply to silence at a judicial proceeding or hearing when the necessity for noninterruption is paramount.⁵⁷ Thus it is error to admit evidence that a party to a suit was silent where his adversary testified to certain facts on a former trial which were prejudicial to him. There can be no inference of acquiescence in such case, as the party is not at liberty to contradict the statement of a witness while testifying.⁵⁸ He could not interfere and deny the statement. To do this would be to charge the witness with perjury, which would be alike inconsistent with decorum and with the rules of law.⁵⁹ For similar reasons no unfavorable inference is to be drawn from the silence of a party *during* the comments or *argument* of counsel.⁶⁰ But it does apply, if, when the time comes where the party may reply, he still maintains silence. Some little confusion formerly existed by reason of the old rule excluding the parties as witnesses, but it is now well established that the denial must be made if and when the party is at liberty to make it;⁶¹ *provided* that except the matter be material to the issue the party is not called upon to reply.⁶² There is

⁵⁶ *People v. Kessler*, 13 Utah, 69, 44 Pac. 97.

⁵⁷ *People v. Willett*, 92 N. Y. 29; *Johnson v. Holliday*, 79 Ind. 151; *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625.

⁵⁸ *Broyles v. State*, 47 Ind. 251.

⁵⁹ *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Commonwealth v. Walker*, 13 Allen (Mass.), 570; *Bob v. State*, 32 Ala. 560; *Noonan v. State*, 9 Miss. (1 Smedes & M.) 562.

⁶⁰ *Rex v. Hollingshead*, 4 Car. & P. 242; *Moffit v. Witherspoon*, 10 Ired. (32 N. C.) 185.

⁶¹ *Collier v. Dick*, 111 Ala. 263, 18 South. 522; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E.

359; *Slattery v. People*, 76 Ill. 217; *Broyles v. State*, 47 Ind. 251; *Eaton v. Commonwealth*, 122 Ky. 7, 12 Ann. Cas. 874, 28 Ky. Law Rep. 906, 90 S. W. 972; *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Barry v. Davis*, 33 Mich. 515; *Stecher Lithographic Co. v. Inman*, 175 N. Y. 124, 67 N. E. 213; *Guy v. Manuel*, 89 N. C. 83; *State v. Senn*, 32 S. C. 392, 11 S. E. 292; *Queener v. Morrow*, 1 Cold. (Tenn.) 123; *Hauger v. United States*, 173 Fed. 54, 97 C. C. A. 372; *Melen v. Andrews*, 1 M. & M. 336, 21 R. R. 736, 22 Eng. Com. L. 540.

⁶² *Hill v. Bishop*, 2 Ala. 320; *Maloney v. State*, 91 Ark. 485, 134 Am. St. Rep. 83, 18 Ann. Cas. 480, 121 S. W. 728; *Muetze v. Procasky*, 126 Ill. App. 589; *Broyles v. State*, 47

authority for the proposition that evidence of statements made to or in the presence of the party and received in silence should be followed by a statement of his conduct at the time.⁶³ This applies specially in criminal cases. While a statement made in the presence of the accused is not admissible, as being itself evidence of any fact narrated therein, it is admissible, primarily, for the purpose of showing that the accused acquiesced in it either by express assent or silence, or by such conduct as fairly implied assent; but such testimony should be received guardedly, and, if not followed by any proof of the conduct of the accused, should be stricken out, and, if requested by the defendant's counsel, the court should instruct the jury that the statement is limited as evidence for the purpose of showing the acquiescence or assent of the accused.⁶⁴ It appears that the whole matter turns rather on what the party *did* than what he *said*, or left *unsaid*, and that his con-

Ind. 251; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Thayer v. Usher*, 98 Me. 468, 57 Atl. 839; *Blanchard v. Hodgkins*, 62 Me. 119; *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Commonwealth v. Burton*, 183 Mass. 461, 67 N. E. 419; *Howe v. Howe*, 199 Mass. 598, 127 Am. St. Rep. 516, 85 N. E. 945; *Mabley v. Kittleberger*, 37 Mich. 360; *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59; *Hooper v. Browning*, 19 Neb. 420, 27 N. W. 419; *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670, 62 L. R. A. 602, 54 Atl. 945; *Lydon v. Metropolitan El. Ry. Co.*, 57 N. Y. St. 74, 7 Misc. Rep. 25, 27 N. Y. Supp. 311; *Leggett v. Schwab*, 111 App. Div. 341, 97 N. Y. Supp. 805; *Croom v. Sugg*, 110 N. C. 259, 14 S. E. 748; *Blackwell v. McElwee*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 976; *Caseday v. Lindstrom*, 44 Or. 309, 75 Pac. 222; *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; *Lombard*

& S. S. Pass. Ry. Co. v. *Christian*, 124 Pa. 114, 16 Atl. 628; *Saunders v. City & Suburban R. Co.*, 99 Tenn. 130, 41 S. W. 1031; *Western Union Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105, 26 S. W. 117; *Melendy v. Ames*, 62 Vt. 14, 20 Atl. 161; *State v. Baruth*, 47 Wash. 283, 91 Pac. 977; *Melen v. Andrews*, 1 Moody & M. (Eng.) 336, 31 R. R. 736.

⁶³ *Stowell v. Hall*, 56 Or. 256, 108 Pac. 182.

⁶⁴ *People v. Mallon*, 103 Cal. 513, 37 Pac. 512. In *People v. Ah Yute*, 54 Cal. 89, Mr. Justice Ross, delivering the opinion of the court, said that certain statements made in the presence of the defendant were hearsay and inadmissible, because they stood "without any proof whatever as to the conduct by the defendant in reference to those accusations," and distinguished the case from *People v. McCrea*, 32 Cal. 98, and *People v. Estrado*, 49 Cal. 171, which were approved.

duct on hearing the statement is the real ground of the admission of evidence that he said nothing. That, being so, there is good reason for the rule in all cases that after the preliminary proof required to admit a statement made in his presence, what the party did by speech or action, by silence or inaction, becomes material. It is easy of illustration that a man to whom or at whom a statement is made might silently assault the utterer. In such case the limitation of the evidence to the statement made to him and that he said nothing, while true, is far short of the whole truth. The rule requiring evidence of the conduct of the party is as healthy as it is consonant with the office of the court to see that the case is justly presented to the jury. Although no admission is to be implied from silence, unless the circumstances are such as to call for some reply, yet if the party makes any reply or declaration in regard to his own rights, the whole conversation is admissible under proper instructions.⁶⁵

§ 291 (293). Offers of compromise.—Overtures for the compromise of controversies are frequently made by parties who in good faith believe in the justice of their claim or defense, but who desire to avoid the annoyance and uncertainty of litigation. Hence offers of compromise are not necessarily any admission that the claim or defense is lacking in merit; and such offers are not in general admissible.⁶⁶ This rule does not apply to criminal cases.⁶⁷ The

⁶⁵ *Mattocks v. Lyman*, 16 Vt. 113; *Pierce's Admr. v. Pierce*, 66 Vt. 369, 29 Atl. 364.

⁶⁶ *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985; *Indianapolis Northern T. Co. v. Dunn*, 37 Ind. App. 248, 76 N. E. 269; *Rudd v. Dewey*, 121 Iowa, 454, 96 N. W. 973; *Houdeck v. Merchants' etc. Ins. Co.*, 102 Iowa, 303, 71 N. W. 354; *Higgins v. Shepard*, 182 Mass. 364, 65 N. E. 805; *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *Robert-*

son v. Blair, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11. See cases cited below.

⁶⁷ *Rumph v. State*, 91 Ga. 20, 16 S. E. 104; *McMath v. State*, 55 Ga. 303; *Barr v. People*, 113 Ill. 471; *Jones v. State*, 64 Ind. 473; *Town of Scranton v. Hensen*, 151 Iowa, 221, 130 N. W. 1079; *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *Cecil v. Territory*, 16 Okl. 197, 8 Ann. Cas. 457, 82 Pac. 654; *Collins v. State*, 115 Wis. 596, 92 N. W. 266.

rule is very clear that when such offers are expressly stated to be *without prejudice*, they are inadmissible.⁶⁸ If the contrary rule prevailed, no attempt to amicably settle litigation could safely be made; and the courts are inclined to encourage rather than discourage such adjustments. Accordingly offers by a party with a view to compromise, to pay or accept a sum of money,⁶⁹ or to make deductions,⁷⁰ or to submit to arbitration,⁷¹ or to surrender certain property,⁷² or to purchase the property in dispute,⁷³ and in general any efforts to secure a settlement,⁷⁴ are inadmissible. While there are cases that an offer of compromise is admissible, unless it is stated to be without prejudice,⁷⁵

⁶⁸ *Wilson v. Hines*, Minor (Ala.), 255; *Wood v. Wood*, 3 Ala. 756; *Chicago etc. Ry. Co. v. Catholic Bishop*, 119 Ill. 525, 10 N. E. 372; *Draper v. Hatfield*, 124 Mass. 53; *Rideout v. Newton*, 17 N. H. 71; *Perkins v. Concord R. R. Co.*, 44 N. H. 223; *Richardson v. International Pottery Co.*, 63 N. J. L. 248, 43 Atl. 692; *Williams v. Thorp*, 8 Cow. (N. Y.) 201; *Townsend v. Merchants' Ins. Co.*, 4 Jones & S. (36 N. Y. Sup. Ct.) 172; *State Bank v. Dutton*, 11 Wis. 371; *West v. Smith*, 101 U. S. 263, 273, 25 L. Ed. 809; *Paddock v. Forrester*, 3 Man. & G. 918.

⁶⁹ *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Barker v. Bushnell*, 75 Ill. 220; *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; *Draper v. Hatfield*, 124 Mass. 53; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Tennant v. Dudley*, 144 N. Y. 504, 39 N. E. 644; *State Bank v. Dutton*, 11 Wis. 371; *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 527, 548, 23 L. Ed. 868.

⁷⁰ *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809.

⁷¹ *Mundhenk v. Central Iowa Ry. Co.*, 57 Iowa, 718, 11 N. W. 656.

⁷² *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809; *Williams v. Price*, 5 Munf. (Va.) 507.

⁷³ *Smith v. Morrow*, 5 Litt. (Ky.) 217.

⁷⁴ *Fowles v. Allen*, 64 Conn. 350; *Ward v. Munson*, 105 Mich. 647, 63 N. W. 498; *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *Tennant v. Dudley*, 144 N. Y. 504, 39 N. E. 644; *Slocum v. Perkins*, 3 Serg. & R. (Pa.) 295; *Daniels v. Woonsocket*, 11 R. I. 4; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Baird v. Rice*, 1 Call (Va.), 18, 1 Am. Dec. 497; *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809.

⁷⁵ *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *White v. Old Dominion S. S. Co.*, 102 N. Y. 661, 6 N. E. 289; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695; *Dickinson v. Dickinson*, 9 Met. (Mass.) 471; *Thomson v. Austen*, 2 Dowl. & Ry. 359, 1 L. J. (O. S.) K. B. 99; *Wallace v. Small*, 1 Moody & M. 446; *Watts v. Lawson*, 1 Moody & M. 447, and note.

yet the prevailing rule in England⁷⁶ and in this country is that the offer will be *presumed to have been made without prejudice*, if it was plainly an offer of compromise.⁷⁷

⁷⁶ In Reynolds' Stephen's Digest the rule is thus stated: "No offer made by either party by way of compromise or to buy peace is deemed to be a relevant admission in any civil action, if it is made either upon an express condition that evidence of it is not to be given; but admissions of any independent facts are deemed to be relevant, though made during a treaty of compromise. Admissions made under duress are not deemed relevant, but in civil actions no legal compulsion is held to be such duress as will exclude them."

⁷⁷ C. W. Zimmerman Mfg. Co. v. Dunn, 163 Ala. 272, 50 South. 906; Feibelman v. Manchester F. Assur. Co., 108 Ala. 180, 19 South. 540; Davis v. Simmons, 1 Ariz. 25, 25 Pac. 535; American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 S. W. 213; Dennis v. Belt, 30 Cal. 247; Donley v. Bailey, 48 Colo. 373, 110 Pac. 65; Holy Cross Gold Min. etc. Co. v. O'Sullivan, 27 Colo. 237, 60 Pac. 570; Beattie v. McMullen, 82 Conn. 484, 74 Atl. 767; Fowles v. Allen, 64 Conn. 350, 30 Atl. 144; Hudson v. Williams, 6 Penne. (Del.) 550, 72 Atl. 985; Austin v. Long, 5 Ga. App. 551, 63 S. E. 640; Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280; Whitney v. Cleveland, 13 Idaho, 558, 91 Pac. 176; Kroetch v. Empire Mill Co., 9 Idaho, 277, 74 Pac. 868; Hartwell Lumber Co. v. Bork, 138 Ill. App. 506; Chicago etc. R. Co. v. Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Welker v. Appleman, 44 Ind. App. 699, 90 N. E. 35; Louisville etc. R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; Massena Savings Bank v. Garside, 151 Iowa, 168,

130 N. W. 918; Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973; Myers v. Goggerty, 10 Kan. App. 190, 63 Pac. 296; Hurst v. Williams, 102 S. W. 1176, 31 Ky. Law Rep. 658; Finn v. New England Tel. etc. Co., 101 Me. 279, 64 Atl. 490; Stewart v. American Bridge Co., 108 Md. 200, 69 Atl. 708; R. J. Biggs & Co. v. Langhammer, 103 Md. 94, 63 Atl. 198; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Gernain v. Union School Dist., 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; Ward v. Munson, 105 Mich. 647, 63 N. W. 498; Melby v. Osborne, 35 Minn. 387, 29 N. W. 58; Engel v. Powell, 154 Mo. App. 233, 134 S. W. 74; Smith v. Shell, 82 Mo. 215, 52 Am. Rep. 365; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849; Theobald v. Shepard, 75 N. H. 52, 71 Atl. 26; Greenfield v. Kennett, 69 N. H. 419, 45 Atl. 233; Scheurle v. Husbands, 65 N. J. L. 681, 48 Atl. 1118; Franklin v. Hoadley, 115 App. Div. 538, 101 N. Y. Supp. 374; Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644; Ely v. Norfolk Southern R. Co., 102 N. C. 42, 8 S. E. 779; Sherer v. Piper, 26 Ohio St. 476; Fisher v. Fidelity Mut. L. Assn., 188 Pa. 1, 41 Atl. 467; Field v. Schuster, 26 Pa. Sup. Ct. 82; Wrynn v. Downey, 27 R. I. 454, 114 Am. St. Rep., 8 Ann. Cas. 912, 4 L. R. A., N. S., 615, 63 Atl. 401; Holden v. Cantrell, 88 S. C. 281, 70 S. E. 815; Norris v. Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 19 Morr. Min. Rep. 556; Strong v. Stewart, 9 Heisk. (Tenn.) 137; Gulf etc. R. Co. v. Bagby (Tex. Civ. App.), 127 S. W. 254; International etc. R. Co. v. Rags-

The courts look at the intrinsic character of the transaction; and if the offer is clearly one of compromise, it is inferred to have been made without prejudice. In such case no caution that the offer is confidential or without prejudice need be expressed.⁷⁸ The surrounding circumstances will disclose whether it was so made or not, and whether the offer was made on the faith of a compromise is usually for the jury.⁷⁹ Offers of compromise to pay a sum of money by the way of compromise, as a general rule, are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication.⁸⁰ The courts sometimes submit to the jury as a question of fact whether the statement was intended as an admission or as an offer of compromise.⁸¹ And the distinction has been well marked and calls for vigilance in discrimination. By all, or nearly all, the cases, the rule as established is not that an admission made during or in consequence of an effort to compromise is inadmissible, but that an offer to do something by the way of compromise,

dale, 67 Tex. 24, 2 S. W. 515; McKinney v. Carson, 35 Utah, 180, 99 Pac. 660; Brown v. Shields, 6 Leigh (Va.), 440; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026; National Bank of Commerce v. Gougar, 51 Wash. 204, 98 Pac. 607; Taylor v. Tigerton Lumber Co., 134 Wis. 24, 114 N. W. 122; Richards v. Noyes, 44 Wis. 609; Hammond Packing Co. v. Dickey, 183 Fed. 977, 106 C. C. A. 317; West v. Smith, 101 U. S. 263, 25 L. Ed. 809; New York Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Paddock v. Forrester, 3 Scott N. R. 734, 3 Man. & G. 903; Healey v. Thatcher, 8 Car. & P. 388; Jones v. Foxall, 15 Beav. 388, 51 Eng. Reprint, 588; Pirie v. Wyld, 11 Ont. 422.

⁷⁸ Reynolds v. Manning, 15 Md. 510; Webber v. Dunn, 71 Me. 331;

Draper v. Hatfield, 124 Mass. 53; Gerrish v. Sweetser, 4 Pick. (Mass.) 374; Campau v. Dubois, 39 Mich. 274; Richards v. Noyes, 44 Wis. 609; West v. Smith, 101 U. S. 263, 25 L. Ed. 809.

⁷⁹ Gibbs v. Johnson, Fed. Cas. No. 5384, 3 App. Com. Pat. 255; Davis v. Catlettsburg etc. Water Co. (Ky.), 127 S. W. 479; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142.

⁸⁰ Gerrish v. Sweetser, 4 Pick. (Mass.) 374; Hartford Bridge Co. v. Granger, 4 Conn. 142; Stranahan v. East Haddam, 11 Conn. 507.

⁸¹ Bartlett v. Hoyt, 33 N. H. 151; Long v. Pierce Co., 22 Wash. 330, 61 Pac. 142. See Colburn v. Groton, 66 N. H. 151, 22 L. R. A. 763, 28 Atl. 95, where it was held to be a question of fact for the judge.

as to pay sums of money, *allow certain prices*, deliver certain property, or *make certain deductions*, and the like, shall be excluded. These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation.⁸² There is no doubt but that the rule is well established in this country that the admission of a distinct fact which in itself tends to establish a cause of action or defense is not rendered inadmissible from the circumstances that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice; but if the admission is of such a nature as that the court can see it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that could fairly be implied from the circumstances that it was not to be used afterward to his prejudice, the court should exclude the evidence. "The rule referred to is founded upon public policy, and with a view of encouraging and facilitating the settlement of legal controversies by compromise, which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions. The law therefore excludes such admissions as appear to have been made tentatively and hypothetically, but admits those only which concede the existence of a fact."⁸³ Thus the rule under consideration *does not exclude the admission of distinct or independent facts*, although such admissions are made during the treaty for a compromise.⁸⁴ So, admissions of fact made during

⁸² West v. Smith, 101 U. S. 263, 25 L. Ed. 809.

⁸³ White v. Old Dominion S. S. Co., 102 N. Y. 661, 6 N. E. 289.

⁸⁴ Matthews v. Farrell, 140 Ala. 298, 37 South. 325; Gibbs v. Wright, 14 Ala. 465; Rose v. Rose, 112 Cal. 341, 44 Pac. 658; Kutcher v. Love, 19 Colo. 542, 36 Pac. 152; Broschart v. Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925; Hartford Bridge Co. v.

Granger, 4 Conn. 142; Teasley v. Bradley, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; Austin v. Long, 5 Ga. App. 551, 63 S. E. 640; Thom v. Hess, 51 Ill. App. 274; Ashlock v. Linder, 50 Ill. 169; Louisville etc. R. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 534; Kennell v. Boyer, 144 Iowa, 303, Ann. Cas. 1912A, 1127, 24 L. R. A., N. S., 488, 122 N. W. 941; Central Branch

negotiations of settlement have been received to prove guilt in actions for bastardy⁸⁵ and criminal conversation;⁸⁶ to prove nonperformance of contract;⁸⁷ agency;⁸⁸ repetition of a slander;⁸⁹ facts admitted by the superintendent tending to show liability of a railroad company;⁹⁰ execution of a note;⁹¹ the correctness of an account;⁹² and the genuineness of handwriting.⁹³ Although it will be seen that the courts have frequently held it proper to receive admissions of distinct facts during such negotiations, yet if the admission is of such a nature that the court can see that it would not have been made except for the purpose of the negotiations, and that under an agreement,

Union Pac. R. Co. v. Butman, 22 Kan. 639; Illinois Cent. R. Co. v. Manion, 113 Ky. 7, 101 Am. St. Rep. 345, 23 Ky. Law Rep. 2267, 67 S. W. 40; Illinois Cent. R. Co. v. Nelson (Ky.), 127 S. W. 520; Chaffe v. Mackenzie, 43 La. Ann. 1062, 10 South. 369; Cole v. Cole, 33 Me. 542; Durgin v. Somers, 117 Mass. 55; Taylor v. Bay City St. Ry. Co., 101 Mich. 140, 59 N. W. 447; Manistee Nat. Bank v. Seymour, 64 Mich. 59, 31 N. W. 140; Garner v. Myrick, 30 Miss. 448; Paris v. Waddell, 139 Mo. App. 288, 123 S. W. 79; Robb v. Hewitt, 39 Neb. 217, 58 N. W. 88; Jenness v. Jones, 68 N. H. 475, 44 Atl. 607; Plummer v. Currier, 52 N. H. 287; Hess v. Van Auken, 11 Misc. Rep. 422, 32 N. Y. Supp. 126; Marvin v. Richmond, 3 Denio (N. Y.), 58; Arthur v. James, 28 Pa. 236; Chickering v. Brooks, 61 Vt. 554, 18 Atl. 144; Kain v. Angle, 111 Va. 415, 69 S. E. 355; Waldbridge v. Kennison, 1 Esp. 143. See, also, the late cases: Alexander v. Smith (Ala.), 61 South. 68; McIntosh v. Patton (Ga. App.), 77 S. E. 6; Hablich v. University Park Bldg. Co. (Ind.), 97 N. E. 539; Freel v. Harken (Iowa), 135 N. W. 648; Shaw v. Boston etc. R. Co., 108

Me. 568, 82 Atl. 1005; Marshall v. Taylor (Mo. App.), 153 S. W. 527; Lenahan v. Casey (Mont.), 128 Pac. 601; Manhattan Top etc. Co. v. White, 78 Misc. Rep. 401, 138 N. Y. Supp. 314; Baynes v. Harris (N. C.), 76 S. E. 230; City of Anadarko v. Argo (Okla.), 128 Pac. 500; Busch v. South Dakota Central R. Co. (S. D.), 135 N. W. 757; Slayden v. Palmo (Tex. Civ. App.), 151 S. W. 649; Montana Tonopah Min. Co. v. Dunlap, 196 Fed. 612, 714, 116 C. C. A. 286.

⁸⁵ Fuller v. Town of Hampton, 5 Conn. 416; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155.

⁸⁶ Sanborn v. Neilson, 4 N. H. 501.

⁸⁷ Hartford Bridge Co. v. Granger, 4 Conn. 142.

⁸⁸ Church v. Steele, 1 A. K. Marsh. (Ky.) 328.

⁸⁹ Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

⁹⁰ Central Branch Union Pac. Ry. Co. v. Butman, 22 Kan. 639.

⁹¹ Grubbs v. Nye, 21 Miss. (13 Smedes & M.) 443.

⁹² Hyde v. Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582.

⁹³ Waldbridge v. Kennison, 1 Esp. 143.

fairly to be implied from the circumstances, it was not to be used to the prejudice of the party making it, it is not error to exclude the evidence.⁹⁴ But if the party making the offer of compromise himself offers it in evidence, the other party is entitled to explain what occurred and give his version of it. He is entitled so to do on the further ground of proving such other parts of the conversation as tended to explain, modify or even destroy the admission.⁹⁵ In addition to such admission of distinct or independent facts, the offer of compromise, especially where written, may itself be used for purposes other than evidence of liability where it contains admissions outside of the cause of action.⁹⁶ In other words, containing matter *dehors* the subject of controversy it may be used, but *per se* it may be absolutely excluded.⁹⁷ But where a letter of compromise contains no statement which can be separated from the offer and convey the idea which was in the writer's mind, the whole of it must be excluded.⁹⁸ The question whether in the offer to compromise a collateral or independent fact has been admitted by one of the parties is a question for the court to determine, and not a question for the jury.⁹⁹

⁹⁴ *White v. Old Dominion Co.*, 102 N. Y. 661, 6 N. E. 289.

⁹⁵ *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28.

⁹⁶ *Watson v. Reed*, 129 Ala. 388, 29 South. 837; *Pacific Mut. Life Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087; *Cross v. Kistler*, 14 Colo. 571, 23 Pac. 903; *Austin v. Long*, 5 Ga. App. 551, 63 S. E. 640; *Lucas v. Parsons*, 27 Ga. 593; *Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176; *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68; *Matthiessen etc. Zinc Co. v. Ferris*, 72 Ill. App. 684; *McCrum v. McCrum*, 36 Ind. App. 636, 76 N. E. 415; *Milhollen v. A. Y. McDonald etc. Mfg. Co.*, 137 Iowa, 114, 112 N. W. 812; *Bayliss v. Murray*, 69 Iowa, 290, 28 N. W. 604; *Passmore v. Passmore's Estate*, 60 Mich.

463, 27 N. W. 601; *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198; *Doncourt v. Denton*, 55 Misc. Rep. 594, 105 N. Y. Supp. 906; *Russell v. Brooklyn Heights R. Co.*, 104 App. Div. 149, 93 N. Y. Supp. 433; *Sutton v. Robeson*, 31 N. C. 380; *Gould v. Dwelling-house Ins. Co.*, 134 Pa. 570, 19 Am. St. Rep. 717, 19 Atl. 793; *Whitney Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007; *Unthank v. Travelers' Ins. Co.*, 28 Fed. Cas. No. 16,795, 4 Biss. 357, 5 Bigelow Ins. Cas. 114.

⁹⁷ *Engel v. Powell*, 154 Mo. App. 233, 134 S. W. 74.

⁹⁸ *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868.

⁹⁹ *Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176.

The general rule excluding offers of compromise applies with the same force to *letters* as to verbal communications. Said Sir John Romilly: "Such communications made with a view to an amicable arrangement ought to be held very sacred, for if parties were to be afterward prejudiced by their efforts to compromise it would be impossible to attempt any amicable arrangement of differences."¹⁰⁰ And where a letter comes within the rules already stated, both the letter and *reply* are inadmissible.¹ Where, in an accident case, it was sought to impeach a witness for a traction company on the ground that he was himself injured in the same accident, and his claim had been compromised by them, and the court instructed the jury not to consider the testimony for any other purpose than that named, the instruction was held properly limited.² Needless to say, statements and admissions made before any dispute took place, or after the attempted compromise was abandoned,³ and admissions which, by their very nature, negative compromise, such as endeavoring to obtain time and arrangements of terms of payment, are not to be excluded upon the ground which would prevent a *bona fide* offer of compromise being used to the prejudice of either party.⁴ As a matter of course and common sense, once the agreement sought in the offers of compromise is completed, or, in the case of a letter written without prejudice, the offer is accepted, the result of the agreement is competent. Until acceptance it is, subject to what we have said, inadmissible.

¹⁰⁰ Kierstead v. Brown, 23 Neb. 595, 37 N. W. 471; Phillips v. United States Ben. Soc., 120 Mich. 142, 79 N. W. 1; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Hoghton v. Hoghton, 15 Beav. 278, 51 Eng. Reprint, 545.

¹ Paddock v. Forrester, 3 Man. & G. 903, 919, 133 Eng. Reprint, 1404; Jones v. Foxall, 15 Beav. 388, 51 Eng. Reprint, 588.

² St. Louis etc. Ry. Co. v. Knowles, 44 Tex. Civ. App. 172, 99 S. W. 867.

³ Broschart v. Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925; Cates v. Kellogg, 9 Ind. 506; Blake v. Austin, 33 Tex. Civ. App. 112, 75 S. W. 571.

⁴ Jackson v. Clopton, 66 Ala. 29; Donley v. Bailey, 48 Colo. 373, 110 Pac. 65; Kutcher v. Love, 19 Colo. 542, 36 Pac. 152; Austin v. Long, 5 Ga. App. 551, 63 S. E. 640; Teasley

§ 292 (294). **Effect of paying money into court — Tender.**—The question has frequently arisen as to the effect of the payment of money into court by a defendant upon an order or rule for that purpose. It was the old practice, if the plaintiff refused to accept the amount paid into court, to have the amount so paid struck out of the declaration or complaint and paid out of court to the plaintiff or to his attorney. On the trial the plaintiff was not allowed to give any testimony for such amount; and if he did not recover more than the amount so paid, judgment went against him for the costs.⁵ Under this old practice of paying the money into court, on a declaration setting out a special contract, the defendant thereby admitted the contract as alleged, and a breach thereof with damages to the amount paid in.⁶ But where the action was in *assumpsit* containing the common counts, the defendant only admitted by such payment some liability on some contract under the money counts; and if the plaintiff sought to recover any further sum, he was bound to prove a contract or liability on the part of the defendant as well as a larger sum due.⁷ In an action against a town for personal injuries caused by a defective highway, it was held that, after a payment into

v. Bradley, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; Hood v. Tyner, 3 Ind. App. 51, 28 N. E. 1033; St. Louis etc. R. Co. v. Stone, 78 Kan. 505, 97 Pac. 471; Finn v. Tel. etc. Co., 101 Me. 279, 64 Atl. 490; Snow v. Batchelder, 8 Cush. (Mass.) 513; Person v. Bowe, 79 Minn. 238, 82 N. W. 480; Grubbs v. Nye, 13 Smedes & M. (Miss.) 443; Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859; Quinn v. White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818; Altman v. Boston etc. R. Co., 75 N. H. 573, 78 Atl. 616; Field v. Tenney, 47 N. H. 513; Perkins v. Concord R. R., 44 N. H. 223; Armour v. Gaffey, 165 N. Y. 630, 59 N. E. 1118; Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695; Bartlett v. Tarbox, 1 Abb. Dec. (N.

Y.) 120; Wallace v. Hussey, 63 Pa. 24; Swan v. Scott, 11 Serg. & R. (Pa.) 155; Draper v. Horton, 22 R. I. 592, 48 Atl. 945; Rotan Grocery Co. v. Martin (Tex. Civ. App.), 57 S. W. 706; Clapp v. Foster, 34 Vt. 580; Chesapeake etc. R. Co. v. Stock & Sons, 104 Va. 97, 51 S. E. 161; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059; McNeil v. Holbrook, 12 Pet. (U. S.) 84, 9 L. Ed. 1009; In re Breon Lumber Co., 181 Fed. 909.

⁵ Bank of Columbia v. Southerland, 3 Cow. (N. Y.) 336.

⁶ Hubbard v. Knous, 7 Cush. (Mass.) 556; Johnston v. Columbian Ins. Co., 7 Johns. (N. Y.) 315.

⁷ Hubbard v. Knous, 7 Cush. (Mass.) 556.

court of a sum of money, the defendant town had so far admitted the cause of action that it could not give evidence of contributory neglect on the part of the plaintiff.⁸ Greenleaf further states the effect of the payment of money into court as an admission: "The defendant conclusively admits that he owes the amount thus tendered in payment; that it is due for the cause mentioned in the declaration; that the plaintiff is entitled to claim it in the character in which he sues; that the court has jurisdiction of the matter; that the contract described is rightly set forth, and was duly executed; that it has been broken in the manner and to the extent declared; and, if it was a case of goods sold by sample, that they agreed with the sample. In other words, the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money. But it admits nothing beyond that. If, therefore, the *contract* is *illegal* or *invalid*, the payment of money into court gives it no validity; and if the *payment* is *general*, and there are several counts or contracts, some of which are legal and others not, the court will apply it to the former."⁹ In England statutes now exist allowing the defendant to plead payment into court, and at the same time to deny the plaintiff's cause of action, and to set up a special defense;¹⁰ and in the United States, by statutes in the various states, which are often resorted to, the defendant is allowed to make an *offer of judgment*, which offer, if not accepted, cannot be made use of by the plaintiff for any purpose.¹¹ There is, however, practically no difference as to the effect of payment into court or tender as an admission, and the extent of that admission is now clearly established. When money has been regularly brought into court after a tender, if the plaintiff fails to prove a cause of action for a greater amount than was tendered, judgment goes for the de-

⁸ Bacon v. Inhabitants of Charlton,
7 Cush. (Mass.) 581.

dan v. Greenwood L. R. 3 Ex. Div.
251.

⁹ 1 Greenl. Ev., § 205.

¹¹ See the statutes in the several

¹⁰ Tayl. Ev., 10th ed., § 832; Ber-

states.

fendant for his costs, but the money paid into court belongs to the plaintiff. It also belongs to him if the defendant fails to prove a valid or sufficient tender; and in such case the plaintiff is entitled to judgment at least for the sum paid into court, and for costs; but execution goes only for the balance of the judgment after deducting such sum. The principle upon which these rules are founded is, that the tender (even though insufficient) and the payment into court, for the plaintiff, of the money tendered, is a conclusive admission that the amount so paid in is due to the plaintiff; and hence, that the money belongs absolutely to him, whatever may be the fate of the action.¹² A debtor, by tendering a certain amount to his creditor, must be held to admit every fact which the creditor would be required to prove to entitle him to a decree for the amount tendered.¹³ Where a declaration contains a single count, specifically set forth, a tender amounts to an admission of every fact which the plaintiff

¹² *Birmingham etc. R. Co. v. Maddox*, 155 Ala. 292, 46 South. 780; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; *Ellison v. Simmons*, 6 Penne. (Del.) 200, 65 Atl. 591; *Rogers Grain Co. v. Jansen*, 117 Ill. App. 137; *Toledo etc. R. Co. v. Beals*, 137 Ill. App. 430; *Ahrens v. Fenton*, 138 Iowa, 559, 116 N. W. 233; *Latham v. Hartford*, 27 Kan. 249; *Slack v. Price*, 1 Bibb (Ky.), 272; *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 517; *Currier v. Jordan*, 117 Mass. 260; *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587, 44 N. W. 864; *Becker v. Boon*, 61 N. Y. 317; *Logue v. Gillick*, 1 E. D. Smith (N. Y.), 398; *Read v. Mutual Safety Ins. Co.*, 3 Sand. (N. Y.) 54; *Slack v. Brown*, 13 Wend. (N. Y.) 390; *Eaton v. Wells*, 82 N. Y. 576; *Brown v. Fink*, 48 N. C. 378; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393; *Woodward v. Cutter*, 33

Vt. 49; *Schnur v. Hieckox*, 45 Wis. 200; *Cain v. Garfield*, 4 Fed. Cas. No. 2293, 1 Low. 483; *Seaton v. Benedict*, 5 Bing. 187, 2 M. & P. 301, 6 L. R. C. P., O. S., 208, 130 Eng. Reprint, 1032.

¹³ *Uedelhofen v. Mason*, 201 Ill. 465, 66 N. E. 364; *Price v. Jester*, 137 Ill. App. 565; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa, 682, 74 N. W. 26; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507, where it was held that a defendant by his tender having acknowledged the cause of action could not afterward avail himself of the defense that in making the sales (the subject matter of the action) the plaintiffs were only acting as agents. Citing the well-known cases: *Hubbard v. Knous*, 7 Cush. (Mass.) 556; *Bacon v. Inhabitants of Charlton*, 7 Cush. (Mass.) 581; *Hosmer v. Warner*, 7 Gray (Mass.), 186; *Hinds v. Cottle*, 143 Mass. 310, 9 N. E. 654.

is bound to prove in order to maintain his cause of action. But when the declaration is general, tender and payment only admit some contract of the kind alleged in the declaration, with damages to the amount paid in. If the plaintiff seeks to recover more, he must prove a contract entitling him so to do, as well as to recover the amount paid in. Nothing beyond the amount paid in is admitted.¹⁴ The tender admits that the amount tendered is due. It does not, however, necessarily admit all the alleged grounds for recovery. That must be determined by the pleadings. For example, in an Iowa action the plaintiffs alleged that they were the owners of a quarter section of land, which was described; that from January 1, 1882, to March 1, 1887, the defendant used, occupied, and cultivated the same, and that such use and occupation were worth the sum of one hundred and twenty-five dollars, which was then due and unpaid. Plaintiffs demanded judgment for that sum, with interest and costs. The answer denied all indebtedness in excess of twenty-five dollars. The court charged the jury that, under the issues and evidence in the case, "the plaintiffs were entitled to recover from the defendant the fair rental value of the use of so much of the premises described in plaintiffs' petition as was actually occupied and cultivated by him from January 1, 1882, to March 1, 1887." Plaintiffs insisted that by his tender, the defendant admitted their cause of action, and the only question to be determined was the amount of their recovery, and that such amount should be determined, not by the rental value of the portion of the land actually occupied, but from that of the entire tract. Plaintiffs alleged that all the quarter section was used and occupied by defendant. But the first division of the answer was a general denial in effect; and the second stated that, if defendant was indebted to plaintiffs, the amount of such indebtedness did not exceed twenty-five dollars, and that sum had been tendered and paid into court. It could not fairly be claimed that anything was admitted by the

¹⁴ *Hinds v. Cottle, supra.*

answer, excepting that the amount tendered was due to plaintiffs on a cause of action included in their suit. It did not admit that defendant used the premises described during all the time named, nor that he used them at any time.¹⁵ While a tender operates as an admission, yet if it be made in error, such as by a tender of a sum greater than that which the tenderer admits, it may be withdrawn. In a New Hampshire case,¹⁶ Foster, J., said: "It was competent for the plaintiffs to explain the grounds upon which their tender was made. Without explanation it might have amounted to an admission of their liability; and for this reason the defendants can have no valid objection to evidence of the understanding of the parties, and the circumstances under which it was made."¹⁷ Where on a contract for land purchase the vendee performed certain work for the vendor which was to go in payment of interest, and a dispute having arisen, the vendee, not wishing to imperil his position, tendered the vendor the amounts due, which the latter refused and, having declared a forfeiture, brought suit, the court said: "A payment into court has been held to be an admission of the indebtedness, to that extent, upon the contract sued upon; but we do not understand that a tender made before suit, to protect incidents, precludes the party making the tender from asserting, after suit brought, any other existing defense. The theory of the

¹⁵ Griffin v. Harriman, 74 Iowa, 436, 38 N. W. 139.

¹⁶ Ashuelot Railroad v. Cheshire R. R., 60 N. H. 356.

¹⁷ See, also, Abel v. Opel, 24 Ind. 250, where the plaintiff in a suit to compel the entry of satisfaction on a mortgage, tendered the defendant fourteen hundred dollars. Subsequently, on finding out that such sum was too much, the plaintiff brought into court thirteen hundred and nine dollars, which was adjudged the correct amount. The court said: "It is true that the tender was an admission of

the amount due; but that admission was not conclusive evidence, excluding the consideration of all other evidence upon the subject. The proof was clear that thirteen hundred and nine dollars was the amount actually due when the tender was made. Nor can we agree that if too much be tendered, any legal obligation is thereby created to pay, or keep good, the whole amount so tendered." Abel v. Opel, *supra*, is cited in Wea Township v. Cloyd, 46 Ind. 49, 91 N. E. 959 (admission of liability for damages on payment into court).

case above cited¹⁸ is that, as to all things which are incidental and accessorial to the debt, the tender is equivalent to payment."¹⁹ If, after a tender, the tenderee at any time offered to take the amount tendered, and the tenderer refused to pay it, the latter would lose the benefit of his tender.²⁰ A verdict may be rendered for more than the amount tendered, but it cannot be rendered for less,²¹ and this, too, although the tender be defective or even be offered in a case where it cannot be legally made or pleaded, and for such reasons be held unavailing, to save costs. A tender and payment into court, however, only admit the cause of action as to the sum tendered, and do not affect the defense of the party making the same by precluding such party from disputing the recovery of a greater sum upon the same cause.²² So in an action upon a store account of different items, the payment of money into court upon a particular item admits the character in which the plaintiff sues and the defendant's indebtedness to the extent of the amount paid in only. It admits nothing as to other items in the same account upon which the money was not paid in. As to them, the defendant, notwithstanding the payment, is free to deny the character in which the plaintiff sues, and the justice of the claim.²³ It has been held in Massachusetts that a tender of a certain sum in full for damages sustained in consequence of a defect in a highway has the effect and operation of a tender at common law; and where the declaration contains only one cause of action, specifically set forth, the tender is a conclusive admission of every fact, which the plaintiff would otherwise be bound to prove, in order to maintain his ac-

¹⁸ Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; Caruthers v. Humphrey, 12 Mich. 270; Van Husan v. Karouse, 13 Mich. 303; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692,

¹⁹ Hill v. Carter, 101 Mich. 158, 59 N. W. 413.

²⁰ Hill v. Carter, *supra*.

²¹ Denver etc. R. Co. v. Harp, 6 Colo. 420.

²² Simpson v. Carson, 11 Or. 361, 8 Pac. 325.

²³ Brown v. Fink, 3 Jones (48 N. C.) 378.

tion, and precludes the defendant from introducing evidence of carelessness on the part of the plaintiff, either as to the merits of the case or in mitigation of damages.²⁴ There is a considerable conflict of authority as to the effect of a tender upon the right of the defendant to avail himself of defenses to prevent a further recovery, or, by means of a counterclaim, to defeat a recovery even to the extent of the tender. In a large number of cases it has been stated that the plaintiff is entitled to a judgment to the amount of the tender at least—thus suggesting that no counterclaim could be set up. But, in many of these cases, the facts show that there was no attempt on the part of the defendant to set up a counterclaim, but only an attempt to deny the facts conclusively admitted by the tender, so as to defeat a recovery of the amount of the tender itself. The subject is somewhat complicated by the fact that a distinction is sometimes made between the effect of a tender in actions on contract and in actions in tort; and other authorities make a distinction between a tender where the declaration sets up a special contract only, and where it states more than one cause of action. Frequently these distinctions are overlooked by the court, and, consequently, it is difficult to determine the particular bearing of the decision upon the general subject.²⁵ The weight of authority

²⁴ *Bacon v. Inhabitants of Charlton*, 7 Cush. (Mass.) 581. See also, *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468, and valuable note appended thereto on the subject generally. *Moynahan v. Moore*, *supra*, remarkable for the brevity and soundness of Chief Justice Martin's exposition of the law, and cited in numerous cases, decides that: A tender made to procure possession of property can hardly be called conditional because it is accompanied with a demand for the property. Objection made at time of tender precludes all others, and if that be not well grounded, the tender will be held good. A tender sufficient in amount

to discharge mechanic's lien for repair of personal property is not vitiated by condition that the property shall be delivered up, where the only objection made to the tender was that the amount was insufficient. A mechanic's lien is discharged by sufficient tender, and the mechanic can thereafter only rely upon the personal responsibility of his employer, who, in bringing replevin for his property, is not obliged, in order to keep his tender good, to bring the money into court.

²⁵ From an excellent note, full of useful illustrations, to *Palmer v. La Rault*, 21 L. R. A., N. S., 354.

seems to be in favor of the defendant's right to avail himself of defenses outside of the tender, and to counterclaim where the circumstances warrant that mode. In one of the latest cases on the subject,²⁶ the plaintiff sought to recover two hundred and eleven dollars for services as a veterinary surgeon. Defendant answered admitting treatment of some of his horses but denied that his services were of any value, except that plaintiff had done dental work upon two of his horses, and that such dental work was of the reasonable value of five dollars, which sum, with all accrued costs and statutory attorney's fees, he tendered into court. Defendant further alleged as an affirmative defense, that plaintiff had held himself out as one possessed of reasonable skill and knowledge of veterinary science; the defendant relied upon such representations, and employed him to treat three head of horses which were afflicted with some disease then unknown to defendant; that in truth plaintiff did not diagnose the disease with which said horses were afflicted in a proper way; that he treated them as if afflicted with a harmless disease, when in fact they were sick with an infectious disease of a most malignant and fatal type, known as glanders; that, by reason of plaintiff's ignorance in diagnosis and improper treatment, certain other horses belonging to defendant, to the number of six head, contracted the said infectious disease, and six of his horses died; that the value of the horses so lost by reason of the careless, unskillful, and negligent treatment of plaintiff was the sum of twelve hundred dollars. For this sum, less the amount admitted to be due for dental services, he demanded judgment. Upon the trial the court announced that no testimony would be allowed upon the defense tendered by the affirmative answer. The error of the trial court was pointed out by Chadwick, J.: "A tender of a part of the amount claimed to be due under a contract involving items which may be segregated is no more than an admission of a contract, and that the amount tendered is

²⁶ *La Rault v. Palmer*, 51 Wash. 664, 21 L. R. A., N. S., 354, 99 Pac. 1036.

due thereon. The value of the services rendered still being an issue, the appellant could, under the statute, plead any counterclaim upon any cause of action arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action. While there is a division of authority, this is in accord with the better rule, in our judgment, consistent with the proper interpretation of § 5176, Ballinger's Anno. Codes & Statutes, (§ 1113, Pierce's Code), which puts no greater burden on a defendant than to tender the amount which he admits to be due, rather than the exact amount which may be found to be due. The old rule was harsh and unjust. To relieve a party of the hazards attending a tender, courts gradually came to declare the more liberal rule." This modern rule has been adopted and announced in the cases in the note hereto.²⁷

§ 293 (295). The whole statement or admission to be received.—Apart altogether from the legal requirement to hear all the truth, we have to recognize the necessity in every-day life for assertions first made and then qualified. Socially as well as commercially the form of statement is adopted both for convenience of speech and dispatch of business. Illustrations innumerable might be furnished to exemplify the evil that would result from a report of the statement unqualified. Hence it need occasion no surprise that in law it is the well-settled rule that the whole of a declaration or statement containing an admission should be received together. Where there is room for surprise is that the rule should ever have been questioned, and that cases should arise calling for the decision of the United States supreme court. The rule has been definitely laid down there by Mr. Justice Field. "Every admission upon which a party relies is to be taken as an entirety of the fact

²⁷ Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Simpson v. Carson, 11 Or. 361, 8 Pac. 325; Spalding v. Vandercook, 2 Wend. (N. Y.) 431; Eaton v. Wells, 82 N. Y. 576; Roose-

velt v. New York & H. R. Co., 45 Barb. (N. Y.) 554; Davis v. Mil-laudon, 17 La. Ann. 97, 87 Am. Dec. 517; Hinds v. Cottle, 143 Mass. 310, 9 N. E. 654.

which makes for his side, with the qualifications which limit, modify or destroy its effect on the other side.”²⁸ This is a settled principle which has passed by its universality into an axiom of the law.²⁹ When, therefore, the agent and officers of an insurance company stated to the agent of a party claiming upon a policy of insurance, that the preliminary proofs presented were sufficient as to the death of the insured, but that they showed that the insured had committed suicide, the whole admission must be taken together; if sufficient to establish the death of the insured, it was also sufficient to show the manner of his death. This rule, together with its reason, is thus stated by Mr. Best: “Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self-serving statements it contains.”³⁰ Many illustrations

²⁸ *Mutual Benefit Life Ins. Co. v. Newton*, 22 Wall. (U. S.) 32, 22 L. Ed. 793, followed in *Sharland v. Washington Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307; *Hassencamp v. Mutual etc. Ins. Co.*, 120 Fed. 475, 56 C. C. A. 625; *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385.

²⁹ *Jones v. Fort*, 36 Ala. 449; *Murry v. Meredith*, 25 Ark. 164; *Bailey v. Carlton*, 43 Colo. 4, 95 Pac. 542; *Presley v. State*, 61 Fla. 46, 54 South. 367; *Mitchem v. Allen*, 128 Ga. 407, 57 S. E. 721; *Black v. Wabash etc. R. Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Moore v. Wright*, 90 Ill. 470; *Courtright v. Deeds*, 37 Iowa, 503; *Taylor v. Whiting*, 2 B. Mon. (Ky.) 268; *State v. Thompson*, 116 La. 829, 41 South. 107; *Lewis v. Gibson*, 9 Rob. (La.) 146; *Oakland Ice Co. v. Maxey*, 74 Me. 294; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Adam v. Eames*, 107 Mass. 275; *Farley v. Rodocanachi*, 100 Mass. 427; *Swift Electric Light Co. v. Grant*,

90 Mich. 469, 51 N. W. 539; *McIntyre v. Harris*, 41 Miss. 81; *Howard v. Newsom*, 5 Mo. 523; *Young v. Beveridge*, 81 Neb. 180, 115 N. W. 766; *Barker v. Barker*, 16 N. H. 333; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Roberts v. Roberts*, 85 N. C. 9; *Wolf Creek Diamond Coal Co. v. Schultz*, 71 Pa. 180, 3 Morr. Min. Rep. 95; *Haisten v. Hixen*, 3 Sneed (Tenn.), 691; *McGehee v. Lane*, 34 Tex. 390; *Prince v. Samo*, 7 Ad. & E. 627, 7 L. J. Q. B. 123, 112 Eng. Rep. 606; *Queen's Case*, 2 Brod. & B. 298, 129 Eng. Reprint, 981. Further, as to the general subject, see § 171, *ante*; §§ 823, 852, *post*.

³⁰ Best, *Ev.*, 10th ed., § 520; *Randle v. Blackburn*, 5 Taunt. 245, 128 Eng. Reprint, 683; *Thomson v. Austen*, 2 Dowl. & R. 359, 1 L. J. (O. S.) K. B. 99; *Smith v. Blandy*, *Ryan & M.* 257; *Darby v. Ouseley*, 2 Jur., N. S., 497, 1 Hurl. & N. 1, 25 L. J.

of this rule might be given. Thus the whole statement should be given, where admissions of a purchase of property are coupled with the statement that the price has been paid;³¹ where there is an admission of trespass or other act accompanied by facts showing justification,³² or where an admission of sale or other contract is coupled with a statement of warranty, together with its breach, or of other qualifying terms.³³ In a New York case the same principle was applied after an elaborate discussion where it was proved as an admission of the defendant that he had pointed out certain property as that of the plaintiff. It was held that the defendant was entitled to prove his state-

Ex. 227; *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641. See, also, the Canadian cases: *Cox v. Pecaud*, Q. R. 23 S. C. 9; *Fulton v. McNamee*, 2 S. C. R. 470. In the case of *Lombard v. Chaplin*, 98 Me. 309, 314, 56 Atl. 903, it was said: "This court, in *Storer v. Gowen*, 18 Me. 174, have held that: 'It is a principle well settled that the admissions of a party, when given evidence, must be taken together, as well what makes in his favor as against him. Both are equal evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve.' (*Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598.) In an early decision in Massachusetts, *Whitwell v. Wyer*, 11 Mass. 6, this is the language of the court: 'Where you rely upon a confession you must take it altogether.' And the same court says in *O'Brien v. Cheney*, 5 Cush. (Mass.) 148: 'The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied': See, also, *Adam v. Eames*, 107 Mass. 275; *Dole*

v. Wooldredge, 142 Mass. 161, 7 N. E. 832. In regard to the admission of the defendant, the court says in *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138: 'That the whole declaration of the party made at one time, as well that in his favor as that which is against him, must be received and weighed.' And in *Moore v. Wright*, 90 Ill. 470, the court holds that: 'Where a party's admissions are called for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him.' It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admission as testimony."

³¹ *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Benedict v. Nichols*, 1 Root (Conn.), 434.

³² *Credit v. Brown*, 10 Johns. (N. Y.) 365.

³³ *Kelsey v. Bush*, 2 Hill (N. Y.), 440; *Whitwell v. Wyer*, 11 Mass. 6; *Oliver v. Gray*, 1 Har. & G. (Md.) 204; *Hopkins v. Smith*, 11 Johns. (N. Y.) 161.

ment in the same conversation that the debt, for which the levy was made, was one which should be paid by the plaintiff.³⁴ "Where, taking the confession together, the branch making against the party is *completely avoided*, qualified or *explained* away by another branch, and there is nothing beside, either intrinsic or extrinsic, the latter branch to render it questionable, the first is neutralized; and the whole is considered by the cases as not weighing a feather against the party."³⁵ In another New York case,³⁶ the plaintiff vendor sued the defendant vendee for breach of a contract for the sale of yarn. The defense was that there was no such contract and that the negotiations related solely to the appointment of defendant as agent for plaintiff to sell yarn. The plaintiff put in part of the correspondence, and even that which was so put in only partially supported his case, but the trial judge properly allowed in the rest of the letters which explained the transaction. The question was as to the true nature of the transaction which the parties had had under consideration, and, for the correct determination of that question, it was essential that all that had passed between them upon the subject should be known. The letters and the conversations to which they presumably related or expressly referred were therefore rightly admitted, and, being both admitted, their effect as a whole was properly left to the jury. The fact that a witness did not hear or did not understand a whole conversation or statement does not render inadmissible the part he did hear and understand. The jury should always be cautioned, however, as to the state of facts. For instance, a foreigner might address an American partly in a foreign language unknown to the American and partly in English. It could never be seriously urged that what he said in English was inadmissible, and there cannot be any reason advanced for the admission

³⁴ Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337, and extended note.

³⁵ Phil. Ev., Cow. & Hill's Notes, p. 343; Smith v. Jones, 15 Johns. (N. Y.) 229; Wailing v. Toll, 9 Johns. (N.

Y.) 141; Carver v. Tracy, 3 Johns. (N. Y.) 427; Benedict v. Nichols, 1 Root (Conn.), 434.

³⁶ Elizabeth City Cotton Mills v. Loeb, 119 Fed. 154, 56 C. C. A. 42.

of the testimony of witnesses who heard only a part of a conversation which will not apply equally to the testimony of a witness who heard it all but only understood or remembered a portion of it.³⁷ In showing the remaining part of the conversation bearing on this subject the party is, of course, not limited to the one witness. The one may have only heard one portion of the conversation and another the remainder, and he is entitled to have the salient matter in evidence.³⁸ Where the defendant's answer to a question put by the witness, or another person, is sought to be introduced, and such answer could not be understood, or would be unintelligible, without stating the question also, to which it was made, in such case the question would be admissible.³⁹ But it does not follow that the one offering the admissions will be compelled to offer in the first instance the whole conversation or statement. He offers that part which he considers advantageous or which the wit-

³⁷ *State v. Lu Sing*, 34 Mont. 31, 9 Ann. Cas. 344, 85 Pac. 121. See, also, *Westmoreland v. State*, 45 Ga. 225; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *State v. Elliott*, 15 Iowa, 72; *State v. Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State v. Madison*, 47 La. Ann. 30, 16 South. 566; *State v. Vallery*, 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 South. 745; *State v. Daniels*, 49 La. Ann. 954, 22 South. 415; *Commonwealth v. Pitsinger*, 110 Mass. 101; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Dice*, 120 Cal. 189, 52 Pac. 477.

³⁸ *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 South. 46; *First Nat. Bank of Oakland v. Wolff*, 79 Cal. 69, 21 Pac. 551; *Clark v. Smith*, 10 Conn. 1, 25 Am. Dec. 47; *Williams v. Keyser*, 11 Fla. 234, 89 Am. Dec. 243; *Dixon v. Edwards*, 48 Ga. 142; *Morris v. Jamieson*, 205 Ill. 87, 68 N. E. 742; *Grand Rapids etc. R. Co. v. Diller*, 110 Ind. 223, 9 N. E. 710; *Robertson v. Vasey*, 125 Iowa, 526,

101 N. W. 271; *Hess v. Wilcox*, 58 Iowa, 380, 10 N. W. 847; *Louisville Times Co. v. Lancaster*, 142 Ky. 122, 133 S. W. 1155; *Beauchamp v. Tennel*, 1 Bibb (Ky.), 441; *State v. Thompson*, 116 La. 829, 842, 41 South. 107; *Agricultural Bank v. The Jane*, 19 La. 1; *Barbour v. Martin*, 62 Me. 536; *Turner v. Jenkins*, 1 Har. & G. (Md.) 161; *Farley v. Radocanachi*, 100 Mass. 427; *Continental Life Ins. Co. v. Willets*, 24 Mich. 268; *Reeves v. Hardy*, 7 Mo. 348; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Steele v. Wood*, 78 N. C. 365; *Sherwood v. Titman*, 55 Pa. 77; *Carolina etc. R. Co. v. Seigler*, 24 S. C. 124; *St. Louis etc. Ry. Co. v. Frazier* (Tex. Civ. App.), 87 S. W. 400; *Yeska v. Swendrzynski*, 133 Wis. 475, 113 N. W. 959; *Elizabeth City Cotton Mills v. Loeb*, 119 Fed. 154, 56 C. C. A. 42.

³⁹ *Barnum v. Barnum*, 9 Conn. 242; *Young v. Bennett*, 4 Scam. (Ill.) 43; *Mulins v. Cottrell*, 41 Miss. 291.

ness remembers, and the adversary has the right to full cross-examination to bring out the remainder. A court or jury are *not bound to give equal credit to all parts* of a statement or admission; they may believe a part and disregard the rest. The rule only requires that what is in favor of the party making the admissions should be fairly and liberally considered and weighed with the other evidence.⁴⁰ Of course, the one offering admissions of this character is not bound by the statements which are favorable to the declarant. He may rebut such statements or show them to be erroneous;⁴¹ and it is for the court or jury to reject such portions of the statement, if any, as appear to be inconsistent, improbable or rebutted by other circumstances in evidence.⁴² Although it is a familiar principle that when a part of a conversation or admission is introduced, the other party may prove the rest of such statement, *yet the rule is limited to such statements as would in any way qualify or explain the part first given.* Where a conversation about a given matter is introduced, the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation.⁴³ It formerly was the rule that any of the re-

⁴⁰ *Wilson v. Calvert*, 8 Ala. 536; *Licett v. State*, 23 Ga. 57; *Field v. Hitchcock*, 17 Pick. (Mass.) 182, 28 Am. Dec. 288; *Coon v. State*, 21 Miss. 246; *McCann v. State*, 21 Miss. 471; *Green v. State*, 13 Mo. 382; *Newman v. Bradley*, 1 Dall. (Pa.) 240, 1 L. Ed. 118; *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138; *Brown v. Commonwealth*, 9 Leigh (Va.), 633, 33 Am. Dec. 263.

⁴¹ *Quick v. Johnson*, 6 Mart. N. S. (La.) 532; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

⁴² *Adkins v. Hershy*, 14 Ark. 442; *Ayers v. Metcalf*, 39 Ill. 307; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Roberts v. Gee*, 15 Barb. (N. Y.) 449; *Kelsey v. Bush*, 2 Hill (N. Y.),

440; *Beckwith v. Mollohan*, 2 W. Va. 477; *Pearson v. Sabin*, 10 N. H. 205.

⁴³ *Straw v. Greene*, 14 Allen (Mass.), 206; *People v. Beach*, 87 N. Y. 508; *Platner v. Platner*, 78 N. Y. 90; *Downs v. New York Cent. Ry. Co.*, 47 N. Y. 83; *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337, and extended note; *Stedman v. Ranney*, 80 Hun (N. Y.), 37, 29 N. Y. Supp. 866; *Dorlon v. Douglass*, 6 Barb. (N. Y.) 451; *Garey v. Nicholson*, 24 Wend. (N. Y.) 350; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Wendt v. Chicago etc. R. Co.*, 4 S. D. 476, 57 N. W. 226; *Prince v. Samo*, 7 Ad. & E. 627; *Miller v. Wildcat Gravel Road Co.*, 52 Ind. 51; *Atherton v. Defreeze*,

mainder of the conversation was admissible, provided it related to the subject matter of the suit;⁴⁴ but that was qualified by the later cases, and the rule now is that where a statement forming part of a conversation is given in evidence, whatever was said by the same person, in the same conversation, that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible; and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a third party.⁴⁵ The rule is also limited to such statements as were made at the same time. A party cannot relieve himself of statements made one day by showing that the next day he said something different.⁴⁶ It is very clear that one who has made admissions cannot be permitted to give evidence of his subsequent declarations for the purpose of contradicting or explaining his former admissions.⁴⁷ It is not a condition that the *exact words* of the statement should be required, since the law does not require impossibilities. It suffices if the witness states the *substance* of the conversation or declaration.⁴⁸ But the mere inferences or con-

129 Mich. 364, 88 N. W. 886; Overman v. Coble, 35 N. C. 1; Edwards v. Ford, 2 Bail. (S. C.) 461; Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446; State v. Leuhrman, 123 Iowa, 476, 99 N. W. 140; State v. Thompson, 116 La. 829, 41 South. 107. See, also, cases above cited to note 29, *supra*.

⁴⁴ Queen's Case, 2 Brod. & B. 297, 129 Eng. Reprint, 981.

⁴⁵ This subject will be found fully treated in the chapter on "Relevancy," § 171, *ante*.

⁴⁶ Beebe v. Smith, 194 Ill. 634, 62 N. E. 856; Hatch v. Potter, 7 Ill. 725, 43 Am. Dec. 88; State v. Thompson, 116 La. 829, 41 South.

107; Adam v. Eames, 107 Mass. 275; O'Connor v. Padget, 82 Neb. 95, 116 N. W. 1131; People v. Green, 1 Park. Cr. Rep. (N. Y.) 11; McPeake v. Hutchinson, 5 Serg. & F. (Pa.) 295; Edwards v. Ford, 2 Bail. (S. C.) 461; Varley Duplex Magnet Co. v. Ostheimer, 159 Fed. 655, 86 C. C. A. 523; Johnson v. Birkett, 21 Ont. L. R. 319, 16 Ont. W. R. 445.

⁴⁷ Murray v. Coster, 4 Cow. (N. Y.) 617; Martin v. Root, 17 Mass. 222.

⁴⁸ Fertig v. State, 100 Wis. 301, 75 N. W. 960; Lewis v. Brown, 41 Me. 448; Worthington v. State, 92 Md. 222, 84 Am. St. Rep. 506, 56 L. R. A. 352, 48 Atl. 355; Kingsbury v. Moses, 45 N. H. 222.

clusions of the witness should be rejected.⁴⁹ In the rule governing the introduction of the whole statement or conversation are included statements in the nature of judicial admissions irrespective of the case in which they are made. There is no reason why the admissions and statements made by a party in a former trial should not be competent to be received as evidence against him to the same extent as if they had been made by him out of court;⁵⁰ and there is ample authority to support this view.⁵¹

§ 294 (296). Same—Written admissions.—The remarks in the previous section apply with all force to written documents, and it is equally well settled that the introduction of a part of a writing as an admission renders admissible so much of the remainder as tends to explain or qualify what has been received.⁵² Thus, if part of a letter is offered as evidence, other explanatory parts may be offered;⁵³ if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible;⁵⁴ and where one party uses as evidence a number of a series of the letters written by the other party, the latter may introduce the entire series.⁵⁵ Where in a crim-

⁴⁹ Helm v. Cantrell, 59 Ill. 524.

⁵⁰ Miller v. People, 216 Ill. 309, 74 N. E. 743.

⁵¹ Benedict v. Nichols, 1 Root (Conn.), 434; Illinois Steel Co. v. Wierzbicki, 107 Ill. App. 69; Merchants L. & T. Co. v. Egan, 222 Ill. 494, 78 N. E. 800; Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473; Lynde v. McGregor, 13 Allen (Mass.), 182, 90 Am. Dec. 188; Kritzer v. Smith, 21 Mo. 296; Dean v. Dean, 43 Vt. 337; Texarkana Gas etc. Co. v. Lanier (Tex. Civ. App.), 126 S. W. 67; Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742.

⁵² Jones v. Hopkins, 32 Iowa, 503; Illinois Cent. R. Co. v. Manion, 113 Ky. 7, 23 Ky. Law Rep. 2267, 101 Am. St. Rep. 345, 67 S. W. 40;

Lombard v. Chaplin, 98 Me. 309, 56 Atl. 903; Grattan v. Metropolitan Life Ins. Co. of New York, 92 N. Y. 274, 44 Am. Rep. 372; Addoms v. Weir, 56 Misc. Rep. 487, 108 N. Y. Supp. 146; Robeson v. Schuylkill Nav. Co., 3 Grant Cas. (Pa.) 186; Hartford Fire Ins. Co. v. Dorroh (Tex. Civ. App.), 133 S. W. 465; Wright v. Collins, 111 Va. 806, 69 S. E. 942. See § 171, *ante*; §§ 685, 822, *post*.

⁵³ Walker v. Griggs, 28 Ga. 552.

⁵⁴ Roe v. Day, 7 Car. & P. 705; Gibson v. Lacy, 87 Ind. 202; Lester v. Sutton, 7 Mich. 329; Livermore v. St. John, 4 Rob. (N. Y.) 12.

⁵⁵ Zimmerman v. Huber, 29 Ala. 379; Raymond v. Howland, 17 Wend. (N. Y.) 389.

inal case it appeared that in response to a request for a particular statement, one of the defendants sent to the witness a letter inclosing a statement "covering, as I believe, all the points you suggested," which statement consisted of an affidavit with copies of contracts annexed to it, it was error to allow one of the copy contracts referred to to be put in evidence with the letter apart from the affidavit and the other document.⁵⁶ In an action against a carrier the plaintiff introduced a receipt in evidence to prove delivery of a package to the defendant. The receipt contained a clause limiting the defendant's liability; the plaintiff having made the receipt a part of his case, the defendant was entitled to the benefit of all its terms and conditions. The plaintiff, under such circumstances, could not claim benefit of a portion of the contract and exemption from the remainder.⁵⁷ And where a notice to stop payment of a check was put in unqualifiedly by a plaintiff, and the notice bore a stamp of the bank showing it was received after the check was paid, the plaintiff failed in his action. The rule is that, if a party uses books of account or other papers against his adversary, he makes them evidence for him on the same subject. They are like any declaration or admission by writing or orally. If part is used, the whole relating to the same matter is admissible, and, being in the case, they must be given force.⁵⁸ Where three instru-

⁵⁶ *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385. The court in granting a new trial said: "It follows from this rule that with the letter of Dr. Perrin, the whole of the statement should have been admitted in evidence, including the copies of the agreements attached to the statement; or if excluded because the author of the statement was present in court at the trial and could be called by the defendants as a witness and cross-examined by the prosecution, then when called he should have been permitted to testify concerning the

matters set forth in such statement; or if the statement of Williams and his testimony relating thereto were properly excluded by the court, then surely Dr. Perrin should have been permitted to testify concerning his letter to Hunt inclosing the Williams' statement and the copies of the agreements."

⁵⁷ *Addoms v. Weir*, 56 Misc. Rep. 487, 108 N. Y. Supp. 146; *Springer v. Westcott*, 78 Hun (N. Y.), 365, 29 N. Y. Supp. 149.

⁵⁸ *Brandt v. Public Bank*, 139 App. Div. 173, 123 N. Y. Supp. 807; *Pendleton v. Weed*, 17 N. Y. 72;

ments, a contract for maintenance of a wife, a bond and deed of trust to secure it, formed one transaction and one was put in evidence, the opponent was entitled to have the other two introduced.⁵⁹ On this principle it has been frequently held that where one party offers the *books* or a statement of *account* furnished by the other party, for the purpose of showing admissions, he renders admissible those items which are favorable as well as those which are adverse to such other party. The one offering such an account as an admission cannot have the benefit of the credits without also submitting to the debits.⁶⁰ A treasury account which contains credits as well as debits is evidence for the defendant as well as the government; and, unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury any part of the credits relied on by the defendant.⁶¹ By the same rule, where a *pleading*, or affidavit, or deposition is offered in evidence, the statements relied on as admissions and the qualifying statements must be construed together, and whether it is in the same or another action.⁶²

Dewey v. Hotchkiss, 30 N. Y. 497. See, also, Bailey v. Robison, 149 Ill. App. 457, as to the production of portion only of the remainder of documentary evidence which could show the whole transaction between the parties.

⁵⁹ Levy v. Goldsoll (Tex. Civ. App.), 131 S. W. 420.

⁶⁰ Fitzpatrick v. Harris, 8 Ala. 32; Dougherty v. Knowlton, 19 Ill. App. 283; Veiths v. Hagge, 8 Iowa, 163; Green v. Glasscock, 9 Rob. (La.) 119; Piper v. White, 56 Pa. 90; Jones v. Jones, 4 Hen. & M. (Va.) 447; Waggoner v. Gray, 2 Hen. & M. (Va.) 603; Freeland v. Cocks, 3 Munf. (Va.) 352; Bell v. Davidson, 3 Wash. (C. C.) 328, 3 Fed. Cas. No. 1248. See §§ 685, 822, *post*.

As to accounts where one of the parties was insane for a part of the period covered, see Gross v. Jones, 89 Miss. 44, 42 South. 802.

It does not follow that entries in another part of the same book which have no connection with those offered must be received: Catt v. Howard, 3 Stark. 3, 23 R. R. 752.

⁶¹ United States v. Jones, 8 Pet. (U. S.) 387, 8 L. Ed. 983.

⁶² Callan v. McDaniel, 72 Ala. 96; Bumpass v. Webb, 1 Stew. (Ala.) 19, 18 Am. Rep. 34; Crocker v. Clements, 23 Ala. 296; Davies v. Flewellen, 29 Ga. 49; McNutt v. Dare, 8 Blackf. (Ind.) 35; Hewlett v. Hyden, 4 Ind. Ter. 176, 69 S. W. 839; Eldridge v. Duncan, 1 B. Mon. (Ky.) 101; Merrill v. Leisenring, 166 Mich. 219, 131 N. W. 538; Bom-

And where a paragraph of an answer admits a specific fact, and in another part of the same paragraph denies the allegations of the corresponding paragraph of the complaint, the plaintiff is entitled to introduce the admission without introducing the part denying the allegations of the complaint.⁶³ Although a party may offer a part of his pleading as explanatory of another part offered by the adversary, he cannot use such pleading as affirmative evidence for himself. There is a difference, however, according to whether the pleading is in the same or another action. The distinction is that, when an answer is read as a part of the pleadings in the cause in which it is filed, only such parts may be read as the party desires; but when it is taken from the cause in which it is filed and read in another proceeding, as an admission, there the whole of it must be read by the party offering it. The reading of a portion of the defendant's answer by the plaintiff as evidence, the answer being a pleading in the cause, and read

part v. Lucas, 32 Mo. 123; Gunn v. Todd, 21 Mo. 303, 64 Am. Dec. 231; Gildersleeve v. Landon, 73 N. Y. 609; Mott v. Consumers' Ice Co., 73 N. Y. 543; Gildersleeve v. Mahoney, 5 Duer (N. Y.), 383; Taft v. Little, 78 App. Div. 74, 79 N. Y. Supp. 507; Goodyear v. De La Vergne, 10 Hun, 537; Baker v. Duff, 136 App. Div. 13, 120 N. Y. Supp. 184 (where the court said: "The plaintiffs put in evidence a certified copy of a portion of the answer of the defendant's grantors in an action brought against them in the federal courts. This evidence, being offered and received generally, is in the case for all purposes, and, being offered, as is contended, for the benefit of the admissions it contains favorable to the plaintiffs, it inures to the benefit of the defendants as well": *People ex rel. Perkins v. Moss*, 187 N. Y. 410, 428, 10

Ann. Cas. 309, 11 L. R. A., N. S., 528, 80 N. E. 383); *McCord v. Southern R. Co.*, 130 N. C. 491, 41 S. E. 886; *Reiter v. Morton*, 96 Pa. 229; *Smith v. Chenault*, 48 Tex. 455; *Galveston etc. Ry. Co. v. Fitzpatrick* (Tex. Civ. App.), 91 S. W. 355 (in which part only of abandoned pleadings was introduced and the court properly sanctioned the reading of the remainder); *Aetna Ins. Co. v. Eastman* (Tex. Civ. App.), 80 S. W. 255 (part of testimony on former trial being introduced, the remainder permitted from stenographer's notes). See § 272 et seq. *ante*.

⁶³ *Lewis v. Norfolk etc. R. Co.*, 132 N. C. 382, 43 S. E. 919; *Stewart v. North Carolina R. Co.*, 136 N. C. 385, 48 S. E. 793; *Hockfield v. Southern Ry. Co.*, 150 N. C. 419, 134 Am. St. Rep. 945, 64 S. E. 181.

as such, gives the defendant no right to use any other parts of the answer as evidence for himself. If a defendant admits one fact and it is used by his adversary as evidence, that can be no warrant to him to take all the facts stated in the answer as evidence against the plaintiff. If any other portions of the answer, not read by the plaintiff, affected the sense, or explained in any way, the portions read, he would have a right to read them; but as to the portions which related to other facts, he would have no right to do so.⁶⁴ As we have seen with respect to oral admissions, the party offering written admissions is *not bound by the accompanying statements* which qualify such admissions, if he chooses to rebut or impeach them. In other words, he is not estopped to disprove them. The fact that the admission is in a pleading does not change its character or create an estoppel.⁶⁵

§ 295 (297). **Proof and weight of admissions.**—From what we have already shown it will have been gathered that it is always competent for the party whose alleged admission is being used against him to prove by any competent evidence either that no such statement was made or that it was so qualified at the time as to change its meaning.⁶⁶ To prove admissions of a party, any of the ordinary modes of proving acts, conduct or speech is applicable, and on such proof of his admissions they stand established and as of controlling weight unless some satisfactory explanation is made by which such effect is counteracted.⁶⁷

⁶⁴ *Kritzer v. Smith*, 21 Mo. 296; *Gunn v. Todd*, 21 Mo. 303, 64 Am. Dec. 231.

⁶⁵ *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Gildersleeve v. Landon*, 73 N. Y. 609; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Boots v. Canine*, 94 Ind. 408, in which Elliott, J., has discussed at interesting length the whole question of the admissibility in evidence of pleadings.

⁶⁶ *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538.

⁶⁷ *Harrison v. Peabody*, 34 Cal. 178; *Freeman v. Peterson*, 45 Colo. 102, 100 Pac. 600; *Alabama Midland R. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655; *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116; *Louisville etc. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; *Rone v. Smith*, 19 Ky. Law Rep. 972, 42 S. W. 740; *Landry's Succession*, 114

In the case of a former trial,⁶⁸ the official stenographer, or anyone else who heard the plaintiff testify upon the previous occasion, would be competent to testify to what he said; and the stenographer may use his minutes taken on the former trial for the purpose of refreshing his recollection as to what the plaintiff testified to; and all that was testified to by the plaintiff upon the subject would be competent as explanatory matter.⁶⁹ It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.⁷⁰ These and similar considerations have often led the courts to declare that admissions are evidence of low grade—the weakest and *most unsatisfactory* form of evidence.⁷¹ Sir William Grant, in

La. 829, 38 South. 575; Robinson v. Stuart, 68 Me. 61; Logan v. State, 39 Md. 177; Laird v. Laird, 127 Mich. 24, 86 N. W. 436; White City State Bank v. St. Joseph Stockyards Bank, 90 Mo. App. 395; Miller v. Nicodemus, 58 Neb. 352, 78 N. W. 618; Welsh v. Brown, 50 N. J. Eg. 387, 26 Atl. 568; Gottlieb v. Alton Grain Co., 87 App. Div. 380, 84 N. Y. Supp. 413; Lane Implement Co. v. Lowder, 11 Okl. 61, 65 Pac. 926; Anderson v. Adams, 43 Or. 621, 74 Pac. 215; McCarty v. Scanlon, 187 Pa. 495, 41 Atl. 345; Fraser v. McPherson, 3 Desaus. (S. C.) 393; Rice v. Southwestern R. Bank, 7 Humph. (Tenn.) 39; Midgley v. Campbell Building Co., 38 Utah, 293,

112 Pac. 820; Jones v. Webb, 1 Pinn. (Wis.) 412; Union Mut. L. Ins. Co. v. Masten, 3 Fed. 881.

⁶⁸ This is quite distinct from the mode of proving former testimony referred to in § 343, *post*.

⁶⁹ Merrill v. Leisenring, 166 Mich. 219, 131 N. W. 538; Barker v. Hebbard, 81 Mich. 267, 45 N. W. 964; Toohey v. Plummer, 69 Mich. 345, 37 N. W. 297.

⁷⁰ Law v. Merrills, 6 Wend. (N. Y.) 268; Malin v. Malin, 1 Wend. (N. Y.) 625; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473, and note 480; Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223.

⁷¹ Ingram v. Illges, 98 Ala. 511, 13 South. 548; Kauffman v. Maier,

dealing with a verbal admission as affecting a trust deed, says: "There is no material evidence but that of the *cestui que trust*, who is made a competent witness by a release. She swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration, supposed to have been made by the husband, admitting that the purchase was made with trust money. That is, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake, or failure of recollection, may totally alter the effect of the declaration." This evidence should have little weight, if it appears that the witness testifying to the admission is careless in his mode of testifying; that he does not accurately remember the statements; that he is willing to misconstrue them, or that the declarant was misinformed, or did not clearly express his own meaning.⁷² *A fortiori*,

94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; Freeman v. Peterson, 45 Colo. 102, 100 Pac. 600; Bradley v. Gorham, 77 Conn. 211, 66 L. R. A. 934, 58 Atl. 698; Husted v. Mead, 58 Conn. 55, 19 Atl. 233; Hewett v. Lewis, 4 Mackey (D. C.), 10; Cobb v. Battle, 34 Ga. 458; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Bragg v. Geddes, 93 Ill. 39, 5 Morr. Min. Rep. 624; Chandler v. Schoonover, 14 Ind. 324; Oberholtzer v. Hazen, 101 Iowa, 340, 70 N. W. 207; Clark v. Larkin, 9 Iowa, 391; Vaughn v. Hann, 6 B. Mon. (Ky.) 338; Litloff v. New Orleans R. etc. Co., 124 La. 278, 50 South. 105; Wilder v. Franklin, 10 La. Ann. 279; O'Brien v. Flynn, 8 La. Ann. 307; Drew v. Hagerty, 81 Me. 231, 10 Am. St. Rep. 255, 3 L. R. A. 230, 17 Atl. 63; Hart v. New Haven, 130 Mich. 181, 89 N. W. 677; Russell v. Sharp, 192 Mo. 270, 91 S. W. 134; Kinney v. Murray, 170 Mo. 674, 71 S. W. 197; Wolfinger v. McFarland

(N. J. Ch.), 54 Atl. 862; Gould v. Hurley, 75 N. J. Eq. 512, 73 Atl. 129; Tompkins v. Leary, 134 App. Div. 114, 118 N. Y. Supp. 810; Garrison v. Akin, 2 Barb. (N. Y.) 25; Clement v. Clement, 54 N. C. 184; Crowell v. Western Reserve Bank, 3 Ohio St. 406; In re Jacoby, 190 Pa. 382, 42 Atl. 1026; Shuman's Estate, 45 Pa. Sup. Ct. 587; Draffin v. Charleston etc. R. Co., 34 S. C. 464, 13 S. E. 427; Clack v. Hadley (Tenn. Ch. App.), 64 S. W. 403; Welder v. Carroll, 29 Tex. 317; Phelps v. Seely, 22 Gratt. (Va.) 573; Horner v. Speed, 2 Pat. & H. (Va.) 616; Kingston v. Kingston, 124 Wis. 263, 102 N. W. 577; Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031; Alden v. Dewey, 1 Fed. Cas. No. 153, 1 Story 336; Colvin v. Fraser, 2 Hagg. Ecc. 266; McManus v. McManus, 24 Grant Ch. (U. C.) 118; Swan v. Adams, 23 Grant Ch. (U. C.) 220.

⁷² Shorter v. Sheppard, 33 Ala. 648; Purcell v. Coleman, 6 D. C.

where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious⁷³ and without corroboration is of little value.⁷⁴ Hence it is

59; *Holmes v. Connable*, 111 Iowa, 298, 82 N. W. 780; *Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742; *Wolfinger v. McFarland* (N. J. Ch.), 54 Atl. 862; *Roberge v. Bonner*, 94 App. Div. 342, 88 N. Y. Supp. 91; *Moore v. Smith*, 14 Serg. & R. (Pa.) 388; *Earp v. Edington*, 107 Tenn. 23, 64 S. W. 40; *In re Miller*, 31 Utah, 415, 88 Pac. 338; *State v. Mickle*, 25 Utah, 179, 70 Pac. 856; *Cleave-land v. Burton*, 11 Vt. 138; *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

⁷³ *Alexander v. Hooks*, 84 Ala. 605, 4 South. 417; *Woolsey v. Williams*, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670; *Solomon v. Solomon*, 2 Ga. 18; *Dangerfield v. Hope*, 157 Ill. App. 63; *Holmes v. Connable*, 111 Iowa, 298, 82 N. W. 780; *Vaughn v. Hann*, 6 B. Mon. (Ky.) 338; *Gabisso's Succession*, 122 La. 824, 48 South. 277; *Piffet's Succession*, 37 La. Ann. 871; *Collins v. Harrell*, 219 Mo. 279, 118 S. W. 432; *Fanning v. Doan*, 139 Mo. 392, 41 S. W. 742; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 4 Ann. Cas. 306, 62 L. R. A. 383, 94 N. W. 705, 96 N. W. 151; *McKinney v. Slack*, 19 N. J. Eq. 164; *Hoffman v. Condon*, 134 App. Div. 205, 118 N. Y. Supp. 899; *Sage v. McGuire*, 4 Watts & S. (Pa.) 228; *Irby v. McCrae*, 4 Desaus. (S. C.) 422; *Grace v. Hanks*, 57 Tex. 14; *Donaghe v. Tams*, 81 Va. 132; *Lake v. Meacham*, 13 Wis. 355; *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493, 16 L. Ed. 203; *Crouch v. Hooper*, 16 Beav. 182, 1 Wkly. Rep. 10, 51 Eng. Reprint, 747.

⁷⁴ *Fox's Succession*, 2 Rob. (La.)

299. The authorities are reviewed in a Missouri case—*Collins v. Harrell*, 219 Mo. 279, 118 S. W. 432—where the court referred to the following *dicta*: In *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 197, the court said: "Evidence of such declarations, it is true, is admissible, but it never amounts to direct proof of the facts claimed to have been admitted by those declarations; and it is sometimes doubted whether it ought to be received at all when introduced for the purpose of divesting a title created by deed": *Johnson v. Quarles*, 46 Mo. 423. "This kind of evidence has always been received with great care, and when not supported by other evidence is generally entitled to but little weight": *Cornet v. Bertelsmann*, 61 Mo. 118. "The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistakes; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. . . . When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transaction, and

obvious that the degree of weight to be given to admissions *depends upon the circumstances* under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related.⁷⁵ When the admission is clearly proved and shown to have been made with deliberation, it is not necessarily weak evidence, nor does it require corroboration;⁷⁶ on the contrary, when admissions are so proved, they *may have great inherent force as evidence.*⁷⁷ Of the circumstances surrounding an admission, the time at which it was made is one of the most important to be considered. When the period is long antecedent to that when it is offered in testimony, not only is the utmost caution demanded, but on cross-examination the witness must be able to account satisfactorily for his refreshed memory of a fact which might well have escaped an interested party. In a New Jersey suit⁷⁸ to enforce a resulting trust fifteen years had elapsed

the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony": 1 Greenl., § 200; Johnson v. Quarles, *supra*; Ringo v. Richardson, 53 Mo. 385; Cornet v. Bertelsmann, *supra*; Berry v. Hartzell, 91 Mo. 132, 3 S. W. 582; Fanning v. Doan, 139 Mo. 392, 41 S. W. 742. "The intrinsic weakness of this class of evidence is further enhanced in any given case by the length of time that has intervened since the declarations were made, and the ease with which it can be manufactured, and the temptation to do so, when all those by whom it could be contradicted are in their graves": Fanning v. Doan, 139 Mo. 392, 41 S. W. 742.

⁷⁵ Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Chicago etc. Ry. Co. v. Button, 68 Ill. 409; Col-

bert v. State, 125 Wis. 423, 104 N. W. 61.

⁷⁶ Commonwealth v. Galligan, 113 Mass. 202; Saveland v. Green, 40 Wis. 431.

⁷⁷ Dreher v. Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; Ector v. Welsh, 29 Ga. 443; Fidler v. McKinley, 21 Ill. 308; Chandler v. Schoonover, 14 Ind. 324; Ray v. Bell, 24 Ill. 444; Myers v. Baker, Hard. (Ky.) 544; Prater v. Frazier, 11 Ark. 249; Hope v. Evans, Smedes & M. Ch. (Miss.) 195; Durkee v. Stringham, 8 Wis. 1; Wittick v. Keiffer, 31 Ala. 199; Commonwealth v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Sullivan v. Mauston Milling Co., 123 Wis. 360, 101 N. W. 679.

⁷⁸ Moore v. Tate, 114 Ala. 582, 21 South. 820; Prater v. Frazier, 11 Ark. 249; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182; McMullen v. Clark, 49 Ind. 77; Parker v. Pierce, 16 Iowa, 227; Vaughn v. Hann, 6 B.

before the witnesses had attempted to repeat the evidence. Vice-Chancellor Van Fleet thus delivered himself: "Now, it seems to me an almost incredible feat for an ordinary memory, after the lapse of fifteen years, to reproduce, with anything like trustworthy accuracy, a conversation occurring under ordinary circumstances, in which the narrator had no special interest, and which he made no effort to retain. It may, perhaps, be done; but when we consider how great the danger is the speaker did not fully and clearly express himself, or that the witness misunderstood him, or has mingled subsequent statements, made by other parties, with the original statement, or that a faded memory, in its effort to reproduce an occurrence long past, has honestly substituted fancy for fact, the probabilities are so great against the reproduction being full, exact, and complete, that I am unwilling, in this case at least, on such evidence alone, to destroy a formal paper title, which has stood undisputed for nearly twenty years."⁷⁹ Indeed, the caution has in the code states been passed into substantive law.⁸⁰

§ 296 (298). Same, continued.—It is hardly necessary to add that, unless admissions are contractual or unless they constitute an estoppel within some of the rules already

Mon. (Ky.) 338; Clark v. Slidell, 5 Rob. (La.) 330; Holmes v. Morse, 50 Me. 102; Allen v. Bobo, 81 Miss. 443, 33 South. 288; Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895; Kinney v. Murray, 170 Mo. 674, 71 S. W. 197; Van Blarcom v. Kip, 26 N. J. L. 351; Midmer v. Midmer, 26 N. J. Eq. 299; Metcalf v. Van Benthuysen, 3 N. Y. 424; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Thompson v. Thompson, 18 Ohio St. 73; Wanger v. Hipple, 10 Pa. 25, 13 Atl. 81; White v. Moore, 23 S. C. 456; Portis v. Hill, 14 Tex. 69, 65 Am. Dec. 99; Donaghe v. Tams, 81 Va. 132; McClellan v. Sanford, 26 Wis. 595; Malony v. Milwaukee, 1

Fed. 611; Kierzkowski v. Dorion, L. R. 2 P. C. 291, 38 L. J. P. C. 12, 20 L. T., N. S., 170; Roblin v. Roblin, 28 Grant Ch. (U. C.) 439.

⁷⁹ Dealing with the suggestion prompting the memory was well painted by Shakespeare:—

"like one

Who having unto truth, by telling of it,

Made such a sinner of his memory, To credit his own life,—he did believe

He was indeed the duke."

—*The Tempest*, Act 1, Scene 2.

⁸⁰ Cal. Code Civ. Proc., § 2061; Ga. Code, § 5774 et seq.

stated, they are *not conclusive*, but are open to rebuttal or explanation, or they may be controlled by higher evidence.⁸¹ And this applies equally to written admissions.⁸²

⁸¹ *Boswell v. Thompson*, 160 Ala. 306, 49 South. 73; *Garrett v. Garrett*, 27 Ala. 687; *McCravey v. Remson*, 19 Ala. 430, 54 Am. Dec. 194; *Clarke v. Roberts' Estate*, 38 Colo. 316, 87 Pac. 1077; *Phoenix Ins. Co. v. Gray*, 113 Ga. 424, 38 S. E. 992; *Cleghorn v. Janes*, 68 Ga. 87; *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. 157; *Fowler v. Hobbs*, 86 Ind. 131; *Fenton v. Traveling Men's Assn.*, 139 Iowa, 166, 117 N. W. 251; *Betts v. Betts*, 113 Iowa, 111, 84 N. W. 975; *Davis v. McCrocklin*, 34 Kan. 218, 8 Pac. 196; *Louisville etc. R. Co. v. O'Nan (Ky.)*, 119 S. W. 1192; *South Covington etc. R. Co. v. McHugh*, 25 Ky. Law Rep. 1112, 77 S. W. 202; *Morris v. Illinois Cent. R. Co.*, 127 La. 445, 53 South. 698; *Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484; *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Wallis v. Truesdell*, 6 Pick. (Mass.) 455; *McManus v. Nichols-Chisholm Lumber Co.*, 105 Minn. 144, 117 N. W. 223; *Linderman v. Carmin*, 142 Mo. App. 519, 127 S. W. 124; *Kirkwood Gymnasium etc. Assn. v. Van Ness*, 61 Mo. App. 361; *Beecroft v. New York Athletic Club*, 111 App. Div. 392, 97 N. Y. Supp. 831; *Chamberlain v. Iba*, 181 N. Y. 486, 74 N. E. 481; *Stephens v. Vroman*, 18 Barb. (N. Y.) 250; *McCraw v. Old North State Ins. Co.*, 78 N. C. 149; *Shuman's Estate*, 45 Pa. Sup. Ct. 587; *Gardner v. Standfield*, 12 Heisk. (Tenn.) 150; *Whittaker v. Thayer (Tex. Civ. App.)*, 123 S. W. 1137; *Boyer v. St. Louis etc. R. Co.*, 97 Tex. 107, 76 S. W. 441; *La Flam v. Missisquoi*

Pulp Co., 74 Vt. 125, 52 Atl. 526; *Wakefield v. Crossman*, 25 Vt. 298; *Bruger v. Princeton etc. Ins. Co.*, 129 Wis. 281, 109 N. W. 95; *Husbrook v. Strawser*, 14 Wis. 403; *Joslyn v. Cadillac Auto Co.*, 177 Fed. 863, 101 C. C. A. 77.

⁸² *Bush v. Barnett*, '96 Cal. 202, 31 Pac. 2; *Western etc. R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266; *Weber v. Della Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441; *Hornstein v. Crandall*, 156 Ill. App. 520; *Stone v. Cook*, 79 Ill. 424; *Coldren v. Le Gore*, 118 Iowa, 212, 91 N. W. 1066; *Atchison etc. R. Co. v. Hastings*, 79 Kan. 499, 100 Pac. 68; *Thomson v. Thomson*, 93 Ky. 435, 14 Ky. Law Rep. 513, 20 S. W. 373; *Maguire v. Pan-American Amusement Co.*, 205 Mass. 64, 137 Am. St. Rep. 422, 18 Ann. Cas. 110, 91 N. E. 135; *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Wright v. St. Louis Sugar Co.*, 146 Mich. 555, 109 N. W. 1062; *Gilman v. Riopelle*, 18 Mich. 145; *Allis v. Day*, 14 Minn. 516; *Lucks v. Northwestern Bank*, 148 Mo. App. 376, 128 S. W. 19; *Friedman v. Ender*, 116 N. Y. Supp. 461; *Miner v. Baron*, 131 N. Y. 677, 30 N. E. 481; *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608, 103 Pac. 53; *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599; *Boyer v. St. Louis etc. R. Co.*, 97 Tex. 107, 76 S. W. 441; *Reed v. Newcomb*, 62 Vt. 75, 19 Atl. 367; *Bardsley v. Truax*, 64 Wash. 400, 116 Pac. 1075; *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809.

The rebuttal will be in accordance with the circumstances of each particular case, but must be clearly established,⁸³ and must show fully the reasons why such admission should not be held binding. The party may confess its untruth;⁸⁴ he may show mistake,⁸⁵ or that the response which formed the admission was made not in a serious but in a jocular manner;⁸⁶ or that the admission was made in ignorance of the true state of the facts.⁸⁷ This is true even though they are *made under oath*, although admissions thus solemnly made are evidence of great weight against the declarant, and they throw on him the burden of showing a mistake.⁸⁸ We have elsewhere dealt with the conclusiveness of admissions in pleadings.⁸⁹ Admissions cannot be rebutted or explained by other statements of the declarant made at another time, for such other statements are not admissible for that purpose, unless they form part of the *res gestae*.⁹⁰

⁸³ Rice v. Southwestern R. Bank, 7 Humph. (Tenn.) 39.

⁸⁴ Garrett v. Garrett, 27 Ala. 687; Wynn v. Garland, 16 Ark. 440; Murley v. Ennis, 2 Colo. 300, 12 Morr. Min. Rep. 360; Posey v. Hanson, 10 App. Cas. (D. C.) 496; Collison v. Illinois etc. R. Co., 146 Ill. App. 64; Clinton Mut. County F. Ins. Co. v. Zeigler, 101 Ill. App. 165; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Home Ins. Co. v. Atchison etc. R. Co., 4 Kan. App. 60, 46 Pac. 179; Liberty v. Haines, 101 Me. 402, 64 Atl. 665; King v. Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10; Whitacre v. Culver, 8 Minn. 133; Newcomb v. Jones, 37 Mo. App. 475; Pearson v. Sabin, 10 N. H. 205; Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; Stewart v. Gleason, 23 Pa. Super. Ct. 325; Fisher v. Tucker, 1 McCord Eq. (S. C.) 169; Lee v. Neumen, 15 S. D. 642, 91 N. W. 320; McKee v. Le Gette, 1 Tex.

App. Civ. Cas., § 1144; Conyngham v. Baldwin, 120 Fed. 500, 56 C. C. A. 650.

⁸⁵ Bright v. Coffman, 15 Ind. 371, 77 Am. Dec. 96; Crowell v. Bebe, 10 Vt. 33, 33 Am. Dec. 172.

⁸⁶ Beebe v. De Baun, 8 Ark. 510.

⁸⁷ National Bank of Commerce v. First Nat. Bank, 61 Fed. 809, 10 C. C. A. 87.

⁸⁸ Rex v. Clarke, 8 Term Rep. 220, 101 Eng. Reprint, 1355; Thornes v. White, 1 Tyrw. & G. 110. See, also, Carter v. Bennett, 4 Fla. 283.

⁸⁹ § 272 et seq., *ante*.

⁹⁰ Lee v. Hamilton, 3 Ala. 529; Roberts v. Trawick, 22 Ala. 490; Hunt v. Roylance, 11 Cush. (Mass.) 117, 59 Am. Dec. 140; Clark v. Huffaker, 26 Mo. 264; Tucker v. Frederick, 28 Mo. 574, 75 Am. Dec. 139; McPeake v. Hutchinson, 5 Serg. & R. (Pa.) 295; Snowden v. Pope, Rice Eq. (S. C.) 174; Davis v. Kirksey, 2 Rich. (S. C.) 176; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550. See note on "Admissibility of Prior

Admissions are not rejected for the reason that the declarant may have had no personal knowledge of the facts admitted;⁹¹ nor because made during intoxication;⁹² nor because they are drawn out by a false suggestion;⁹³ nor because they may have been given under legal compulsion, as in answer to irrelevant questions or to questions which might have been objected to as incompetent,⁹⁴ or in answer to interrogatories irregularly taken,⁹⁵ or where there had been no opportunity to explain the answer.⁹⁶ In all such cases the *objection goes to the weight* to be given to the admission and not to the question of competency. But admissions are not admissible if made while a party is unlawfully restrained or held in *duress*.⁹⁷ It was so held in a case where, at the trial, the jury had been instructed to give no weight to the admissions, unless upon the whole proof before them they were satisfied that the declarations and admissions of the defendant were made, not in consequence of the unlawful detention or imprisonment, but solely from his own conviction and consciousness of their truth and with the intention on that account to give them utterance.⁹⁸ An admission made by a party which is *inconsistent* with his testimony goes merely to the credibility of the witness.⁹⁹

Consistent Statements of Witness After Proof of Prior Inconsistent Statements," to *Burke v. State*, 8 Ann. Cas. 477.

⁹¹ *Sparr v. Wellman*, 11 Mo. 230; *Kitchen v. Robbins*, 29 Ga. 713.

⁹² *State v. Bryan*, 74 N. C. 351.

⁹³ *Higgins v. Dellinger*, 22 Mo. 397.

⁹⁴ *Grant v. Jackson*, Peake, 204; *Ashmore v. Hardy*, 7 Car. & P. 501; *Smith v. Beadnell*, 1 Camp. 30.

⁹⁵ *Edwards v. Norton*, 55 Tex. 405.

⁹⁶ *Collett v. Keith*, 4 Esp. 212.

⁹⁷ *Stockfleth v. De Tastet*, 4 Camp. 11, 2 Rose, 282, 15 R. R. 720; *Robson v. Alexander*, 1 Moore & P. 448.

⁹⁸ *Tilley v. Damon*, 11 Cush. (Mass.) 247.

⁹⁹ *Eastman v. Lake Shore & M. S. Ry. Co.*, 101 Mich. 597, 60 N. W. 309.

CHAPTER 10.

HEARSAY.

- § 297. Definition—Hearsay Evidence—Reasons for Its Exclusion—Where not Objected to—Mode of Exclusion.
- § 297a. Illustrations of Hearsay Evidence.
- § 298. Hearsay may Relate to What is Done or Written or Printed as Well as to What is Spoken.
- § 299. Hearsay may Include Things Stated Under Oath or Against Interest.
- § 300. Statements Apparently Hearsay may be Original Evidence.
- § 301. Matters of Public and General Interest.
- § 302. Distinction Between the Public and Merely General Rights.
- § 303. Reputation as to Private Boundaries Excluded in England.
- § 304. Relaxation of the Rule in the United States.
- § 304a. Same—Prerequisites to the Admission of Evidence of Reputation in Cases of Private Boundaries.
- § 305. Declarations as to Particular Facts Concerning Private Boundaries not Admissible.
- § 306. Declarations of Surveyors and Chainmen.
- § 307. Maps Relating to Subjects of Public or General Interest.
- § 308. Ancient Documents in Support of Ancient Possession—Effect of Recitals—Custody.
- § 308a. Same—Copies of Ancient Documents.
- § 309. Same—Documents to Come from the Proper Custody.
- § 310. Declarations must have Been Made Before the Controversy Arose.
- § 311. Same—Meaning of the Rule—*Lis Mota*.
- § 312. Declarations as to Pedigree—Reason for the Exception.
- § 313. Same—Declarant's Relationship—How Proved—Particular Facts.
- § 314. Are the Declarations Limited to Cases Where Pedigree is the Direct Subject of the Suit.
- § 315. Acts and Conduct of Relatives Admissible as Well as Declarations—Written Declarations.
- § 316. Same—Family Recognition of Writings and Records.
- § 317. Weight of Such Testimony.
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- § 321. Recollection of the Fact by the Person Making the Entry.
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- § 323. Declarations of Deceased Persons Against Interest—In General—Absentees—Those Physically or Mentally Incapacitated.
- § 324. Same—The Declaration must be Against Pecuniary or Proprietary Interest.
- § 325. Sufficient if the Entries are *Prima Facie* Against Interest.
- § 326. Same—Evidence of Collateral Facts.

- § 327. Rule When the Declaration is Made by an Agent.
- § 328. Declarant Need not have Actual Knowledge of the Transaction.
- § 328a. Absence of Probable Motive to Falsify.
- § 329. Such Declarations Inadmissible to Prove Contracts.
- § 330. General Rules on the Subject.
- § 331. Dying Declarations.
- § 332. Limited to Cases of Homicide and When Made in Expectation of Impending Death.
- § 333. Declarant must have Been Competent to Testify.
- § 334. Declarations must be Confined to the Homicide.
- § 335. Form of the Declaration—General Rules.
- § 336. Evidence of Witnesses Given in Former Action or on Former Trial.
- § 337. Exact Identity of the Parties not Necessary.
- § 338. Parties Should be Substantially the Same or in Privy.
- § 339. Form of Proceeding may be Different.
- § 340. The Opportunity of Cross-examination on the Former Trial.
- § 341. Death of the Former Witness—Relaxation of the Rule.
- § 341a. Same—Physical, Mental or Legal Incapacity of the Former Witness.
- § 342. Same—Absence from State—Absence Through Contrivance of Opposite Party—Other Disability.
- § 342a. Same, Continued.
- § 342b. Same—In Criminal Cases.
- § 343. Mode of Proving Former Testimony—Refreshing Memory.

§ 297 (299, 300). Definition—Hearsay evidence—Reasons for its exclusion—Where not objected to—Mode of exclusion.—"There is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English court, two centuries ago and over, when they checked the attempt of a woman to testify what another woman had told her. 'The court' it was quietly remarked, 'are of the opinion that it will be proper for Wells to give her own evidence.' That is to say, the objection went to the medium of communication."¹ The witness was to tell what she saw and heard of the matter in question, not what others saw and heard and which they had recounted to her. We do not purpose analyzing the various accepted definitions of hearsay, most of which convey, sufficiently accurately, the kind of testimony to which, with some exceptions, the exclusionary rules

¹ Thayer Prel. Treat. on Ev., 518; *Hardy v. Randall*, 173 Ala. 516, 55 South. 997.

of evidence apply. Let it suffice that one of the most important of the rules excluding certain classes of testimony is that which rejects hearsay evidence. By this is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. Such testimony—sometimes well called second-hand testimony—is excluded as being hearsay, as being that which is based on what someone else, not a party to the action, nor an agent of the party, nor in the hearing of the party, has said, and to which that someone else could testify directly if a witness, and himself stand the cross-examination which might establish or destroy its value.²

² *Brown v. Prude*, 97 Ala. 639, 11 South. 838; *Matko v. Daly*, 10 Ariz. 175, 85 Pac. 721; *Spencer Lumber Co. v. Dover*, 99 Ark. 488, 138 S. W. 985; *Fordyce v. McCants*, 51 Ark. 509, 14 Am. St. Rep. 69, 4 L. R. A. 296, 11 S. W. 694; *Spencer v. Clarke*, 15 Cal. App. 512, 115 Pac. 248; *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381; *City and County of Denver v. Perkins*, 50 Colo. 159, 114 Pac. 484; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Knapp v. Sioux Falls Nat. Bank*, 5 Dak. 378, 40 N. W. 587; *Cohen v. Harris*, 61 Fla. 137, 54 South. 905; *Mizell v. Travelers' Ins. Co.*, 44 Fla. 799, 33 South. 454; *Johnson County Savings Bank v. Richardson & Son*, 9 Ga. App. 466, 71 S. E. 757; *Mondon v. Western Union Tel. Co.*, 96 Ga. 499, 23 S. E. 853; *Hilbert v. Spokane etc. R. Co.*, 20 Idaho, 54, 116 Pac. 1116; *Turner v. Lovington Coal Min. Co.*, 156 Ill. App. 60; *Grubey v. National Bank*, 133 Ill. 79, 24 N. E. 575; *Greener v. Niehaus*, 44 Ind. App. 674, 89 N. E. 377;

Board of Commrs. Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385; *Massena Sav. Bank v. Garside*, 151 Iowa, 168, 130 N. W. 918; *Garretson v. Merchants' etc. Ins. Co.*, 92 Iowa, 293, 60 N. W. 540; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *United States Health Ins. Co. v. Jolly (Ky.)*, 118 S. W. 281; *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 14 Ky. Law Rep. 455; *State v. Fletcher*, 127 La. 602, 53 South. 877; *State v. Thomas*, 28 La. Ann. 827; *Gains v. Hasty*, 63 Me. 361; *Sumwalt Ice etc. Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48; *Treusch v. Shryock*, 51 Md. 162; *Pennsylvania Iron Wks. Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228; *Blaisdell v. Bickum*, 139 Mass. 250, 1 N. E. 281; *Merritt v. Westerman*, 165 Mich. 535, 131 N. W. 66; *Merritt v. Stebbins*, 86 Mich. 342, 48 N. W. 1084; *Paine v. Crane*, 112 Minn. 439, 128 N. W. 574; *Little v. Cook*, 55 Minn. 265, 56 N. W. 750; *Pearson v. State*, 97 Miss. 841, 53 South. 689; *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 South.

The leading case on the subject in this country³ lays down the law with certainty. The syllabus says that, "hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge." And in that case Chief Justice Marshall, delivering the opinion of the court, said: "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of such vast importance to all orders and degrees of men; our lives,

452; *Barker v. Lewis Pub. Co.*, 152 Mo. App. 706, 131 S. W. 924; *Fougue v. Burgess*, 71 Mo. 389; *Washoe Copper Co. v. Junila*, 43 Mont. 178, 1 Water & Min. Cas. 451, 115 Pac. 917; *State v. Welch*, 22 Mont. 92, 55 Pac. 927; *Hinckley v. Jewett*, 86 Neb. 464, 125 N. W. 1086; *Ponca v. Crawford*, 18 Neb. 551, 26 N. W. 365; *Kennedy v. Kennedy*, 27 Nev. 152, 74 Pac. 7, 77 Pac. 597; *Elwell v. Roper*, 72 N. H. 585, 58 Atl. 507; *Murray v. Boston etc. R. Co.*, 72 N. H. 32, 101 Am. St. Rep. 660, 61 L. R. A. 495, 54 Atl. 289; *Austrian v. Laubheim*, 78 N. J. L. 178, 73 Atl. 226; *Demoney v. Walker*, 1 N. J. L. 33; *McRae v. Cassan*, 15 N. M. 496, 110 Pac. 574; *Mautner v. Brody*, 120 N. Y. Supp. 734; *Doyle v. Rector etc. of Trinity Church Corp.*, 118 N. Y. 678, 23 N. E. 928; *Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422; *Spencer v. Fortescue*, 112 N. C. 268, 16 S. E. 898; *Cochrane v. National Elevator Co.*, 20 N. D. 169, 127 N. W. 725; *Adams v. Brown*, 16 Ohio St. 75; *Wells v. State*, 5 Okl. Cr. 22, 113 Pac. 210; *Anderson v. Aupperle*, 51 Or. 556, 95 Pac. 330; *Haase v. Oregon R. etc. Co.*, 19 Or. 354, 24 Pac. 238; *Ranck v. Brackbill*, 209 Pa. 499, 58 Atl. 884; *Corser v. Hale*, 149 Pa. 274, 24 Atl. 285; *Carr v. Locomotive Co.*, 29 R. I. 276, 70 Atl. 196; *King*

v. Western Union Tel. Co., 84 S. C. 73, 65 S. E. 944; *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *State v. Kruse*, 24 S. D. 174, 123 N. W. 71; *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009; *Brazelton v. Turney*, 7 Cold. (Tenn.) 267; *Taylor v. State*, 62 Tex. Cr. 611, 138 S. W. 615; *Noel v. Denman*, 76 Tex. 306, 13 S. W. 318; *Wells etc. Express Co. v. Williams* (Tex. Civ. App.), 71 S. W. 314; *State v. Blake*, 36 Utah, 605, 105 Pac. 910; *Lumm v. Howells*, 27 Utah, 80, 74 Pac. 432; *Wilkins' Admr. v. Brock*, 81 Vt. 332, 70 Atl. 572; *Hurlburt v. Hurlburt*, 63 Vt. 667, 22 Atl. 850; *Richmond v. Wood*, 109 Va. 75, 63 S. E. 449; *Hopper v. Commonwealth*, 6 Gratt. (Va.) 684; *Riggs v. Northern Pac. Ry. Co.*, 60 Wash. 292, 111 Pac. 162; *McNicol v. Collins*, 30 Wash. 318, 70 Pac. 753; *Sayre v. Woodyard*, 66 W. Va. 288, 66 S. E. 320; *Thompson v. Updegraff*, 3 W. Va. 629; *Gillotti v. State*, 135 Wis. 634, 116 N. W. 252; *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121; *Lawlor v. Loewe*, 187 Fed. 522, 109 C. C. A. 288; *Young v. Godbe*, 15 Wall. (U. S.) 562, 21 L. Ed. 250; *Rex v. Eriswell*, 3 Tenn. Rep. 707, 100 Eng. Reprint, 815; *Gagnon v. Prince*, 7 Can. S. Ct. 386.
³ *Mima Queen v. Hepburn*, 7 Cranch (U. S.), 290, 3 L. Ed. 348.

our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages and are now revered for their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible." So strictly have the courts guarded and applied the rule, that hearsay has been held incompetent even in aid of human freedom.⁴ Other considerations are that legal *proceedings* might be indefinitely *delayed* and rendered practically fruitless, if mere extrajudicial assertions were to be received as evidence. Moreover, it is contrary to the spirit of the common law that statements made out of court, without any opportunity for *cross-examination* and under none of the sanctions of an oath, should be received as evidence. In addition, it might be urged that the practice of allowing the statements of witnesses to a transaction to be given second hand would, in criminal cases, be a violation of the spirit of the constitutional provision that the *accused* shall enjoy the *right of being confronted* with the witnesses testifying against him. Judges acting as triers of the facts, and skilled in the art of scrutinizing and weighing evidence, have sometimes believed that they could admit hearsay testimony without danger; that they could trust themselves entirely to disregard the hearsay evidence or to give it such little

⁴ Hauger v. United States, 173 Fed. 54, 97 C. C. A. 372. See, also, Baumgartner v. Eigenbrot, 100 Md. 508, 60 Atl. 601; Davis v. Wood, 1 Wheat. (U. S.) 6, 4 L. Ed. 22; 1 Phil. Ev., c. 7, § 1; 1 Greenl. Ev., § 99; Thayer, Prel. Treat. Ev., pp. 520-523. For a long discussion of

history of the rules, see Wigmore, Ev., § 1360 et seq. For a discussion of the exception to the rule excluding hearsay, see article in 69 Law Times, 440. See, also, extended note to Ohio etc. R. Co. v. Stein, 19 L. R. A. 733-752; also article and notes cited under § 344, *post*.

weight as it might seem to deserve.⁵ The dangers of admitting hearsay evidence are especially obvious when issues of fact are to be determined by *jurors* who are *not trained* to discriminate between different grades of testimony; between those statements which in a legal sense are only gossip and others which are tested by cross-examination and sanctioned by the solemnity of an oath. The rigor with which the rule excluding hearsay has been adhered to under the common-law system is no doubt due in part to a jealous preservation of the right of *trial by jury*.⁶ Such evidence is always excluded on objection, no matter whether offered from the party himself or his witness. If the statement is based on knowledge acquired second hand—is such that the witness himself cannot swear to its truth beyond what he has heard or been told—then, with the few exceptions to be hereafter dealt with, it is incompetent.⁷ So rigidly is the rule adhered to that, except with the qualifications hereafter stated, the statements of persons who

⁵ Berkeley Peerage Case, 4 Camp. 414.

⁶ Berkeley Peerage Case, 4 Camp. 414.

⁷ Sibley v. Smith, 167 Ala. 158, 52 South. 27; McDonald v. Wood, 118 Ala. 589, 24 South. 86; Hamby v. Books, 86 Ark. 448, 111 S. W. 277; Little Rock etc. R. Co. v. Allister, 62 Ark. 1, 34 S. W. 82; People v. Jailles, 146 Cal. 301, 79 Pac. 965; Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643; Persse v. Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951; Turgeon v. Woodward, 83 Conn. 537, 78 Atl. 577; Myers v. State, 97 Ga. 76, 25 S. E. 252; Chicago City R. Co. v. Douglas, 104 Ill. App. 41; Chicago etc. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560; Pichon v. Martin, 35 Ind. App. 167, 73 N. E. 1009; Peck v. Parchen, 52 Iowa, 46, 2 N. W. 597; Cleaver v. Louisville etc. R. Co., 30 Ky. Law

Rep. 1059, 100 S. W. 223; Alexander v. First Nat. Bank, 114 Ky. 683, 71 S. W. 883, 24 Ky. Law Rep. 1486; Willner v. Silverman, 109 Md. 341, 24 L. R. A., N. S., 895, 71 Atl. 962; Chelton v. State, 45 Md. 564; Byers v. Anderson, 143 Mich. 178, 106 N. W. 734; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752; Barclay v. Smith (Miss.), 36 South. 449; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Bloom's Son Co. v. Haas, 130 Mo. App. 122, 108 S. W. 1078; State v. Goddard, 162 Mo. 198, 62 S. W. 697; Evans v. Deming, 2 N. Y. St. 349, 41 Hun, 637; King v. Bynum, 137 N. C. 491, 49 S. E. 955; Scull v. Wallace, 15 Serg. & R. (Pa.) 231; Hargrove v. State, 53 Tex. Cr. 541, 110 S. W. 913; Chowning v. State, 41 Tex. Cr. 81, 51 S. W. 946; Vagts v. Utman, 125 Wis. 265, 104 N. W. 88.

have since died or otherwise become disqualified as witnesses cannot be received as evidence, if such statements are in the nature of hearsay. In other sections we shall see that the declarations of persons since deceased are received under certain well-established *exceptions* to the general rule. But the admission of such declarations depends upon *fixed rules*, and not upon any theory that it rests in the discretion of the court to admit hearsay because other testimony cannot be obtained. The rule excluding hearsay evidence applies with full force notwithstanding no better evidence is to be found, and though it be certain, if the account is rejected, that no other can possibly be obtained.⁸ While hearsay testimony is excluded, it must be borne in mind that in civil cases it must be objected to, and if not, it becomes evidence by reason of the want of such objection, although its admission does not confer upon it any new attribute in point of weight. Its nature and quality remain the same, so far as its intrinsic weakness and incompetency to satisfy the mind are concerned, and as opposed to direct primary evidence, the latter always prevails.⁹ Where a witness testifies to a fact, the presumption is, in the absence of anything to the contrary, that he is testifying from his own knowledge.¹⁰ Where testimony given by a witness is apparently direct, but is later revealed as hearsay, application to strike it out should be made. Again, counsel may be prevented from putting a question objected to to a witness. In such case the practice is well settled that a party has a right, when he has a witness on the stand, to offer to prove such facts as may be thought to be material to the case, and if the court rules that the evidence is incompetent, the offered evidence may be incorporated into a bill of exceptions, and the ruling may thus be reviewed on appeal or writ of

⁸ Reeves v. State, 7 Tex. App. 276.

⁹ State Bank v. Wooddy, 10 Ark. 638; Hoover v. Empire Coal Co., 149 Ill. App. 258; Holder v. Cannon Mfg.

Co., 135 N. C. 392, 47 S. E. 481; Crandall v. Kraetzer, 155 Ill. App. 496.

¹⁰ Shaw v. Jones, Newton & Co., 133 Ga. 446, 66 S. E. 240.

error.¹¹ The necessity for this course is obvious. It would prolong examinations of witnesses unduly, if counsel had to precede his questions by eliciting whether the witness was speaking from his own knowledge. It may not appear whether the witness is answering from his own information or that supplied, and although the question may be first asked no prejudice is sustained if it is not, if the application to strike it out is made on discovery of its objectionable character.

§ 297a (299, 300). Illustrations of hearsay evidence.—The declarations of third persons as to the *loss of papers* which had been in their possession are not admissible to let in secondary evidence of their contents;¹² and the declarations of a *warrantor* or *grantor* made after giving a deed of land are not evidence to support the title of the grantee.¹³ The *value* of property sold under execution cannot be shown as against the owner by the *appraisal*.¹⁴ Save in exceptional cases, *reputation* and *rumor* are pure hearsay.¹⁵ A witness cannot be asked what is the estimated value placed on certain lands by the neighborhood generally,¹⁶ nor the opinion of others as to the *value of property*.¹⁷ When witnesses give their own estimates of market value, such testimony is not to be rejected because it may in part depend on hearsay;¹⁸ or as to whom

¹¹ *Chicago etc. Ry. Co. v. Fiet-sam*, 123 Ill. 518, 15 N. E. 169.

¹² *Rex v. Denis*, 7 Barn. & C. 620, 108 Eng. Reprint, 854; *Jackson v. Cris*, 11 Johns. (N. Y.) 437; *Governor v. Barclay*, 4 Hawks (N. C.), 20. On the general subject of inadmissibility of hearsay, the following Canadian cases may usefully be referred to: *Dowling v. McNeilly*, 3 Pugs. & Bur. 42; *Craig v. Corcoran*, 23 U. C. R. 441; *Leffeunbeum v. Beaudoin*, 28 S. C. R. 89.

¹³ *Jackson v. Vredenbergh*, 1 Johns. (N. Y.) 159; *Bartlet v. Delprat*, 4 Mass. 702.

¹⁴ *Flannigan v. Althouse*, 56 Iowa, 513, 9 N. W. 381.

¹⁵ *Welch v. Norton*, 73 Iowa, 721, 36 N. W. 758; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *Abel v. State*, 90 Ala. 631, 8 South. 760; *School of Milford v. Powner*, 126 Ind. 528, 26 N. E. 484; *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776.

¹⁶ *Powell v. Governor*, 9 Ala. 36.

¹⁷ *Green v. Caulk*, 16 Md. 556; *Barrett v. Wheeler*, 71 Iowa, 662, 33 N. W. 230.

¹⁸ *Fennerstein's Champagne*, 3 Wall. (U. S.) 145, 18 L. Ed. 121.

a lot is reputed to belong.¹⁹ The fact that property is assessed to a person is not admissible as proof of *ownership*;²⁰ nor can one be asked whether he had any information from any source at a stated time as to a given subject.²¹ The *motive* which leads a person, not a party, to do an act cannot be proved by his declarations, when such declarations are no part of the *res gestae*.²² In an action on a *building contract* between the contractor and the owner, the *statement of the laborers* made out of court are not evidence as to the progress of the work.²³ This rule excludes evidence of statements as to what physicians and others have said as to the condition or *state of health* of a person;²⁴ the *estimate* as to the *damage* to a building, made by an expert since deceased;²⁵ the certificate of the master of a vessel of the expenses incurred by an agent, in an action between the principal and the agent;²⁶ declarations by a party that he intended to make his home on certain wild lands to show that his *possession* was actual and *bona fide*;²⁷ *declarations* made by a party *in his own favor*, in the absence of the other party;²⁸ the testimony as to the contents of a *lost instrument* by one who cannot read and write,²⁹ or by one who went to the clerk's office and asked

¹⁹ *Berry v. Osborne*, 15 Ga. 194; *Barrett v. Wheeler*, 71 Iowa, 662, 33 N. W. 230; *Burns v. Fredericks*, 37 Conn. 86; *Beñiaud v. Beecher*, 76 Cal. 394, 18 Pac. 598.

²⁰ *Adams v. Hickox*, 55 Iowa, 632; 8 N. W. 485; *Tuckwood v. Hanthorn*, 67 Wis. 326, 30 N. W. 705.

²¹ *Xenia Bank (First Nat. Bank) v. Stewart*, 114 U. S. 224, 29 L. Ed. 101, 5 Sup. Ct. Rep. 845; *Lamar v. Pearre*, 82 Ga. 354, 14 Am. St. Rep. 168, 9 S. E. 1043.

²² *North Stonington v. Stonington*, 31 Conn. 412.

²³ *Gonzales College v. McHugh*, 26 Tex. 677.

²⁴ *Heald v. Thing*, 45 Me. 392; *Ponca v. Crawford*, 18 Neb. 551, 26 N. W. 365; *Armstrong v. Ackley*, 71

Iowa, 76, 32 N. W. 180; *Alabama etc. Ry. Co. v. Arnold*, 80 Ala. 600, 2 South. 337.

²⁵ *Collins v. Langan*, 58 N. J. L. 6, 32 Atl. 258.

²⁶ *Newson v. Douglass*, 7 Har. & J. (Md.) 417, 16 Am. Dec. 317.

²⁷ *McKinnon v. Meston*, 104 Mich. 642, 62 N. W. 1014.

²⁸ *Treadway v. Treadway*, 5 Ill. App. 478; *Ward v. Ward*, 37 Mich. 253; *Wallace v. Story*, 139 Mass. 115, 29 N. E. 224; *Whitney v. Houghton*, 125 Mass. 451; *Nourse v. Nourse*, 116 Mass. 101; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256, 94 Am. Dec. 65.

²⁹ *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643.

that the document be read to him;³⁰ statements made by a person for whom a testator had sent to draft a will, who had declined to go on account of the testator's mental incapacity.³¹ Proof of a general understanding among the employees that a certain rule (in the sense of a formulated rule) exists is not the proper method of showing the existence of the rule, though proof that a cautionary rule (in the sense of practice) is generally pursued by the employees in doing a particular kind of work may be relevant as tending to establish a standard of common prudence. General reputation or rumor is not the proper method of proving that fact. There is a more direct way of showing it. General reputation or rumor is a sort of agglomerate hearsay, but it is hearsay nevertheless.³² Where a witness testified, "I didn't witness the document, but I heard it spoken of, and it was anywhere from the 9th or 10th up to the 15th of June, 1906," his testimony in reference to the date of the execution of said instrument was very properly stricken out as hearsay.³³ In an action in Georgia for criminal trespass to land, it was error to admit testimony of a witness for the plaintiffs, "I always heard this land in question spoken of as the mining company's mountain, the Long Mining Company," over objection of the defendant "that the title to land cannot be proven by general reputation." This evidence was not sufficient to show general reputation in the community, if offered as tending to prove notice of a fact already shown to exist.³⁴ When a witness was asked "what, apart from his observation, he had heard that enabled him to say what would be done by others in his line of work," the court described it as bald hearsay.³⁵ The same term might well have been applied to, "Did you ever hear of his being

³⁰ *Propst v. Mathis*, 115 N. C. 526, 20 S. E. 710.

³¹ *Renaud v. Pageot*, 102 Mich. 568, 61 N. W. 3.

³² *Schaufele v. Central etc. Ry. Co.*, 6 Ga. App. 660, 65 S. E. 708.

³³ *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 108 Pac. 42.

³⁴ *Heatley v. Long*, 135 Ga. 153, 68 S. E. 783.

³⁵ *State v. Flanigan*, 111 Md. 481, 74 Atl. 818.

a railroad clerk?"³⁶ Alleged admission to the opposite party of the same facts testified to by a witness, whose deposition has been suppressed at the trial, cannot be shown in evidence on the cross-examination of such opposite party to supply the loss of the deposition suppressed. Answers to these questions would clearly have been hearsay.³⁷ Where defendant was sued for rent of a boat at *per diem*, testimony to prove what an employee of the plaintiff had told him as to the boat being worked on some of the days when defendant was absent was excluded as hearsay.³⁸ A witness may not testify to a conversation with the defendant's husband concerning the subject matter of an action when the defendant was not present and there is no evidence that she was made aware of such conversation.³⁹ The issue being as to whether the defendant had either expressly or impliedly agreed to the appointment of a certain committee to represent all the lot occupants, he being one whose duties were to appraise such lots, determine who the occupants were, and make certificate thereof, upon which the trustee, holding the legal title to said lots, should convey such title to such occupant when the occupant presented such certificate and the amount assessed to such lot, it was held that statements made by persons at a mass meeting of the lot owners, where it is not shown that said defendant was present or had knowledge of the calling of the meeting and the purpose thereof, with an express or implied assent thereto, were inadmissible as being hearsay.⁴⁰ In an action for malicious prosecution, where the plaintiff was discharged by a court of competent jurisdiction after having been arrested upon a charge of larceny preferred against him by the defendant, the president of a corporation, the plaintiff was permitted to testify, subject to the defendant's exception, that after his arrest, and

³⁶ Supreme Lodge etc. of Honor v. Baker, 163 Ala. 518, 50 South. 958.

³⁷ Sayre v. Woodyard, 66 W. Va. 288, 66 S. E. 320.

³⁸ Dickens v. Murray, 163 Ala. 556, 50 South. 1019.

³⁹ Hansen v. Vogelsang, 139 App. Div. 759, 124 N. Y. Supp. 437.

⁴⁰ Moore v. O'Dell, 27 Okl. 194, 111 Pac. 308.

while waiting for bail at police headquarters, the inspector called someone on the telephone and asked if it was Sage Brothers Company (the defendant's corporation), and said, "You needn't wait any longer because we went around the other way." This evidence was inadmissible. It did not appear to have been spoken to the defendant or to anybody acting for him.⁴¹ On an indictment for *murder* the statements of other persons that they killed the deceased are hearsay,⁴² and the same is true as to threats made by third persons.⁴³ The statements of a *person* who has been *robbed*, made to a third party as to the description of the parties committing the crime, are hearsay and are not admissible on the part of the defendant to show that he was not the person thus described.⁴⁴ Other interesting illustrations will be found in the cases noted.⁴⁵

⁴¹ *Casavan v. Sage*, 201 Mass. 547, 87 N. E. 893.

⁴² *State v. Duncan*, 6 Ired. (28 N. C.) 236; *State v. Haynes*, 71 N. C. 79.

⁴³ *State v. Weaver*, 57 Iowa, 730, 11 N. W. 675.

⁴⁴ *People v. McCrea*, 32 Cal. 98.

⁴⁵ *Merrill v. Sheffield Co.*, 169 Ala. 242, 53 South. 219; *Sibley v. Smith*, 167 Ala. 158, 52 South. 27; *St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.*, 167 Ala. 442, 52 South. 904; *Mobile etc. R. Co. v. Hawkins*, 163 Ala. 565, 51 South. 37; *Landrum v. Swann*, 8 Ga. App. 209, 68 S. E. 862; *Eplan v. Wheat*, 134 Ga. 511, 68 S. E. 78; *Blakely Oil & Fertilizer Co. v. Proctor & Gamble Co.*, 134 Ga. 139, 67 S. E. 389; *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696, 126 S. W. 362; *Fidelity & Casualty Co. v. Cooper*, 137 Ky. 544, 126 S. W. 111; *Rehfuss v. Hill*, 243 Ill. 140, 90 N. E. 187; *Hoover v. Empire Coal Co.*, 149 Ill. App. 258; *Magers v. Magers*, 143 Iowa, 750, 123 N. W. 230; *Canton Lumber Co. v. Liller*, 112 Md. 258, 76 Atl. 415; *Clifford*

v. Taylor, 204 Mass. 358, 90 N. E. 862; *Pratt v. Hamilton*, 161 Mich. 258, 17 Det. Leg. N. 288, 126 N. W. 196; *Stenzhorn v. City Elec. R. Co.*, 159 Mich. 82, 16 Det. Leg. N. 786, 123 N. W. 621; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Louisiana Purchase Exposition Co. v. Emerson*, 149 Mo. App. 594, 129 S. W. 753; *Blake v. Meadows*, 225 Mo. 1, 123 S. W. 868; *Gardner v. Metropolitan R. Co.*, 223 Mo. 389, 18 Ann. Cas. 1166, 122 S. W. 1068; *Gibson v. Boston*, 75 N. H. 405, 75 Atl. 103; *Thomas v. Thomas* (N. J. Eq.), 74 Atl. 125; *Underwood v. Germania Life Ins. Co.*, 152 N. C. 274, 67 S. E. 587; *Erp v. Raywood Canal & Milling Co.* (Tex. Civ. App.), 130 S. W. 897; *Dibrell v. Fisher* (Tex. Civ. App.), 126 S. W. 905; *Openshaw v. Dean* (Tex. Civ. App.), 125 S. W. 989; *Carlisle v. Gibbs*, 57 Tex. Civ. App. 592, 123 S. W. 216; *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915; *Dunkin v. Houquiam*, 56 Wash. 47, 105 Pac. 149; *Consolidated Grocery Co. v. Hammond*, 175 Fed. 641, 99 C. C. A. 195.

§ 298 (301). Hearsay may relate to what is done or written or printed as well as to what is spoken.—We have already dealt with the objections to hearsay evidence generally, and they will be found very forcibly illustrated in the oft-quoted opinion of Fletcher, J., in a well-known Massachusetts case.⁴⁶ To admit hearsay would be to admit evidence without the sanction of an oath, without cross-examination, and without those tests of truth which the law in general so wisely requires. There must, of necessity, be some general rule or principle of the law on the subject; and if mere declarations should be admitted in one case, they must be in every case; and if the declarations of one person are admitted, the declarations of every other person must also be admitted, and the trial of issues would be embarrassed, and justice obstructed and defeated by innumerable unfounded and conflicting declarations and statements. Parties would be defrauded of their rights and of their property by loose, inconsiderate, or ill-disposed assertions or remarks. The danger that casual observations would be misunderstood, misremembered, and misreported, increase the number and force of the objections to the admission of hearsay. The law, therefore, in its wisdom, rejects hearsay, regardless of whether it is written, verbal or acted. There can be no distinction made between the statement of a witness that what he is saying was told to him verbally by the real witness of it, and that it was written to him, and between such verbal account and a reproduction of physical acts. The guiding rule sustaining the objection always is, “that something which should come through an original witness is sought to be put in at second hand, by one to whom it has been told, one who is not a witness properly speaking, who did not perceive it and cannot therefore testify to it, but only to the fact that somebody said so. It would operate to nullify the requirement that witnesses should personally appear and testify publicly in court, if the statements of the original perceiver could be got in through another person; and it was always

⁴⁶ *Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 36.

the rule that witnesses should thus publicly appear and testify.'⁴⁷ The rule is so well established that more attention is directed to the exceptions to it hereinafter dealt with than to the rule itself, but it will be found exemplified in the cases noted.⁴⁸ The rule, too, is so sweeping that it excludes such written hearsay irrespective of the mode in which it is presented—very often in the form of official records,⁴⁹ but more frequently according to the particular

⁴⁷ Thayer, *Prel. Treat. Ev.* 501.

⁴⁸ *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774; *Denver City Tramway Co. v. Hills*, 50 Colo. 328, 116 Pac. 125; *Abel v. Fitch*, 20 Conn. 90; *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515; *Holinger v. Phillips*, 140 Ill. App. 317; *Schooler v. State*, 57 Ind. 127; *Over v. Dehne*, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; *Bryce v. Chicago etc. Ry. Co.*, 129 Iowa, 342, 105 N. W. 497; *Ashcraft v. De Armond*, 44 Iowa, 229; *Doty v. Bitner*, 82 Kan. 551, 108 Pac. 858; *Mattingly v. Shortell*, 120 Ky. 52, 8 Ann. Cas. 1134, 85 S. W. 215, 27 Ky. Law Rep. 426; *Morgan v. Yarborough*, 13 La. 74, 33 Am. Dec. 553; *Hunter v. Randall*, 69 Me. 183; *Filley v. Angell*, 102 Mass. 67; *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 South. 452; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *McIlhargy v. Chambers*, 117 N. Y. 532, 23 N. E. 561; *Matter of Rossell*, 126 App. Div. 607, 110 N. Y. Supp. 706; *People v. Cox*, 21 Hun (N. Y.), 47; *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201; *State v. Haynes*, 71 N. C. 79; *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61; *Pugh v. Holli-*

day, 3 Ohio St. 284; *Keller v. Bley*, 15 Or. 429, 15 Pac. 705; *Bowser v. Cravener*, 56 Pa. 132; *State v. Easterling*, 1 Rich. (S. C.) 310; *State v. De Marias*, 27 S. D. 303, 130 N. W. 782; *Missouri etc. R. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. 1087; *Gaither v. Hanrick*, 69 Tex. 92, 6 S. W. 619; *Campbell v. State*, 8 Tex. App. 84; *Stannard v. Smith*, 40 Vt. 513; *Sussex Peerage Case*, 11 Clark & F. 85, 113, 8 Eng. Reprint, 1034; *Stapylton v. Clough*, 22 Eng. L. & Eq. 276, 2 El. & B. 933, 118 Eng. Reprint, 1016.

⁴⁹ *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899; *Shumway v. Leahey*, 67 Cal. 458, 8 Pac. 12; *Montezuma v. Minor*, 73 Ga. 484; *Gatling v. Newell*, 9 Ind. 572; *St. Louis etc. Ry. Co. v. Maddox*, 18 Kan. 546; *Seibel-Suessdorf etc. Co. v. Manufacturers' Ry. Co.*, 230 Mo. 59, 130 S. W. 288; *Weinstein v. Interurban St. Ry. Co.*, 52 Misc. Rep. 468, 102 N. Y. Supp. 512; *Lynn v. City of Troy*, 57 Hun, 590, 10 N. Y. Supp. 594; *Connecticut Mut. L. Ins. Co. v. Schwenck*, 94 U. S. 593, 24 L. Ed. 294; *Cook v. United States*, 138 U. S. 157, 34 L. Ed. 906, 11 Sup. Ct. Rep. 268; *Glenn v. Liggett*, 47 Fed. 472; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Bucknam v. Barnum*, 15 Conn. 67.

commercial transaction to which it relates.⁵⁰ The strictness with which the courts adhere to the rule excluding hearsay is well illustrated in a celebrated case, often cited, in which it was held that letters addressed to a *deceased testator* indicating that the writers thought him sane, but which were not acted on by him, could not be admitted for the purpose of proving his sanity. By way of illustration, Baron Parke stated in his opinion in this case that the conduct of the family or relatives of a testator in taking the same precautions in his absence as if he were a lunatic, his election in his absence to some high and responsible office, the conduct of a physician who permitted a will to be executed by a sick testator, the conduct of a deceased captain on a question of seaworthiness, who after examining every part of a vessel embarked in it with his family, would all be mere instances of hearsay evidence—mere acts or statements not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.⁵¹ But in the case just cited it was held that a different rule would have prevailed if it had been shown that the testator himself had read and understood the letters in question, and that he had acted upon them. In that case the letters, although the acts and statements of third parties, would have been strictly relevant as illustrating the conduct of the testator, and would have such probative effect as the jury might deem proper.⁵² Of course the fact that the written hearsay is in the form of letters

⁵⁰ *Boyd v. Yerkes*, 25 Ill. App. 527; *Illinois Cent. R. Co. v. Langdon*, 71 Miss. 146, 14 South. 452; *Carter v. Catchings* (Miss.), 48 South. 515; *Pritchard v. Hooker*, 114 Mo. App. 605, 90 S. W. 415; *Bryan v. Buford*, 7 J. J. Marsh. (Ky.) 335; *Shook v. Fox*, 126 App. Div. 565, 110 N. Y. Supp. 951; *McIlhargy v. Chambers*, 117 N. Y. 532, 23 N. E. 561; *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496; *Boulton v. First Nat. Bank of Goshen*, 46 Iowa,

273; *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226; *Bennett v. Bennett*, 37 W. Va. 396, 38 Am. St. Rep. 47, 16 S. E. 638; *Minton v. Underwood Lumber Co.*, 79 Wis. 646, 48 N. W. 857.

⁵¹ *Wright v. Doe ex dem. Tatham*, 7 Ad. & E. 313, 112 Eng. Reprint, 488.

⁵² *Wright v. Doe ex dem. Tatham*, 7 Ad. & E. 313, 112 Eng. Reprint, 488.

or telegrams does not avail to make it admissible.⁵³ No authority is needed for the proposition that the same considerations which exclude the naked assertions of third persons as evidence forbid that any inference should be drawn in favor of or against a party from the *mere acts of a stranger*. The fact that hearsay is printed, no matter in what form, does not alter the application of the rule. When the introduction of a newspaper in evidence had been permitted, the court characterized it as "hearsay evidence, twice removed."⁵⁴ But when the witness can testify as to

⁵³ *Mobile etc. R. Co. v. Worthington*, 95 Ala. 598, 10 South. 839; *East Tennessee etc. R. Co. v. Thompson*, 94 Ala. 636, 10 South. 280; *Owen v. Jones*, 14 Ark. 502; *Fordyce v. McCants*, 51 Ark. 509, 14 Am. St. Rep. 69, 4 L. R. A. 296, 11 S^W 694; *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774; *Moore v. Langdon*, 2 Mackey (D. C.), 127; *Hickson v. Bryan*, 75 Ga. 392; *Laughlin v. Inman*, 138 Ill. App. 40; *George v. Hurst*, 31 Ind. App. 660, 68 N. E. 1031; *Simpson v. Smith*, 27 Kan. 565; *Morton v. Smith*, 4 T. B. Mon. (20 Ky.) 313; *Garrett v. Morgan*, 11 Rob. (La.) 447; *Hunter v. Randall*, 69 Me. 183; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Brooks v. Acton*, 117 Mass. 204; *Culver v. Smith*, 131 Mich. 359, 91 N. W. 608; *Peck v. Snow*, 47 Minn. 398, 50 N. W. 470; *Probert v. Girard Inv. Co.*, 155 Mo. App. 344, 137 S. W. 41; *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; *Southern Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613; *Davis v. Blume*, 1 Mont. 463; *Duysters v. Crawford*, 69 N. J. L. 614, 55 Atl. 823; *Rossitti v. Valente*, 127 N. Y. Supp. 319; *Schliep v. Box Board etc. Co.*, 70 Misc. Rep. 228, 126 N. Y. Supp. 705; *Simmons v. Mann*, 92 N. C. 12; *Morris v. Van-*

deren, 1 Dall. (U. S.) 64, 1 L. Ed. 38; *Stouffer v. Erwin*, 81 S. C. 541, 62 S. E. 843; *Missouri etc. R. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. 1087; *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121; *Conrad v. New York Atlantic Ins. Co.*, 1 Pet. (U. S.) 386, 7 L. Ed. 189. See, also, the following interesting late cases: *Banks v. Warner*, 85 Conn. 613, 84 Atl. 325; *Van Deman v. Demos (Fla.)*, 60 South. 342; *American Towing etc. Co. v. Baker Whitely Coal Co.*, 117 Md. 660, 84 Atl. 182; *Anderson v. Shaw (La.)*, 60 South. 50; *Howell v. Sherwood*, 242 Mo. 513, 147 S. W. 810; *Anderson v. Robinson (Or.)*, 127 Pac. 546; *Biard v. Tyler etc. Assn. (Tex. Civ. App.)*, 147 S. W. 1168; *Lawn v. Prager*, 67 Wash. 568, 121 Pac. 466; *Aeme Cement Plaster Co. v. Westman (Wyo.)*, 122 Pac. 89; *Klicke v. Allegheny Steel Co.*, 200 Fed. 933.

⁵⁴ *Child v. Sun Mutual Ins. Co.*, 3 Sand. (N. Y.) 26; *Johnson County Savings Bank v. Walker*, 80 Conn. 509, 69 Atl. 15; *Brandon v. Atchison etc. Ry. Co.*, 134 Mo. App. 89, 114 S. W. 540; *Norfolk & W. Ry. Co. v. Bell*, 104 Va. 836, 52 S. E. 700; *F. W. Brockmann Commission Co. v. Aaron*, 145 Mo. App. 307, 130 S. W. 116.

the value of cattle from his own knowledge, the fact that he gathered information also from a market report does not affect the competency of his evidence.⁵⁵

§ 299 (302). **Hearsay may include things stated under oath or against interest.**—It might be thought that the fact that the written hearsay had been sworn to would lend it additional force for introduction. This is not so. The inherent weakness of hearsay testimony is not cured by the fact that the statement has been made under oath, or in any judicial proceedings between other parties. Thus, a voluntary *affidavit* ranks in equal grade with other hearsay testimony in the law of evidence.⁵⁶ Conspicuous among such affidavits are those made by jurors after a trial and which are invariably rejected. In one case⁵⁷ there was an affidavit filed, in support of appellant's motion for a new trial, to the effect that one of the jury had stated to affiant after the trial that he had gone to the scene of the accident and formed his opinion upon what he saw then and there. The court refused to consider such affidavit, and we think properly. It purported to contain a statement made by a juror after he had been discharged from service in the case, not under sanction of an oath and tending to impeach his conduct when acting as a sworn juror.⁵⁸ In England it has

⁵⁵ *Southern Kansas Ry. Co. v. Texas v. Bennett*, 46 Tex. Civ. App. 379, 103 S. W. 1115.

⁵⁶ *Owen v. Peebles*, 42 Ala. 338; *Smith v. Feltz*, 42 Ark. 355; *Fleming v. Shepherd*, 83 Ga. 338, 9 S. E. 789; *Louisville etc. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Jones v. Jones*, 20 Iowa, 388; *Pt. Scott v. Elliott*, 68 Kan. 805, 74 Pac. 609; *Grayble v. Froman*, 1 A. K. Marsh. (Ky.) 191; *Poutz v. Jones*, 21 La. Ann. 726; *Patterson v. Maryland Ins. Co.*, 3 Har. & J. (Md.) 71, 5 Am. Dec. 419; *Kipp v. Clinger*, 97 Minn. 135, 106 N. W. 108; *Bean v. Missoula Lumber Co.*,

40 Mont. 31, 104 Pac. 869; *Hyatt v. Leslie* (Miss.), 10 South. 672; *Patterson v. Fagan*, 38 Mo. 70; *Dare v. Ogden*, 1 N. J. L. 91; *Barry v. Galvin*, 37 How. Pr. (N. Y.) 310; *Tucker v. Town Council of South Kingstown*, 5 R. I. 558; *Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426; *Rice v. Ragan* (Tex. Civ. App.), 129 S. W. 1148; *Peterson v. Ankrom*, 25 W. Va. 56; *United States v. Zucca & Co.*, 175 Fed. 578; *In re Barnett*, 2 Fed. Cas. No. 1024.

⁵⁷ *Chicago City Ry. Co. v. Wyckhoff*, 136 Ill. App. 342.

⁵⁸ Affidavits of jurors made after the trial will not be received to im-

been held that the *ex parte* deposition of a pauper as to his place of settlement is inadmissible, although no other testimony can be obtained on the subject.⁵⁹ And in this country the fact of hearsay being contained in a deposition has been held to lend it no additional weight. Where a deposition on behalf of a defendant showed the details of a settlement between plaintiff and defendant's intestate, but the cross-examination showed that the witnesses testified that all their information on the subject was derived from "family conversations," and they were unable to recollect whether the plaintiff was present thereat, the testimony was rightly held incompetent and hearsay.⁶⁰ The court has power to strike out answers to interrogatories which, from the whole deposition, are evidently based on hearsay.⁶¹ Nor, in general, are hearsay statements admissible, although they are apparently *contrary to the interest* of the person who made them.⁶² Thus, the solemn statement made out of court by one charged with crime, that he in connection with others had committed the offense, might afford the most satisfactory evidence of his own guilt, and, if admitted in evidence in a trial against the others thus

peach their verdict; nor will affidavits as to statements made by jurymen be received to impeach their verdict: *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130; *Sanitary District v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Smith v. Smith*, 169 Ill. 623, 48 N. E. 306; *Bonardo v. People*, 182 Ill. 411, 55 N. E. 519. In *Heldmaier v. Rehor*, 188 Ill. 458, 59 N. E. 9, two jurymen, whose conduct was complained of, did not make any affidavit or affidavits, but the affidavits presented, two of which were by the appellant himself and one of his attorneys, set forth that the jurymen in question stated in their presence that during the trial they examined a stone wagon for the purpose of

ascertaining whether there was space enough under it for it to have passed over the body of the child in the manner testified to upon the trial. As was said in *Smith v. Smith*, *supra*: "Nor can evidence of outsiders as to facts derived from members of the jury concerning their action be received to impeach a verdict." Hence, the court below properly disregarded the affidavits so presented.

⁵⁹ *Rex v. Ferry Frystone*, 2 East, 54, 102 Eng. Reprint, 289.

⁶⁰ *Thomas v. Whitehead*, 48 Ga. 587.

⁶¹ *Harrison Wire Co. v. Moore*, 55 Mich. 610, 22 N. W. 62.

⁶² See § 323 et seq., *post*, as to declarations against interest.

implicated, would no doubt have great weight in the minds of a jury in determining their guilt. But whatever moral weight might be given to such statements, they have no place in a court of justice as legal evidence.⁶³ The same, of course, would be true respecting such statements admitting that the declarant is jointly liable with others.⁶⁴

§ 300 (303). Statements apparently hearsay may be original evidence.—This part of the subject has been already partially dealt with, in treating of the relevancy of facts apparently collateral.⁶⁵ “It does not follow because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and in other cases such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy.”⁶⁶ On this principle, statements which have been made to a person may be material for the purpose of showing what *knowledge or information* he had respecting a given subject, when such knowledge or information is material to the issue.⁶⁷ Thus in an action to recover damages caused by flooding the plaintiff’s premises, it was competent for plaintiff

⁶³ *Commonwealth v. Felch*, 132 Mass. 22; *State v. Duncan*, 6 Ired. (28 N. C.) 236; *State v. Haynes*, 71 N. C. 79.

⁶⁴ *Stark. Ev.* 59, 60.

⁶⁵ *Sec. c. 5, “Relevancy,” § 141 et seq.*

⁶⁶ 1 *Greenl. Ev.*, § 100; *DuBost v. Beresford*, 2 *Camp.* 511; *Bartlett v. Delprat*, 4 *Mass.* 702; *People v. Shea*, 8 *Cal.* 538; *Turner v. United States*, 66 *Fed.* 280, 13 *C. C. A.* 436, that a witness derived his knowledge concerning a boundary from a

third person. See note on “Admissibility of Testimony as to Statement Made to Witness by Another Where Latter Admits Statement but has Forgotten Facts Stated,” to *Hart v. Atlantic Coast Line R. R. Co.*, 12 *Ann. Cas.* 706. The following are Canadian cases bearing on the subject of complaints and answers to inquiries; *Rex v. Spuzzum*, 12 *B. C. R.* 291; *Reg. v. Graham*, 31 *O. R.* 77; *Cuff v. Frazee Storage etc. Co.*, 14 *O. L. R.* 263.

⁶⁷ *Rice v. Bancroft*, 11 *Pick. (Mass.)* 469. See §§ 142, 145, *ante*.

to show that he had called to the attention of the persons who were doing certain excavating work for the defendant railway company that it was too near the ditch on the road, and to prove that, by reason of it, the banks of the ditch were so weakened that they would not hold the water, and that the banks, in consequence thereof, broke and allowed the water to flow out of the ditch into plaintiff's premises, to his damage. This evidence was proper, both to show that the excavation complained of caused the injury, as part of the *res gestae*, and also to show *scienter* on the part of the defendant that the damage and injury would probably follow the wrong being done. Such evidence might authorize the jury to award punitive damages.⁶⁸ Where a plaintiff was injured by a blind horse which was being led about in a sale ring by the defendant's employee, evidence that such employee was told of the horse's blindness by the man who delivered it to him was admitted in support of plaintiff's case that the horse was negligently handled. The court held it was material to prove knowledge.⁶⁹ So, too, evidence is admissible that an attaching creditor had notice before his levy of a deed executed by his debtor though not recorded at the time of the attachment.⁷⁰ In determining whether there was probable cause in an action for *malicious prosecution*, the information on which the defendant acted in bringing the former suit is material and is not hearsay, though consisting of the statements of others. Such statements, if the advice of counsel, may constitute a full defense.⁷¹ If the statements are made by others, they may bear upon the question of good faith, and thus affect the

⁶⁸ Southern Ry. Co. v. Lewis, 165 Ala. 555, 138 Am. St. Rep. 77, 51 South. 746.

⁶⁹ Craney v. Union Stockyard etc. Co., 240 Ill. 602, 88 N. E. 1046. See, also, St. Louis etc. R. Co. v. Dalby, 19 Ill. 353.

⁷⁰ Folkes v. Wyatt (Tex. Civ. App.), 126 S. W. 958; Tumlin v. Crawford, 61 Ga. 128. See, also,

Gaskell v. Morris, 7 Watts & S. (Pa.) 32; Pace v. Louisville & N. R. Co., 166 Ala. 519, 52 South. 52; Continental Building etc. Assn. v. Bogness, 158 Cal. 469, 111 Pac. 357; Eareckson v. Rogers, 112 Md. 160, 75 Atl. 513; Benedict v. Dakin, 243 Ill. 384, 90 N. E. 712.

⁷¹ Ravenga v. Mackintosh, 2 Barn. & C. 693, 107 Eng. Reprint,

measure of damages.⁷² They are always admissible from the very nature of the action. It charges the defendant with prosecuting the plaintiff without reasonable or probable cause, and therefore it is on the defendant to show that he had good reason which may be entirely apart from his direct knowledge. It may be information from others; and it then becomes a question for the jury whether the defendant, when he made the complaint, acted upon such information as a man of ordinary care, prudence and discretion would have been warranted in acting upon under similar circumstances. He may therefore give in evidence what that information, which in other cases would be excluded as hearsay, was and from whom he got it. The nature of the information is clearly such as would not be given in the presence of the plaintiff. The defendant, in such cases, is not charged with merely prosecuting the plaintiff, but in doing so without reasonable and probable cause, so that the latter portion of the proposition calls on him for his cause, and being called upon, he is entitled to answer.⁷³ So in actions for *slander and libel*, it is plain that the rule excluding hearsay is not violated by proof of the uttering of the language, since it is the fact of uttering and not the truth of the language which is to be proved. In such actions there is authority for the view that the information on which the defendant acted, though derived from the statements of third persons, may constitute original evidence tending to show his good faith, as well as to mitigate the damages.⁷⁴ For example, where a newspaper

541; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Pullen v. Glidden*, 68 Me. 559; *Stanton v. Hart*, 27 Mich. 539; *Laird v. Taylor*, 66 Barb. (N. Y.) 139. See § 157, *ante*.

⁷² *Thomas v. Russell*, 9 Ex. 764; *Lister v. Perryman*, L. R. 5 Ex. 365; *Wyatt v. White*, 5 Hurl. & N. 371; *Lamb v. Galland*, 44 Cal. 609; *Hirsch v. Feeney*, 83 Ill. 548; *Pullen v. Glidden*, 68 Me. 559; *Bacon v. Towne*, 4 Cush. (Mass.) 217;

Heyne v. Blair, 62 N. Y. 19; *Bell v. Percy*, 5 Ired. (27 N. C.) 83; *White v. Tucker*, 16 Ohio St. 468.

⁷³ *Lindsay v. Batés*, 223 Mo. 294, 122 S. W. 682.

⁷⁴ *Ferdon v. Dickens*, 161 Ala. 181, 49 South. 888; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Williams v. Miner*, 18 Conn. 464; *Todd v. Every Evening Printing Co.*, 6 Penne. (Del.) 233, 66 Atl. 97; *Jones v. Townsend*, 21 Fla. 431, 53 Am. Rep.

was sued for libel of a married woman, that she was mysteriously missing from the home of a sister, whom she was visiting, it was permissible for them to prove their *bona fides* in mitigation of damages. In the case referred to,⁷⁵ the proof the newspaper company was held entitled to give was that it was its function to chronicle current events, and that, on the day of the publication complained of in the petition, it was informed that one Laura Hunter, of Bardstown, was lost and missing from her sister's house at 1023 First street, in said city, and that the police had been asked to search for her, and in good faith, believing same to be true, it published said item in pursuance of its policy and duty, and as a matter of kindness to said Laura Hunter, her friends and relatives, that the information of her loss or abduction might be widely disseminated, and she be speedily restored to her friends and relatives, and their anxiety and distress of mind concerning her be quickly relieved; and said publication was made for no other purpose and in no other spirit. It is hardly necessary to cite authorities to the obvious proposition that when proof is to be made of a *parol contract*, or when for other reasons the statements of a person are relevant, such statements may be proved by third persons who were present as well as by the one who used the language. In such case the statements are not hearsay, but *substan-*

676; *Moore v. Mauk*, 3 Ill. App. 114; *Prewitt v. Wilson*, 128 Iowa, 198, 103 N. W. 365; *Clement v. Their Creditors*, 37 La. Ann. 692; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *Lewis v. Humphries*, 64 Mo. App. 466; *Hearst v. New Yorker Staats Zeitung*, 71 Misc. Rep. 7, 129 N. Y. Supp. 1089; *Alpin v. Morton*, 21 Ohio St. 536; *Beehler v. Steever*, 2 Whart. (Pa.) 313; *Folwell v. Providence Journal Co.*, 19 R. I. 551, 37 Atl. 6; *San An-*

tonio Light Pub. Co. v. Lewy, 52 Tex. Civ. App. 22, 113 S. W. 574; *Adamson v. Raymer*, 94 Wis. 243, 68 N. W. 1000; *Astrue v. Star Co.*, 182 Fed. 705; *Palmer v. Mahin*, 120 Fed. 737, 57 C. C. A. 41.

⁷⁵ *Evening Post Co. v. Hunter* (Ky.), 38 S. W. 487. See, also, *Kershaw v. Steurer*, 138 App. Div. 211, 123 N. Y. Supp. 77; *Folwell v. Providence Journal Co.*, 19 R. I. 551, 37 Atl. 6; *Robinson v. Evening Post Publishing Co.*, 25 Misc. Rep. 243, 55 N. Y. Supp. 62; *Hearst v. New Yorker Staats Zeitung*, 71 Misc. Rep. 7, 129 N. Y. Supp. 1089.

tive evidence. The following is an apt illustration: A was the owner of an omnibus and delivered it to C under an agreement that he might take it and use it, and that it should become his property on payment of one hundred and fifty dollars, but if he failed to pay that sum, it should remain the property of A, and C should pay a reasonable price for the use of it. No time of payment or terms for its use were ever agreed upon; and no part of the price was ever paid. C took the omnibus, and repaired it, and painted his name upon it, and used it until January, 1855, when it was attached as his property at the suit of B and sold on execution to B. After the seizure and before the sale, the attaching officer and the attorney of B had notice that it was A's property. A called a witness to prove the agreement under which the omnibus was delivered to C. B objected, because he was not present at the interview, and because C might be called as a witness. The court, in confirming the admission of the evidence, said: "The evidence offered to prove the agreement of sale was clearly competent. It was not hearsay, but legal proof of a contract of which there was no other or better evidence. It was evidence of a fact, and not of a mere conversation or declaration. It being necessary to prove the agreement, of which there was no written evidence, it might be shown by the testimony of anyone who was present when it was made. It was not necessary to prove it by the testimony of one of the parties to the contract. His evidence might have been more satisfactory and decisive; but it was no better evidence, in a legal sense, than that of any third person who was present when the agreement was made."⁷⁶ Where in an action on a beneficiary certificate it was necessary to show a search made to find the assured,⁷⁷ the plaintiff was entitled to give in evidence newspaper clippings and affidavits which tended to show what diligence had been taken to find the assured or explain his absence, this being a

⁷⁶ *Blanchard v. Child*, 7 Gray (Mass.), 155.

⁷⁷ *Modern Woodmen v. Gerdorn*, 77 Kan. 401, 94 Pac. 788.

material question in the case.⁷⁸ In proving *self-defense*, a party may show that he had information from others which led him to apprehend an attack.⁷⁹ As we have seen elsewhere, there are also numerous cases in which evidence may be given of general reputation as to *character*; and under some circumstances *reputed ownership*, public rumor and notorious usage may be shown.⁸⁰ So in a large class of cases the *opinions* of witnesses may be received. The proof of the age of a person may generally be made by the testimony of a relative or other person who is in such position as to have personal knowledge of such age. Thus, the date of a person's birth may be testified to by members of his family, though they know the fact only by hearsay based on family tradition.⁸¹ The testimony of a person as to the proximate age of his older brother is not necessarily based on hearsay, and may be legitimate original evidence if the brothers passed their childhood together.⁸² The plaintiff in a personal injury case is competent to testify as to his own age when he signed a release of damages, as is also a relative who has known the plaintiff since he was six years of age, and has been informed by plaintiff's father, who has since died, on what day plaintiff was born. So, also, is a woman who has known plaintiff since he was an infant. Such woman may testify also as to the year in which plaintiff was born.⁸³ In a prosecution for rape the testimony of the mother and sister of the prosecutrix as to her age is admissible.⁸⁴ *Relationship to a family of*

⁷⁸ *Farington v. Modern Woodmen of America*, 82 Kan. 841, 109 Pac. 187.

⁷⁹ *People v. Shea*, 8 Cal. 538. See § 146, *ante*.

⁸⁰ See § 148 et seq., *ante*. In *Barker v. Commonwealth*, 90 Va. 820, 20 S. E. 776, it was held that it could not be proved by general reputation that a house at which a person resided was of ill-repute; but the same must be established by particular facts. Nor can the making of a note be denied by showing

a payee's reputation of being "hard up" at the time when it was purported to have been given by him: *Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446.

⁸¹ *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541.

⁸² *Hancock v. Supreme Council Catholic Ben. Legion*, 69 N. J. L. 308, 55 Atl. 246.

⁸³ *Chicago etc. R. R. Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497.

⁸⁴ *George v. State*, 61 Neb. 669, 85 N. W. 840. See, also, *Hill v.*

a particular person may be proved by one acquainted with the family, and who knows that the person was recognized by the family as a relative. Although that sort of evidence is in the nature of hearsay, is based on hearsay, it is admissible from necessity, because many times in no other way could relationship be shown but by proof that relationship in and to a particular family was recognized by the members of the family.⁸⁵ When such testimony is introduced, it is for the jury to determine, from the extent of the witness' acquaintanceship with the family and his opportunities for knowing that its members recognized the particular person as a member, what weight to give it.⁸⁶ To render the evidence competent, it must appear that the declarant, or source of the witness' information, was a member of the family, or related to the family, whose history the fact concerns, and was deceased or out of the state. The witness must name the source of his information, and show affirmatively that it was a relative or connection.⁸⁷ There is another class of declarations and acts, often close to the line of hearsay testimony, which are received as original evidence on the ground that they are so intimately connected with the principal fact under investigation as to illustrate its character—in other words, they are parts of the *res gestae*.⁸⁸ As we have shown, with reference to malicious prosecution that which would otherwise be hearsay testimony is permissible in explanation of conduct, as it is for the purpose of identifying and locating objects referred to in the testimony.⁸⁹

Eldridge, 126 Mass. 234; Commonwealth v. Stevenson, 142 Mass. 466, 8 N. E. 341; State v. Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; State v. Best, 108 N. C. 747, 12 S. E. 907; State v. McClain, 49 Kan. 730, 31 Pac. 790; Dodge v. State, 100 Wis. 294, 75 N. W. 954; Loose v. State, 120 Wis. 115, 97 N. W. 526. See note to Grand Lodge v. Bartes, 111 Am. St. Rep. 583, and to Koeester v. Rochester Candy Works, 16 Ann. Cas. 592, on proof of age.

⁸⁵ 1 Greenl. Ev., § 106.

⁸⁶ Backdahl v. Grand Lodge etc., 46 Minn. 61, 48 N. W. 454. See § 312, *post*.

⁸⁷ Abbott, Trial Ev., 91; State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444.

⁸⁸ See § 344 et seq., *post*.

⁸⁹ Stamps v. Newton County, 8 Ga. App. 229, 68 S. E. 947.

§ 301 (304, 305). **Matters of public and general interest.** One of the well-recognized exceptions to the rule excluding hearsay evidence relates to those matters which are of public and general interest to the community. Subject to the limitations hereafter stated, it is well settled that the declarations of *deceased* witnesses may be received when they relate and are relevant to the existence of any public or general right or custom, or matter of public or general interest.⁹⁰ But in order to authorize the admission of hearsay evidence (except in cases of pedigree), three things must generally concur: First, that the fact to which the reputation or tradition applies must be of a public nature; second, if the reputation or tradition relate to the exercise of a right or privilege, it must be supported by acts of enjoyment or privilege within the period of living memory; third, that it must not be reputation or traditionary declarations to a particular fact.⁹¹ "Evidence of reputation on general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information."⁹² That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, and also upon questions respecting the boundaries of lands, is a familiar doctrine. But there are, no doubt, other cases in which the same kind of evidence may be received, for the purpose of establishing a mere private right, when the fact to be proved is one of a *quasi*—public nature, that is, one which interests a multitude of people,

⁹⁰ *People v. Velarde*, 59 Cal. 457; *Southwest School Dist. of Bolton v. Williams*, 48 Conn. 504; *Wooster v. Butler*, 13 Conn. 309; *McCall v. United States*, 1 Dak. 320 (307), 46 N. W. 608; *Drury v. Midland Ry. Co.*, 127 Mass. 571; *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543; *McKinnon v. Bliss*, 21 N. Y. 206; *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240; *Murray v. Spencer*, 88 N. C. 357; *Tucker v. Smith*, 68

Tex. 473, 3 S. W. 671; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475; *Shutte v. Thompson*, 15 Wall. (U. S.) 151, 21 L. Ed. 123; 1 Greenl. Ev., 128. See note to *Halvorsen v. Mono etc. Lumber Co.*, 94 Am. St. Rep. 677.

⁹¹ *Ellicott v. Pearl*, *supra*.

⁹² Lord Kenyon in *Morewood v. Wood*, 14 East, 327, 104 Eng. Reprint, 626.

or an entire community.⁹³ Such as where the original plan of a city was lost and it was sought to use the testimony of an old inhabitant as to a copy. On his evidence practically rested the title of every lotholder and citizen of the borough. The court in admitting it referred to the fact of its affecting a whole community, the members of which could hardly be joined as parties. "A city cannot be remediless, simply because it is so large that it is impossible to make all its inhabitants defendants, and therefore you must resort to the only practicable method adopted in this case. But the declarations of a deceased surveyor, in relation to lines run and plans made from actual survey, are clearly evidence in an instance like the present, which concerns a matter of general if not public interest. It is of no consequence whether such declarations were made under oath or not, on a bill to perpetuate testimony, or on the trial of a cause between other parties. It is within a well-known and well-defined exception to hearsay testimony."⁹⁴ The considerations which have led the courts to admit testimony of this character are the inherent difficulty of obtaining any other evidence than that in the nature of tradition and reputation, when the controversy relates to *ancient rights*; and the further fact that since the public are interested in such statements, there is good rea-

⁹³ *McKinnon v. Bliss*, 21 N. Y. 206, in which Selden, J., went on to say: "It seems to me, that this case is one that might fairly be considered as falling within the latter class. The Royal Grant, as it is called, is an extensive tract, embracing an entire township and parts of several others; and everything relating to the original document upon which the title depended, would necessarily affect the interests of every occupant of the tract. Again, the fact sought to be proved, viz., the burying in the ground, by the descendants of Sir William John-son, of the muniments of his title,

is one which would scarcely be susceptible of any other kind of proof. Of too ancient a date to be proved by eye-witnesses, and not of character to be made a matter of public record, unless it could be proved by tradition, there would seem to be no mode in which it could be established. It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable; hence, had a proper foundation been laid for the proof in this case, I should have thought it admissible."

⁹⁴ *Birmingham Borough v. Anderson*, 40 Pa. 506.

son to believe that the falsity or error of such declarations could be exposed or corrected by other testimony. The particular objection which excludes mere hearsay in general does not apply to those cases which are of a public nature, which may be presumed to be matters of public notoriety, as in the instance of public prescriptions and customs, and where "reliance is placed, not on the credit due to the assertion of a single individual, but is sanctioned by the concurrent opinion and assent of indefinite numbers. In such cases a presumption exists that the truth of the fact is known and faithfully communicated."⁹⁵ It may also be observed that since declarations of this character are received only when they deal with matters of public or of general interest, there is less reason to suspect that the statements were made for the purpose of fabricating testimony, than if they related to individual rights. Cases illustrating this exception to the general rule are far more numerous in England than in the United States. Testimony of this character has been received where the question related to a *right of common* existing by immemorial custom;⁹⁶ to a *custom of mining* in a particular district;⁹⁷ to the custom of a corporation to exclude foreigners from trading within a town;⁹⁸ to the *boundaries* of towns, counties, parishes, hamlets and manors;⁹⁹ to the *public character of roads* or highways;¹⁰⁰ to a claim of *tolls* on a

⁹⁵ Stark Ev., 46.

⁹⁶ Weeks v. Sparke, 1 Maule & S. 679, 105 Eng. Reprint, 253. Though questioned in Dunraven v. Lewellyn, 15 Ad. & E., N. S., 791, 117 Eng. Reprint, 657.

⁹⁷ Crease v. Barrett, 1 Crompt. M. & R. 919, 5 Tyr. 458, 4 L. J. Ex. 297.

⁹⁸ Davies v. Morgan, 1 Crompt. & J. 587, 1 Tyr. 457, 9 L. J. (O. S.) Ex. 153.

⁹⁹ Reg. v. Mytton, 2 El. & El. 557, 121 Eng. Reprint, 209; Nicholls v. Parker, 14 East, 331, 104 Eng. Reprint, 629; Brisco v. Lomax, 8 Ad.

& E. 198, 112 Eng. Reprint, 812; Evans v. Rees, 10 Ad. & E. 151, 113 Eng. Reprint, 58; Plaxton v. Dare, 10 Barn. & C. 17, 109 Eng. Reprint, 357; Thomas v. Jenkins, 6 Ad. & E. 525, 112 Eng. Reprint, 201; Doe v. Sleeman, 9 Q. B. 298, 115 Eng. Reprint, 1287; Barnes v. Mawson, 1 Maule & S. 77, 105 Eng. Reprint, 30.

¹⁰⁰ Reg. v. Bliss, 7 Ad. & E. 550, 112 Eng. Reprint, 577; Crease v. Barrett, 1 Crompt. M. & R. 919, 5 Tyr. 458, 4 L. J. Ex. 297; Reed v. Jackson, 1 East, 355, 102 Eng. Reprint, 137.

public road;¹ to a *prescriptive liability* to repair sea-walls;² or bridges;³ and to a right of ferry,⁴ or public landing place.⁵ Testimony of this kind is competent as well *against* a *public right* as in its favor.⁶ Although cases illustrating this rule are much less numerous in the United States, the doctrine has been accepted as well settled, and it will be found as the discussion proceeds that in this country the principle has been extended to a class of cases not included within the common-law rule. Among the American cases will be found the admission of such testimony where the question related to *boundaries*,⁷ to the location of a section *line*,⁸ or a street boundary,⁹ or of a *line* between two commons,¹⁰ and to the location of a highway.¹¹

¹ Brett v. Beales, Moody & M. 416.

² Reg. v. Leigh, 10 Ad. & E. 398, 113 Eng. Reprint, 152.

³ Reg. v. Sutton, 8 Ad. & E. 516, 112 Eng. Reprint, 934; Rex v. Bedfordshire, 4 El. & Bl. 535, 119 Eng. Reprint, 196.

⁴ Pim v. Currell, 6 Mees. & W. 234.

⁵ Drinkwater v. Porter, 7 Car. & P. 181. But *such evidence has been rejected*, where the question was what *usage* had obtained in electing the schoolmaster of a grammar school: Withnell v. Gartham, 1 Esp. 324, 6 Term Rep. 388, 101 Eng. Reprint, 610; whether the *sheriff* of the county of Chester or of the city of Chester was bound to execute criminals: Reg. v. Antrobus, 2 Ad. & E. 793, 111 Eng. Reprint, 304; whether certain tenants of a manor had prescriptive *rights of common*: Dunraven v. Llewellyn, 15 Q. B. 791, 117 Eng. Reprint, 657; Warrick v. Queen's Coll. Oxford, 40 L. J. 785, L. R. 6 Ch. 716; what were the *boundaries* of a waste over which many of the tenants of a manor claimed a right of common: Dunraven v. Llew-

elley, 15 Q. B. 791, 117 Eng. Reprint, 657; whether the *tenants* of a particular manor had the right of cutting and selling wood: Blackett v. Lowes, 2 Maule & S. 494, 105 Eng. Reprint, 465; and what were the *boundaries between two private estates*: Clothier v. Chapman, 14 East, 331; Drinkwater v. Porter 7 Car. & P. 181.

⁶ 1 Greenl. Ev., § 140.

⁷ People v. Velarde, 59 Cal. 457; Drury v. Midland Ry. Co., 127 Mass. 571; Ellicott v. Pearl, *supra*.

⁸ Mullaney v. Duffey, 145 Ill. 559, 33 N. E. 750.

⁹ Klinkner v. Schmidt, 114 Iowa, 695, 87 N. W. 661.

¹⁰ Morris v. Callahan, 105 Mass. 129.

¹¹ Wooster v. Butler, 13 Conn. 309. In this interesting case the plaintiffs denied that the highway intended to be reserved in the original grant was ever located over the *locus in quo*, but claimed that if any highway was ever laid out upon that reservation, it was over the upland. And as conducing to show this, they offered as witnesses several aged men who testified that,

§ 302 (306.) **Distinction between the public and merely general rights.**—The distinction seems now clearly established in England that hearsay, or reputation, or tradition, is not admissible in cases of mere private rights; but only in cases of public rights or those *quasi public*, involving similar interests by a number of persons.¹² In addition to the broad division referred to, a distinction has long been well recognized between those rights or customs which are strictly *public* and those which are only *general*. The former are common to all the citizens of the state, and as to those the declarations of any citizen are admissible, although such declarations would, of course, have little weight if made by a person who had no means of knowledge. While the declarations of any citizen may be received in relation to such a subject as the existence of a public highway or ferry, or of other matters of public right, yet declarations cannot be received in respect of general rights or those rights which are only common to a considerable number of persons, unless the declarant appears to have had competent *means of knowledge*.¹³ The prin-

when young, they had heard old men, now dead, say that there was a traveled road or highway over the upland, as the plaintiffs claimed. This evidence was objected to, but admitted. "The evidence," said the court, "was of that species of hearsay, called traditionary evidence. In England such testimony has always been received to prove facts of a public or general nature, as in the present case. In this state, we have extended it yet further, and have admitted it to prove the boundaries of lands between individual proprietors; and we have no doubt as to the propriety of its admission on the trial below."

¹² Perhaps a reason may be found which, upon general principles, would well support this distinction. It is, that in regard to private rights, the acts, possession and as-

sertion of title by the parties claiming for themselves are, in all cases, susceptible of direct proof; but in cases of public rights, the acts, possession and assertion of title by many persons, not in privacy with each other, cannot be explained or qualified to be in furtherance of a common public right, unless the evidence of general reputation were admissible to explain the intention and objects of the parties in those acts, or that possession or assertion of title; that is to say, whether done in furtherance of a common right, or of a private right: *Ellicott v. Pearl, supra*.

¹³ *Lay v. Neville*, 25 Cal. 545; *Keystone Mills Co. v. Peach River Lumber Co.* (Tex. Civ. App.), 96 S. W. 64; *Crease v. Barrett*, 1 *Crompt. M. & R.* 919, 5 *Tyr.* 458, 4 *L. J. Ex.* 297; 1 *Greenl. Ev.*, § 128.

ciple upon which oral declarations are admitted in matters of general and public interest, as a means of proving traditionary reputation, applies to documentary and all other kinds of proof denominated hearsay. If the matter in controversy is ancient, and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written, subject to the proper qualifications. Thus deeds, leases and other private documents have been admitted as declaratory of the public matters recited in them.¹⁴ In subjects interesting to a comparatively small portion of the community, as a city or a parish, a foundation for admitting evidence of reputation, or the declarations of ancient or deceased persons, must first be laid by showing that from their situation they probably were conversant with the matter of which they were speaking.¹⁵ Thus, where the dispute relates to the existence of a local custom in a parish or manor in which all the residents of the district have an interest, the declarations, in order to be admissible, should be those of deceased persons who had resided therein or who are shown to have otherwise gained competent knowledge of the subject.¹⁶ In the New York case referred to in the last section the attempt was made to prove by tradition or reputation that the descendants of the patentee under a royal grant of a large tract of land consisting of parts of several townships had buried his muniments of title. The court held that, while this might be deemed a matter of general interest in the community, the proffered evidence was incompetent because no proof had been made that the settlers upon the tract in question claimed title under the grant referred to, and that consequently it did not appear that they had any interest in or peculiar knowledge on the

¹⁴ *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489. Such evidence was received without objection in *New Boston v. Dunbarton*, 15 N. H. 201.

¹⁵ 1 Greenl. Ev., § 136; 1 Phill. Ev. 255.

¹⁶ *Dunraven v. Llewellyn*, 15 Q. B. 791, 809, 117 Eng. Reprint, 657; *Newcastle v. Broxtowe*, 4 Barn. & Ad. 273, 110 Eng. Reprint, 458; *Crease v. Barrett*, 1 Crompt. M. & R. 919, 5 Tyr. 458, 4 L. J. Ex. 297.

subject.¹⁷ In Massachusetts it was held inadmissible to show it to have been a notorious fact in a certain county that no license for the sale of liquors had been granted in that county for many years, for the purpose of showing that a resident of another county had knowledge of this fact.¹⁸ "It may well be doubted," said the court in that case, "whether this is of the class of facts of such general public interest, that a mere knowledge of the fact may be shown by its general notoriety. As a matter of public interest it affected the inhabitants of the county of Norfolk chiefly, if not only. It was not, and in its nature could not be, a usage or custom permanent in its character. Not only might the members composing the tribunal change, but their opinion. The fact that no licenses were granted last year would be no evidence that they might not be granted this or the next. But if matter of general usage or custom, it was the usage or custom of a particular county, and only to affect persons living within the district."

§ 303 (307). **Reputation as to private boundaries excluded in England.**—The English authorities seem to have limited this exception to the general rule strictly to those cases where the litigation related to public or general interests. This is illustrated by the cases already cited, in some of which the declarations proposed and rejected related to the interests of individuals only. It is true that where *private lines* in dispute were *coincident with public or quasi-public boundaries*, evidence of reputation has been received to determine the private right. Thus, where the proof showed that the boundaries of the farm in question and those of a hamlet were the same, evidence of reputation as to the boundaries of the hamlet was admitted to prove the boundaries of the farm. The court held that a fact is to be proved in the same manner when subsidiary, as when it is the very matter in issue.¹⁹ But in respect to

¹⁷ McKinnon v. Bliss, 21 N. Y. 206.

¹⁸ Dunbar v. Mulry, 8 Gray (Mass.), 163.

¹⁹ Thomas v. Jenkins, 6 Ad. & E. 525, 112 Eng. Reprint, 201. See note to Coate v. Speer, 15 Am. Dec. 628.

mere private boundaries and monuments, the English courts have excluded evidence of reputation, for the reason that such private interests could not be matter of public knowledge or of any public interest or concern.²⁰ In a well-known case²¹ Lord Campbell, C. J., said: "The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters, in which the community are interested, all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that, although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing."

²⁰ *Outram v. Morewood*, 5 Term Rep. 121, 101 Eng. Reprint, 70; *Doe v. Thomas*, 14 East, 323, 104 Eng. Reprint, 625; *Clothier v. Chapman*, 14 East, 323, 104 Eng. Reprint, 629; *Dunraven v. Llewellyn*, 15 Q. B. 791, 117 Eng. Reprint, 657; *Vankoughnet v. Demson*, 1 Ont. R. 349, 11 A. R. 699; *Dougall v. Sandwich* etc. Road

Co., 12 U. C. R. 59. See, also, references in *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584; *Hall v. Mayo*, 97 Mass. 416. See full note to *Coate v. Spear*, 15 Am. Dec. 628.

²¹ *Reg. v. Bedfordshire*, 4 El. & Bl. 535, 119 Eng. Reprint, 196.

§ 304 (308). **Relaxation of the rule in the United States.** In regard to the admissibility of traditionary evidence of boundaries where the rights of individuals alone are involved, the course of decision in this country has been not to follow the English precedents. And declarations of deceased persons have been received to establish boundaries of private tracts of land in cases where they would undoubtedly have been rejected in England. The rule prescribing the conditions of admissibility is not uniformly stated in the different states. And, although the weight of authority appears to be that the declarations of a deceased person, who was in a situation to possess the information, are admissible on questions of boundary if made before the commencement of the suit, some of the courts have set precise limitations to the reception of hearsay evidence in matters of peculiarly individual concern.²² In the courts of some states the exception allowing hearsay in respect to matters of public and general interest has been so extended as to admit hearsay testimony in matters of *private boundary*. Although the American cases can hardly be fully reconciled with the restrictions that form part of the English law on this subject, the departure is quite natural, and is easily traceable to the wholly different methods of making surveys which have prevailed in the two countries. In the United States the surveys are generally under the direction of government officers, and made in such a manner that the boundaries between private estates are so often *coincident with general boundary lines* as to be, to some extent, matters of general interest. Such surveys have often been made many years before the full settlement of the community was effected; and the location of the corners, monuments and boundaries often rests largely in tradition, and is the subject of continued discussion among those having both opportunity and interest to know the facts. In this country the courts have frequently recognized the doctrine that proof of reputation may be received in proof of private boundaries. With

²² Coate v. Speer, note, *supra*.

the exception of a few states which have followed the English line of decisions referred to in the previous section, it may be taken as a general rule that the declaration of a third person, since deceased, on a question of boundary between the estates of private proprietors, is admissible in a controversy between them, provided the declarant was at the time in a situation to be acquainted with the matter and was free from any interest therein. Such evidence is admissible as hearsay from the necessity of the case. In other words, the declarations of deceased persons as to private boundaries, though not made upon the land, are admissible on an issue between parties not privy in estate to them, if the declarants had means of knowledge as to such boundaries and no apparent interest to misrepresent.²³ The evidence, as in all cases of statements of deceased persons, must be scanned with care and received with caution.²⁴ The slight conflict in American decisions is rather with regard to the limitations upon the rule than to the rule itself. In one of the controlling cases²⁵ Mr. Justice McLean says: "That boundaries may be proved by hearsay testimony is a rule well settled, and the neces-

²³ Barrett v. Kelly, 131 Ala. 378, 30 South. 824; Taylor v. Fomby, 116 Ala. 621, 67 Am. St. Rep. 149, 22 South. 910; Lay v. Neville, 25 Cal. 545; Morton v. Folger, 15 Cal. 275; Porter v. Warner, 2 Root (Conn.), 22; Mullaney v. Duffy, 145 Ill. 559, 33 N. E. 750; State v. Vale Mills, 63 N. H. 4; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; McKinnon v. Bliss, 21 N. Y. 206; Jackson v. McCall, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; McKinnon v. Bliss, 21 N. Y. 206; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Tate v. Southard, 1 Hawks (8 N. C.), 45; Smith v. Headrick, 93 N. C. 210; Raymond v. Coffey, 5 Or. 132; Kramer v. Goodlander, 98 Pa. 366;

Whitman v. Haywood, 77 Tex. 557, 14 S. W. 166; Ralston v. Miller, 3 Rand. (Va.) 44, 15 Am. Dec. 704; Martyn v. Curtis, 68 Vt. 397, 35 Atl. 333; Clement v. Packer, 125 U. S. 309, 31 L. Ed. 721, 8 Sup. Ct. Rep. 907; Boardman v. Reed, 6 Pet. (U. S.) 328, 8 L. Ed. 415; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Conn. v. Penn, Fed. Cas. No. 3104, Pet. C. C. 496; Nys v. Biemeret, 44 Wis. 104. See notes to Putnam v. Fisser, 36 Am. Rep. 749; Coate v. Speer, 15 Am. Dec. 628-631; Curtis v. Aaronson, 60 Am. Rep. 589-591; Halvorsen v. Moon etc. Lumber Co., 94 Am. St. Rep. 678-683, and to Twining v. Goodwin, Ann. Cas. 1912A, 847.

²⁴ Welder v. Carroll, 29 Tex. 317.

²⁵ Boardman v. Reed, *supra*.

sity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials. . . . By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries." And in another case²⁶ Mr. Justice Lamar says, "The limitations upon this extension of the original rule are different in different states."²⁷ The undoubted weight of authority, however, is in favor of the admission of the declarations without the limitation of ownership or possession, and that

²⁶ *Clement v. Packer, supra.*

²⁷ Some jurisdictions maintain that in order to make declarations of a person since deceased evidence as to private boundaries between third persons, the declarant must at the time have been the owner or in possession of the land, and that in questions of private boundary, the declaration of a person since deceased of particular facts, as distinguished from reputation, is not admissible against third persons, unless it is shown that the declarant had knowledge of that whereof he spoke, and was then on the land as owner, or in possession of it, and was pointing out and marking the boundary or discharging some duty in relation thereto: *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Bartlett v. Emerson*, 7 Gray (Mass.), 174; *Whitney v. Bacon*, 9 Gray (Mass.), 206, 69 Am. Dec. 281; *Long v. Colton*, 116 Mass. 414; *Lemmon v. Hartsook*, 80 Mo. 13; *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. Ed. 113. Where made by one since deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at

the time of the declarations, they were held inadmissible against a subsequent owner. And in *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886, it was held that declarations as to boundaries by a person since deceased, who was never the owner of the premises, and not made in the performance of any act in respect to such boundaries, are inadmissible in evidence. See the note to this case collecting the cases and containing a discussion on the subject. And also the note to *Halvorsen v. Moon & Kerr Lumber Co.*, 94 Am. St. Rep. 672, from which this is an excerpt. Among other cases incidentally supporting the exception are: *Southern Iron Wks. v. Georgia Cent. R. Co.*, 131 Ala. 649, 31 South. 723; *Cherry v. Boyd*, Litt. Sel. Cas. (Ky.) 7; *Read v. Gilliam*, 140 Ky. 824, 131 S. W. 1034; *Sullivan Granite Co. v. Gordon*, 57 Me. 520; *Emmett v. Perry*, 100 Me. 139, 60 Atl. 872; *Hall v. Mayo*, 97 Mass. 416; *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; *Perkins v. Brinkley*, 133 N. C. 348, 45 S. E. 652; *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61.

such declarations of persons who were so situated as to have the means of knowledge and had no interest to misrepresent are competent evidence upon a question of boundary, public or private.²⁸ It was formerly a question whether a disputed boundary was of such public character as to permit evidence of reputation concerning it. In the case of *lines of counties, towns, townships, highways, large watercourses and the like*, the testimony would be admissible as relating to a matter of general interest. In such cases the English and the American rules coincided. Then again there may be lines and monuments of a less marked public character and yet, by reason of their relation to numerous minor titles and land divisions, a local public interest may arise and a consequent knowledge in the neighborhood concerning them may be readily supposed to exist. In such cases proof of reputation might be received under the authorities of this country.²⁹ The weight of general reputation in such cases would depend very much on the circumstances of the case; the boundary must be *ancient* and its supposed locality must be of sufficient interest in the neighborhood to have been the subject of conversation among the people. Such were the *quasi*-public boundaries, and from these sources has sprung the relaxation or rather the extension of the rule which now admits, in cases of private boundaries, the declarations of deceased persons as to the reputation or tradition of such boundary lines, subject to the conditions set out in the next section.

²⁸ *Cornwall v. Culver*, 16 Cal. 423; *Noble v. Chrisman*, 88 Ill. 186; *Cadwalader v. Price*, 111 Md. 310, 134 Am. St. Rep. 603, 19 Ann. Cas. 547, 73 Atl. 273; *Keefe v. Sullivan County B. R.*, 75 N. H. 116, 71 Atl. 379; *Adams v. Stanyan*, 24 N. H. 405; *Caldwell Land etc. Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823; *Westfeldt v. Adams*, 135 N. C. 591, 47 S. E. 816; *Collins v. Clough*, 222 Pa. 472, 15 Ann. Cas. 871, 71 Atl. 1077; *Moul*

v. Hartman, 104 Pa. 43; *Lynn v. Thomson*, 17 S. C. 129; *McCloud v. Mynatt*, 2 Cold. (Tenn.) 163; *Keystone Mills Co. v. Lumber Co.* (Tex. Civ. App.), 96 S. W. 64; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279; *Hill v. Proctor*, 10 W. Va. 59.

²⁹ *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, and long note, 7 Atl. 886; *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. 750.

§ 304a (308). **Same—Prerequisites to the admission of evidence of reputation in cases of private boundaries.**—One of the chief prerequisites to the admission of such declarations is the absence of a reasonable probability that evidence can be obtained from those who had actual knowledge on the subject. That being established, declarations of persons since deceased, who had actual knowledge as to the location of an ancient boundary between individual proprietors, or who had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the line, and when pointing it out, may be received as to the location of such line. To render admissible the declarations of persons as evidence, other than the owner who was in possession at the time of making the declarations, for the purpose of showing ancient boundary lines between third persons, it must be shown that the declarant is dead, and that he had an opportunity to know and *prima facie* had the knowledge whereof he spoke and had been on the land at the time of making the declarations, or was in possession of it when he made them.³⁰ In order to lay the foundation for the introduction of the declaration of a person since deceased, as to a boundary in an action between third persons, it must be shown that the declarant is dead, and that he had actual knowledge of the fact declared, or that he had means from which such knowledge could be inferred. Mere absence of the declarant is not a sufficient foundation.³¹ In order that declarations made by a person since deceased concerning a private

³⁰ Barrett v. Kelly, 131 Ala. 378, 30 South. 824; Payne v. Crawford, 102 Ala. 387, 14 South. 854; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; Reh fuss v. Hill, 243 Ill. 140, 90 N. E. 187; Noble v. Chrisman, 88 Ill. 186; Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. Law Rep. 52; Royal v. Chandler, 83 Me. 150, 21 Atl. 842; Morse v. Emery, 49 N.

H. 239, note; Partridge v. Russell, 50 Hun, 601, 2 N. Y. Supp. 529; Caldwell Land etc. Co. v. Triplett, 151 N. C. 409, 66 S. E. 343; Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716.

³¹ Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Miller v. Wood, 44 Vt. 378.

boundary may be admissible between third persons, such declarations must have been made *ante litem motam*, and by a person who has since died.³² But the declarations of a disinterested person since deceased, made before a controversy has arisen in reference to private boundaries, are admissible in evidence against third parties.³³ Evidence of declarations of an old inhabitant since deceased, in respect to the location of boundary lines, made *ante litem motam*, cannot be impugned by evidence of later inconsistent declarations made by him after the controversy between the parties to the suit had arisen, although before any suit was brought, and without knowledge of any dispute regarding such boundary line.³⁴ Another condition upon which the declarations of deceased persons in relation to the location of boundary lines and monuments are received in evidence is, that it shall be shown that they had knowledge of such lines and monuments at the time of making the declarations to be proved.³⁵ It is also prerequisite to the admission of such declarations as evidence against a third person that the declarant should

³² Barrett v. Kelly, 131 Ala. 378, 30 South. 824; Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; McCall v. United States, 1 Dak. 320 (307), 46 N. W. 608; Stockton v. Williams, Walk. Ch. (Mich.) 120; Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543; Partidge v. Russell, 50 Hun, 601, 2 N. Y. Supp. 529; Yow v. Hamilton, 136 N. C. 327, 48 S. E. 782; Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Dancy v. Sugg, 2 Dev. & B. L. (19 N. C.) 515; Lewis v. John L. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; In re Old Eagle School Property, 36 Wkly. Notes Cas. (Pa.) 348; Coate v. Speer, 3 McCord (S. C.), 227, 15 Am. Dec. 627; McCloud v. Mynatt, 2 Cold. (Tenn.) 163; Stroud v. Springfield, 28 Tex. 649;

Robinson v. Dewhurst, 68 Fed. 336, 15 C. C. A. 466; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113.

³³ Whitehurst v. Pettipher, 87 N. C. 179, 42 Am. Rep. 520; Moul v. Hartman, 104 Pa. 43; McCloud v. Mynatt, 2 Cold. (Tenn.) 163.

³⁴ Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884.

³⁵ Such knowledge cannot be shown by what they said; it must be proved by other means: Hadley v. Howe, 46 Vt. 142. But in Smith v. Headrick, 93 N. C. 210, it was held that it is not necessary to show the knowledge or means of information of such deceased declarant to make the declaration admissible, and that if such knowledge or means of information are not shown, it goes to the weight, and not to the admissibility, of such evidence.

have had no interest to misrepresent at the time the declarations were made, because if the circumstances and his situation at the time show that he had an interest to make a false representation as to a corner or a boundary line, such declarations are inadmissible.³⁶ The declarations of deceased owners of land are admissible as to the boundaries of their land as against third persons, when it appears from their situation that they had the means of knowledge and no interest to misrepresent, especially when the declarations are in disparagement of the title.³⁷

§ 305 (309). Declarations as to particular facts concerning private boundaries not admissible.—There has been considerable conflict of opinion over the question whether proof may be given of the declarations of persons since deceased, not relating to reputation or tradition respecting a boundary line, but to *particular facts*. In discussing this subject Mr. Justice Strong said: “We do not question that such declarations of reputation respecting ancient public boundaries are admissible; and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a *limited class of cases*, a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof

³⁶ *Cornwall v. Culver*, 16 Cal. 423; *Morton v. Folger*, 15 Cal. 275; *Porter v. Warner*, 2 Root (Conn.), 22; *Adams v. Stanyan*, 24 N. H. 405; *Melvin v. Marshall*, 22 N. H. 379; *Smith v. Powers*, 15 N. H. 546; *Shepherd v. Thompson*, 4 N. H. 213; *Bethea v. Byrd*, 95 N. C. 309, 59 Am. Rep. 240; *Caldwell v. Neely*, 81 N. C. 114; *Coate v. Speer*, 3 McCord (S. C.), 227, 15 Am. Dec. 627; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Stroud v. Springfield*, 28 Tex. 649; *Harriman v. Brown*, 8 Leigh (Va.), 697; *Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502.

³⁷ *Noble v. Chrisman*, 88 Ill. 186;

Royal v. Chandler, 83 Me. 150, 21 Atl. 842; *Simpson v. Blaisdell*, 85 Me. 199, 35 Am. St. Rep. 348, 27 Atl. 101; *Mason v. McCormick*, 85 N. C. 226; *Smith v. Forrest*, 49 N. H. 230; *Beard v. Talbot, Cooke* (3 Tenn.), 142, Fed. Cas. No. 1182; *Hurt v. Evans*, 49 Tex. 311; *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500; *Hill v. Proctor*, 10 W. Va. 59. From the excellent note to *Halvorsen v. Moon & Kerr Lumber Co.*, 94 Am. St. Rep. 672, on “Declarations of Persons Since Deceased, When Admissible Against Third Persons.”

of reputation is open to rebuttal by witnesses. Not so with declarations of a particular fact respecting a private boundary. They are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the *res gestae*. . . . In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons are not admissible, unless they were made by *persons who*, it is shown, *had knowledge* of that whereof they spoke, and who were on the land or in possession of it when the declarations were made. To be evidence they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a *mere recital* of something past is not an exception to the rule that excludes hearsay evidence."³⁸ This clearly states the rule which obtains in the courts of some of the states, and which is in accordance with the general rule, that hearsay evidence is not admissible except as stated to prove a specific fact.³⁹ Nevertheless some confusion has perhaps arisen in marking the distinction, which the facts in the case referred to may help to clear. In an action of ejectment wherein it was material to locate the land called "Basques four leagues," it transpired that a witness and one Moore, since deceased, were surveying in a reserve, lots other than and distinct from the "Basques four leagues." During the time that Moore and the witness were thus engaged surveying in the reserve, and perhaps before that time, as he testified, he was allowed to state that Moore informed him he had made the survey of the "Basques four leagues" tract; that the upper line of said grant began on the east bank of the Brazos river, at the point where the upper line of the reserve began; and that the upper line of the Basques ran north 71 east

³⁸ Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113.

³⁹ Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475; Bartlett v. Emerson, 7 Gray (Mass.), 174; Long v. Colton, 116 Mass. 414; Bender v.

Pitzer, 27 Pa. 333; Southern Iron Wks. v. Central of Georgia Ry. Co., 131 Ala. 649, 31 South. 723; Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584, and long note, 7 Atl. 886.

with the reserve line the full distance of the Basques line, and that the upper line of the Basques and the upper line of the reserve were the same to the extent of the Basques line. It was this testimony, and other of a similar nature, to which the defendants objected, and to the admission of which they excepted. The reported case goes on to say that the witness himself, as he expressly stated, had no knowledge of the location or lines of the Basques survey, except what Moore told him. The declarations of Moore were made when he was at a distance from the place of beginning of the Basques survey and from its upper line, and they were not made when he was pointing out the boundaries of that survey. That Moore had made the survey, or that he had ever been upon its upper line, or on the upper line of the reserve, was proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde*. Moore's declarations had no reference to reputation in the neighborhood. "They are not to be confounded with proof of reputation—proof of what the community thought, believed or said. As repeated by the witness, it was mere hearsay, the unsworn declarations of a deceased person respecting a particular fact not of a public nature." And Mr. Justice Strong then stated the law as above set out. But there are numerous authorities which give a much *wider range* to this class of testimony and which admit the declarations of third persons, strangers to the title, made when not engaged in any act like a survey or the pointing out of boundaries.⁴⁰ The cases holding this view are confessedly a *departure from the common-law rule*, but they claim that

⁴⁰ Clement v. Packer, 125 U. S. 309, 31 L. Ed. 721, 8 Sup. Ct. Rep. 907; Kinney v. Farnsworth, 17 Conn. 355; Lemmon v. Hartsook, 80 Mo. 13; Smith v. Forrest, 49 N. H. 230; Whitehurst v. Pettipher, 87 N. C. 179, 42 Am. Rep. 520; Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; McCausland v. Fleming, 63 Pa. 36;

Coate v. Speer, 3 McCord (S. C.), 227, 15 Am. Dec. 627, and note; Powers v. Silsby, 41 Vt. 288; Child v. Kingsbury, 46 Vt. 47. A stricter rule prevails in Massachusetts, where declarations as to a private boundary in which only a few persons have interest are not received: Boston Water Power Co. v. Hanlon, 132 Mass. 483; Hall v. Mayo, 97 Mass. 416.

the departure is a necessity growing out of the difficulty, which often arises, of obtaining other and positive proof of the location of boundary marks, and that the declaration will be heard only when the testimony proceeding from the mouth of a living witness would be competent. The declaration is received under the conditions mentioned as evidence, instead of the sworn statement for which it is substituted, when the party making it is dead and the evidence would otherwise be lost. It is manifest that if the declarant were alive, and would be allowed to prove that fact to which the declaration relates, the declaration itself may be proved after his death.⁴¹ This liberal rule finds confirmation in other states. On questions of private boundaries, declarations of persons since deceased who were in a position to possess information on the subject and who were not interested are admissible in evidence, even when the declarations were not part of the original *res gestae*. Evidence of this character, except when it was part of the original *res gestae*, was not admissible at common law, for the purpose of establishing the boundaries of private estates. Its admission was restricted to cases involving questions of a general or public nature. The tendency of American decisions has been to break in upon this rule of the common law, as above mentioned, and to admit such evidence on questions of private as well as public boundaries. This tendency is attributable to the destruction of landmarks in this country, in consequence of the perishable nature of their materials and of the settlement and improvement of the lands, by reason of which it is indispensable in many cases that hearsay or reputation should be received to establish old boundaries.⁴² The declaration of a person since deceased is admissible to establish a corner tree, which was not in view at the time of the declaration, but the position of which was so described by the declarant as to enable the witness, to whom he made

⁴¹ *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520.

⁴² *Stroud v. Springfield*, 28 Tex. 649.

the declaration, to find it.⁴³ And it is competent to prove the statements of persons since deceased as to where corner or line trees, which are gone, originally stood.⁴⁴ The declarations of a person, since deceased, touching the locality of a boundary line between adjoining owners are admissible when such declarant was an adjoining owner, who pointed out the line at the time.⁴⁵ These cases generally recognize the limitation that the declarations must have been made *before the controversy* began and by persons since deceased who, from their situation, appear to have had the means of knowledge respecting the private boundaries and who had no interest to misrepresent,⁴⁶ although it has been held that the declarant need not be

⁴³ *Scoggin v. Dalrymple*, 7 Jones (52 N. C.) 46.

⁴⁴ *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188, 16 Ky. Law Rep. 52.

⁴⁵ *Bender v. Pitzer*, 27 Pa. 333. An exception to the general rule exists in some jurisdictions, which maintain the doctrine that in order to make declarations of a person since deceased evidence as to private boundaries between third persons, the declarant must at the time have been the owner or in possession of the land. Hence these cases assert that in questions of private boundary, the declaration of a person since deceased of particular facts, as distinguished from reputation, is not admissible as against third persons, unless it is shown that the declarant had knowledge of that whereof he spoke, and was then on the land as owner, or in possession of it, and was pointing out and marking the boundary or discharging some duty in relation thereto: *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Bartlett v. Emerson*, 7 Gray (Mass.), 174; *Lemmon v. Hartsook*, 80 Mo. 13; *Whitney v. Bacon*, 9 Gray

(Mass.), 206, 69 Am. Dec. 281; *Long v. Colton*, 116 Mass. 414. Where made by one since deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at the time of the declarations, they were held inadmissible against a subsequent owner. And in *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886, it was held that declarations to boundaries by a person since deceased, who was never the owner of the premises, and not made in the performance of any act in respect to such boundaries, are inadmissible in evidence. See the note to this case collecting the cases and containing a discussion on the subject.

⁴⁶ *Great Falls Co. v. Worster*, 15 N. H. 412; *Smith v. Forrest*, 49 N. H. 230; *McCausland v. Fleming*, 63 Pa. 36; *Coate v. Speer*, 3 McCord (S. C.), 227, 15 Am. Dec. 627; *Wood v. Wilard*, 37 Vt. 377, 86 Am. Dec. 716; *Child v. Kingsbury*, 46 Vt. 47; *Hariman v. Brown*, 8 Leigh (Va.), 697; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Hill v. Proctor*, 10 W. Va. 79.

wholly disinterested.⁴⁷ It need hardly be said that reputation is not admissible to prove *acts of ownership* or *possession*, as such facts cannot be proved by reputation;⁴⁸ nor can evidence of this character be admitted to *contradict record evidence*,⁴⁹ nor is present reputation as to boundary lines admissible, unless it is *traditional*, or derived from ancient sources or from those who had peculiar means of knowing what the reputation was in an early day as to the boundary line.⁵⁰

§ 306 (310). Declarations of surveyors and chainmen.—

On the more liberal view which prevails in some states that the declarations of deceased persons having the means of knowledge may be received as evidence of private boundaries, the declarations of surveyors have been admitted in numerous cases.⁵¹ The acts and declarations of a surveyor since deceased, while surveying an adjoining lot are admissible on the question of a boundary, if he was not interested as owner in either lot at the time he made such declarations.⁵² If the location of a tract of land is in dispute, declarations of a surveyor since deceased, made by him while on the ground and at the time of examining the lines of the tract, are admissible in evidence. The

⁴⁷ Child v. Kingsbury, 46 Vt. 47; Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835. See, also, note to § 304, ante.

⁴⁸ Wendell v. Abbott, 45 N. H. 349; Hiers v. Risher, 54 S. C. 405, 32 S. E. 509.

⁴⁹ McCoy v. Galloway, 3 Ohio, 282, 17 Am. Dec. 591.

⁵⁰ Shutte v. Thompson, 15 Wall. (U. S.) 151, 21 L. Ed. 123.

⁵¹ Cauffman v. Presbyterian Congregation, 6 Binn. (Pa.) 59; Hamilton v. Menor, 2 Serg. & R. (Pa.) 70; Coate v. Speer, 3 McCord (S. C.), 227, 15 Am. Dec. 627; Ayers v. Watson, 137 U. S. 584, 34 L. Ed. 803, 11 Sup. Ct. Rep. 201 (memorandum made by surveyor); Birmingham, Borough of,

v. Anderson, 40 Pa. 506; Montgomery v. Lipscomb, 105 Tenn. 144, 58 S. W. 306; Simpson v. De Ramirez, 50 Tex. Civ. App. 25, 110 S. W. 149; Powers v. Silsby, 41 Vt. 288; Clements v. Kyles, 13 Gratt. (Va.) 468; Tracy v. Eggleston, 108 Fed. 324, 47 C. C. A. 357. And the declarations of a surveyor, since deceased, taken in one action are admissible in another action between different parties as hearsay evidence from the necessity of the case; Morton v. Folger, 15 Cal. 275. See note to Halverson v. Moon etc. Co., 94 Am. St. Rep. 682, and to Collins v. Clough, 15 Ann. Cas. 874.

⁵² Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569.

more careful and thorough such surveyor's examination was, the greater the weight which should be attached to such declarations.⁵³ The declarations of the chain-carrier as well as the surveyor, when both of them were engaged on the original survey, are admissible against third persons to establish a boundary by identifying a particular corner, tree, or boundary, provided such chainman is free from interest in the property and has died since making such declarations.⁵⁴ Upon a question of boundary, an inquiry as to the statements of a surveyor, since deceased, in regard to the location of a corner or line, must be made in such shape as to elicit from the witness whether he ever heard the surveyor say at what point he fixed such corner or line, and not where it had been fixed at the instance of an interested person, nor where it should be fixed according to the witness' interpretation of the deed.⁵⁵ In another case a memorandum, being properly identified as being made by the surveyor, who died before the trial, was received in evidence. The court observed: "It is a well-recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank

⁵³ *Kramer v. Goodlander*, 98 Pa. 366; *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500.

⁵⁴ *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500; *Hill v. Proctor*, 10 W. Va. 59. In *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475, the declarations of a chain-carrier, since deceased, as to the location of a boundary were rejected, but the decision was upon the rule that hearsay evidence was not admissible to establish a merely private right. And *Thacker v. Wilson* (Tex. Civ. App.), 122 S. W. 938, also follows *Russell v. Hunnicutt*, *supra*. In *Overton v. Davisson*, 1 Gratt. (Va.) 211, 42 Am. Dec. 544, it is laid down that in a

controversy concerning the boundary or locality of a tract of land granted by the commonwealth, pursuant to a survey, the calls and description of a survey made by the same surveyor, about the same time, or recently thereafter, of a coterminous or neighboring tract, upon which last-mentioned survey a grant has also issued from the commonwealth, whether to a party to the controversy, or a stranger, is proper evidence upon such question of boundary or locality, unless plainly irrelevant. And in *Hill v. Proctor*, 10 W. Va. 59, the court adopted *Hariman v. Brown*, 8 Leigh (Va.), 697, to the same effect.

⁵⁵ *Evans v. Green*, 21 Mo. 170.

no higher, and cannot be so safe or satisfactory, as evidence written down by the surveyor at the time.”⁵⁶ Of course the declarations of surveyors and others acting under competent authority while actually making a survey or pointing out boundaries might be material on other grounds, as that they were a part of the *res gestae*.⁵⁷ But where a private surveyor is employed by the plaintiff to ascertain boundaries, and during the survey he makes declarations as to the identity of the original lines and corners, he not having been present at the original survey, such declarations are inadmissible, being pure hearsay.⁵⁸ In order that the declarations of a surveyor since deceased may be admissible against third persons, it is necessary that he should have been present and have taken part in the survey when it was made, and the opinion of a surveyor, since deceased, formed from an inspection of marks upon trees as to the boundary of land, cannot be given in evidence.⁵⁹

§ 307 (311). Maps relating to subjects of public or general interest.—In proving matters of public and general interest the declarations will not be confined to those which are merely oral. Thus, in England ancient maps showing public roads and the boundaries between counties, towns, parishes and manors are admissible, when it is

⁵⁶ *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768.

⁵⁷ *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113. See, also, *Clement v. Packer*, 125 U. S. 309.

⁵⁸ *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500. In this case the court said: “If it had been shown that he made the original survey, or was present when it was made, or that he was in a position as to know the truth of his declarations, they would have been admissible, he having died before the trial.” *Simpson v. De Ramirez*, *supra*, follows this *dictum*.

⁵⁹ *Wallace v. Goodall*, 18 N. H. 439. On the question as to the location of

the lines and corners of a survey, declarations of a surveyor, since deceased, who was not present at or connected with the original survey are inadmissible, although he took part in the subdivision of the survey: *Angle v. Young* (Tex. Civ. App.), 25 S. W. 798. And the declarations of a surveyor, since deceased, relative to the location of the lines or corners of a tract of land, are not admissible in evidence, when not made when he was putting out or marking the boundaries, or discharging some duty in relation thereto: *Clay County Land etc. Co. v. Montague County*, 8 Tex. Civ. App. 575, 28 S. W. 704.

proved that they have been made or recognized by persons having knowledge of the subject who are since deceased.⁶⁰ In his work on Evidence Stephen thus expresses his view as to the relevancy of maps in general: "Statements of facts in issue, or relevant or deemed to be relevant to the issue, made in public maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts; but such statements are irrelevant, if they relate to matters of private concern, or matters not likely to be accurately stated in such documents."⁶¹ In a celebrated English case maps of a distant country were received in evidence to show the situation of places at which the defendant said he had lived.⁶² Under the rule excluding declarations as to *private boundaries* ancient maps are not admissible in England to prove boundaries of that character.⁶³ As we have seen in this country the declarations of persons, since deceased, as to private boundaries have been received in some states more freely than in England;⁶⁴ and in such jurisdictions ancient maps are more liberally admitted on the same ground to prove, not only matters of public or general interest, but *private boundaries* as well.⁶⁵ In other states, however, they are not admitted to prove private boundaries. In Massachusetts there are consistent rulings against their admission. In one of the late cases,⁶⁶ the law

⁶⁰ *Hammond v. Bradstreet*, 10 Ex. 390, 23 L. J. (Ex.) 332, 2 C. L. R. 1195; *Pipe v. Fulcher*, 28 L. J. Q. B. 12, El. & El. 111, 120 Eng. Reprint, 850; *Reg. v. Milton*, 1 Car. & K. 58.

⁶¹ *Reynolds' Steph. Ev.*, art. 35.

⁶² *Tichbourne Case*, *Reg. v. Orton*. For this case, in its various stages, see *Reg. v. Castro*, alias *Orton*, L. R. 9 Q. B. 350, 12 Cox C. C. 454; 5 Q. B. D. 490, 14 Cox C. C. 436; 6 App. Cas. 229, 14 Cox C. C. 546.

⁶³ *Doe v. Lakin*, 7 Car. & P. 481; *Bridgman v. Jennings*, 1 Ld. Raym.

734, 91 Eng. Reprint, 1390; *Wilberforce v. Hearfield*, L. R. 5 Ch. Div. 709.

⁶⁴ See § 304, *ante*.

⁶⁵ *Penny Pot Landing v. Philadelphia*, 4 Harr. (16 Pa.) 79; *Sample v. Robb*, 4 Harr. (16 Pa.) 305; *McCausland v. Fleming*, 63 Pa. 36; *Coate v. Spear*, 3 McCord (S. C.), 227, 15 Am. Dec. 627, and long note; *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

⁶⁶ *Boston Water Power Co. v. Hanlon*, 132 Mass. 483. See, also, *Drury*

of that state is thus stated as to the written statements upon which such maps are usually founded. "The evidence of such ancient documents is admitted upon the ground that, although between strangers, they are of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to co-existing subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated. But plottings for plans and field-notes are memoranda only, which may never have been acted on. They are preparations for a transaction which may never have taken place. The fact that they are so full that plans could be made from them is not important; they still lack the element which makes plans admissible. Nor are they admissible as the declarations of a person deceased. The rule which permits the introduction of reputation or tradition, or declarations of persons deceased as to matters of public or general interest, does not extend to questions of private boundary."⁶⁷ *Ancient maps of villages or cities* which have been kept in public offices and regarded as public records are admissible as evidence of the mode of laying out the village or city,⁶⁸ and as evidence

v. Midland R. Co., 127 Mass. 571; Hall v. Mayo, 97 Mass. 416.

⁶⁷ This applies only to private boundaries. When the boundary is of public or general interest, Massachusetts is in line with other states. In 1879, in *Drury v. Midland R. Co.*, *supra*, the petitioner was properly allowed to put in evidence plans made in 1805 and 1816. In that case, the court said: "The evidence was at least competent as tending to show the position of the creek before referred to; the channel of which, it is inferred, had been filled up by the recent occupation and improvement of the flats. This creek, from which the tide did not wholly ebb, was a natural boundary, like an arm of the sea, which, while it existed, was notorious

and public in its nature. It governed the claims of all adjacent proprietors of flats, and in that respect was a common boundary to many interested persons. *Attorney General v. Boston Wharf Co.*, 12 Gray (Mass.), 553. In one view taken at the trial, the thread of this creek was the dividing line between the two counties. Its location may be proven by reputation and tradition, recitals in ancient deeds, and the evidence afforded by ancient maps and plans. 1 Greenl. Ev., §§ 139, 145; *Morris v. Callanan*, 105 Mass. 129; *Sparhawk v. Bullard*, 1 Met. (Mass.) 95."

⁶⁸ *St. Louis Public Schools v. Erskine*, 31 Mo. 110; *Whitehouse v. Bickford*, 29 N. H. 471; *Blackman v. Riley*, 138 N. Y. 318, 34 N. E. 214.

of title, although not as a muniment of title conclusive in itself.⁶⁹ Maps made by early *explorers*, as, for instance, of the courses of a river, are admissible in evidence, but may be shown to be incorrect and, when evidence impeaching them is offered, are not to be greatly relied upon.⁷⁰ Until maps are shown to be *ancient* within the meaning of the rule, they are not admissible, unless proved to be correct, even though they were made by officials or other persons having the means of knowledge. But of course they may be relevant as *admissions* against those who may have acted upon or adopted them.⁷¹ Once, however, they are shown to be ancient, they come within the rules as to ancient documents referred to in the next section. In a recent New York case⁷² we find the following reference: "Under the circumstances such charts, unless shown to be at fault, are better evidence than human recollection about such small questions as the depths of water at precise points and the relative locations upon a north and south line of the shoals of a channel, where navigable water was the test of how the channel should be used, and would necessarily be the central feature of the witness' recollection. Human memory as to definite monuments is excellent testimony

⁶⁹ *Schools v. Risley*, 10 Wall. (U. S.) 91, 19 L. Ed. 850; *Carrolton R. Co. v. Municipality No. 2*, 19 La. 62; *Drury v. Midland R. Co.*, 127 Mass. 571; *Adams v. Stanyan*, 24 N. H. 405; *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 633; *Mineral R. & Min. Co. v. Auten*, 188 Pa. 568, 41 Atl 327.

⁷⁰ *Missouri v. Kentucky*, 11 Wall. (U. S.) 395, 20 L. Ed. 116. Mr. Justice Davis, in that case, said: "But it is said the maps of the early explorers of the river and the reports of travelers prove the channel ways to have been east of the island. The answer of this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude

all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle to dispossess a party of property on the mere statements—not sworn to—of travelers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?"

⁷¹ *Harris v. Commonwealth*, 20 Gratt. (Va.) 83; *Marble v. McMinn*, 57 Barb. (N. Y.) 610.

⁷² *Van Deventer v. Lott*, 172 Fed. 574.

of the existence and general location of these monuments, but a reliable chart or map must be depended on as to small distances and details, even as against human recollection, when that recollection or memory has not been fixed by something connected with those same details." And there is ample authority that an ancient map or plan may be received in evidence to prove public boundaries if it appears that it was an authorized survey. If it purports to be an authorized survey, or if it be proved *aliunde* to be official, and is produced from an appropriate place, there may be little doubt of its admissibility. But some evidence derived either from an inspection of the document itself or from the place of its deposit, or from some other source, must be adduced in support of its authenticity before it can be regarded as competent evidence of anything except its own existence and antiquity. The primary question is, What does the document profess to be, or what is it shown to be? The answer to this question is the basis of the further inquiry—Was it found in such a place as such a document might reasonably be expected to be deposited in? And on the determination of this question the admissibility of the evidence depends. The decisions include plans and field-notes.⁷³ Such maps prove themselves the same as ancient documents.⁷⁴

§ 308 (312). Ancient documents in support of ancient possession—Effect of recitals—Custody.—One of the recog-

⁷³ *Nichols v. Turney*, 15 Conn. 101; *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543; *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848; *Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166; *Böwer v. Cohen*, 126 Ga. 35, 54 S. E. 918; *Davis v. Clinton*, 25 Ky. Law Rep. 2021, 79 S. W. 259; *Cravath v. Baylis*, 113 App. Div. 666, 99 N. Y. Supp. 973; *Carrollton R. Co. v. Municipality No. 2*, 19 La. 62; *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333; *Lexington v. Hoskins*, 96

Miss. 163, 50 South. 561; *Jackson v. Witter*, 2 Johns. (N. Y.) 180; *Dugger v. McKesson*, 100 N. C. 1, 5 S. E. 746; *Mineral R. etc. Co. v. Auten*, 188 Pa. 568, 41 Atl. 327; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376; *Dickinson v. Smith*, 134 Wis. 6, 114 N. W. 133; *Burns v. United States*, 160 Fed. 631, 87 C. C. A. 533.

⁷⁴ See next section; also *In re Webster*, 106 App. Div. 360, 94 N. Y. Supp. 1050, and *Burns v. United States*, 160 Fed. 631, 87 C. C. A. 533.

nized exceptions to the general rule excluding hearsay relates to the admission of ancient documents.⁷⁵ While it may be objected that documents of this class may be fabricated and that they are not corroborated or authenticated as any part of the *res gestae*, yet it may be answered that the fabrication or forgery of documents purporting to be ancient is not likely to escape exposure, when subjected to the tests of public trials, and is not to be presumed. "The rule is that an ancient deed may be admitted in evidence without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity freeing it from all just grounds of suspicion."⁷⁶ Thus where a

⁷⁵ Hewlett v. Cock, 7 Wend. (N. Y.) 371; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Harlan v. Howard, 79 Ky. 373; Quinn v. Eagleston, 108 Ill. 248; Beard v. Ryan, 78 Ala. 37; Wilson v. Braden, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409; 1 Greenl. Ev., § 141. See 1 Ency. on Ev., 857 et seq. See § 531, *post*. See note to Davidson v. Morrison, 9 Am. St. Rep. 302, on ancient deeds, when admissible.

⁷⁶ Lollar v. Sloss-Sheffield Steel etc. Co., 170 Ala. 239, 54 South. 272; Alexander v. Wheeler, 78 Ala. 167; Arbuckle v. Matthews, 73 Ark. 27, 83 S. W. 326; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Foote v. Brown, 81 Conn. 218, 70 Atl. 699; Doe v. Deputy, 3 Houst. (Del.) 574; Leverett v. Tift, 6 Ga. App. 90, 64 S. E. 317; Follendore v. Follendore, 110 Ga. 359, 35 S. E. 676; Stalford v. Goldring, 197 Ill. 156, 64 N. E. 395; Henthorn v. Doe, 1 Blackf. (Ind.) 157; Salter v. Corbett, 80 Kan. 327, 102 Pac. 452; Harlan v. Howard, 79 Ky. 373; Greenfield v. Camden, 74 Me. 56; Lawry v. Williams, 13 Me. 281; Owings v. Norwood, 2 Har. & J. (Md.) 96; Pet-

tingell v. Boynton, 139 Mass. 244, 29 N. E. 655; Township of Jasper v. Martin, 161 Mich. 336, 137 Am. St. Rep. 508, 126 N. W. 437; Anderson v. Cole, 234 Mo. 1, 136 S. W. 395; Kansas City v. Scarritt, 169 Mo. 471, 69 S. W. 283; Havens v. Seashore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Coleman v. Brueh, 132 App. Div. 716, 117 N. Y. Supp. 582; Clark v. Owens, 18 N. Y. 434; McReynolds v. Longenberger, 57 Pa. 13; Almy v. Church, 18 R. I. 182, 26 Atl. 58; Thompson v. Brannon, 14 S. C. 542; Cox v. Bowman, 2 Yerg. (Tenn.) 108; Robertson v. Brothers (Tex. Civ. App.), 139 S. W. 657; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143; Hdy v. McFaddin, 140 Fed. 433, 72 C. C. A. 655; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. Rep. 780, 29 L. Ed. 915; Applegate v. Lexington etc. Min. Co., 117 U. S. 255, 262, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742; Bouvier-Iaeger etc. Co. v. Sypher, 186 Fed. 644; Lefebure v. Worden, 2 Ves. Sr. 54, 28 Eng. Reprint, 86; Chamberlain v. Torrance, 14 Grant Ch. (U. C.) 181; Cairns v. Horsman, 35 New Brunsw. 436.

deed was offered in evidence more than thirty years old, but was not proved by the subscribing witnesses, nor their absence accounted for, and its admission was alleged as error, the supreme court of the United States said "that as the deed was more than thirty years old and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in a prior chancery suit, it was, in the language of the books, sufficiently accounted for; and on this ground, as well as because it was a part of the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution."⁷⁷ So in a Virginia case,⁷⁸ it was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed, without proof of its execution, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. But the court held, in substance, that an ancient deed may be introduced in evidence without proof of its execution, although possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. "The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it."⁷⁹ As to possession, the cases are entirely harmonious to this extent: that where possession of the land has accompanied the deed, the fact furnishes sufficient evidence of its authenticity to justify its admission, but where possession has not accompanied the deed, the cases are

⁷⁷ *Barr v. Gratz*, 4 Wheat. (17 U. S.) 213, 4 L. Ed. 553.

⁷⁸ *Caruthers v. Eldridge*, 12 Gratt. (Va.) 670.

⁷⁹ *Harlan v. Howard*, 79 Ky. 373.

See, also, *Winn v. Patterson*, 9 Pet. (34 U. S.) 663, 9 L. Ed. 266; *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371.

not entirely agreed as to what proof, other than proof of possession, will be sufficient to justify its admission.⁸⁰ Again, the inherent *difficulty* of furnishing strict *proof* of the execution of ancient documents is another consideration which has influenced the courts to relax the general rule and to admit, under proper restrictions, ancient documents pur-

⁸⁰ *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497, which contains a valuable discussion of the subject. See, also, *Carter v. Doe*, 21 Ala. 72; *Goza v. Browning*, 96 Ga. 421, 23 S. E. 842; *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014; *Winston v. Gwathmey*, 8 B. Mon. (Ky.) 19; *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Carroll v. Norwood*, 1 Har. & J. (Md.) 167; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Ryder v. Fash*, 50 Mo. 476; *Clark v. Wood*, 34 N. H. 447; *Enders v. Sternberg*, 2 Abb. Dec. (N. Y.) 31, 1 Keyes, 264, 33 How. Pr. 464; *Davis v. Higgins*, 91 N. C. 382; *Healy v. Moul*, 5 Serg. & R. (Pa.) 181; *Frost v. Frost*, 21 S. C. 501; *Holmes v. Coryell*, 58 Tex. 680; *Giddings v. Smith*, 15 Vt. 344; *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463; *Stokes v. Dawes*, 23 Fed. Cas. No. 13,477, 4 Mason, 268. Greenleaf says that where possession has not accompanied the deed to justify its admission, there must be other equivalent or explanatory proof: 1 Greenl. Ev., § 144. The rule, as thus stated, seems to have met the approval of Chief Justice Green, for, in *Osborne v. Tunis*, 1 Dutch. (25 N. J. L.) 633, 663, he, in effect, said the presumption that an ancient deed is genuine only arises in case the deed comes from the proper depository and is accompanied and followed by possession, or in case there is other collateral proof to warrant the belief

that the deed is genuine: Chief Justice Bronson, in *Willson v. Betts*, 4 Denio (N. Y.), 201, 213, 215, said that other facts, besides possession, might be sufficient to raise the presumption that an ancient deed was genuine, but he thought that nothing would justify such presumption but acts done under the deed or the recognition of its validity by those having an interest in the other direction. What is called explanatory or collateral proof in some of the cases was defined in *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283, 285, as follows: "Such account must be given of the deed as may reasonably be expected under all the circumstances of the case and as will afford a presumption that it is genuine." This definition has been approved in several cases: 2 Phil. Ev., 4th Am. ed., 475, note 430, by C. & H. The supreme court of the United States, speaking by Judge Story, held, in *Barr v. Gratz*, 4 Wheat. 213, 221, 4 L. Ed. 553, that where a deed is more than thirty years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for, and it is admissible in evidence without regular proof of its execution. The rule, as thus stated, was reiterated by the same court in *Coulson v. Walton*, 9 Pet. 70, 72, 9 L. Ed. 51.

porting to constitute part of a transfer of title or act of ownership.⁸¹ "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence."⁸² We have already referred to the rule that *recitals* in ancient documents of former documents have been held presumptive evidence of their existence,⁸³ and recitals generally in such deeds call for more than passing attention. It must be borne in mind that the rule as to ancient documents does not import any verity to the recitals contained in such documents. The documents themselves are presumed to be genuine, and the rule, whether statutory or not, has no further effect.⁸⁴ At the risk of reiteration, we must point out that although the documents are admitted as proving themselves, the genuineness is only a presumption, and therefore subject to rebuttal. The conditions to which such a document is subject in order to authorize its introduction are, (1) it must have been in existence for the period of thirty years; (2) it must have come from the proper custody—i. e., from some place where it would be natural to find a genuine document such as the one in question; (3) the document must in appearance be free from suspicion—i. e., to use the language of Justice Jackson in a Georgia case,⁸⁵ "On inspection, it must exhibit an honest face; otherwise it is not such an ancient document that its countenance will pass muster"; and (4) in some jurisdictions possession under

⁸¹ *Bristow v. Cormican*, 3 App. Cas. 653; 1 Phill. Ev. 273; Tayl. Ev., 10th ed., § 658.

⁸² *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 11 Eng. Reprint, 1155. See § 531, *post*.

⁸³ § 50, *ante*.

⁸⁴ *Gwin v. Calegaris*, 139 Cal. 384, 73 Pac. 851. The code provision in California is that all other presumptions are satisfactory, if uncontradicted. They are denominated dis-

putable presumptions, and may be controverted by other evidence. The following are of that kind: That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained: Cal. Code Civ. Proc., § 1963.

⁸⁵ *Hill v. Nisbet*, 58 Ga. 586.

the document is regarded as a requirement.⁸⁶ In determining the issue of genuineness the jury are entitled to look to all the evidence tending to prove or disprove any fact necessary to be shown to and considered by the trial judge in the first instance in determining whether the document should be admitted in evidence.⁸⁷ Even if the jury should find, after the document has been admitted in evidence, all the requirements essential to the admission of the instrument were established by plaintiff's testimony, still, if the defendant has come forward with other testimony to the contrary, no artificial probative force as to the genuineness of the document can be given to the fact that it is an ancient instrument.⁸⁸ The question of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document which only dispenses with proof of its genuineness.⁸⁹ When possession has been held under a deed for over sixty years, its recitals are evidence even against strangers. If there is a recital of a lease in a deed of release, not tendered as an ancient document, and if in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not, *per se*, evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself under such circumstances materially fortify

⁸⁶ But, though the judge has deemed the evidence sufficient to allow the document to go before the jury, it is not to be inferred from such action on his part that the document is genuine; for it simply means that there is such proof of the essential requirements as is deemed sufficient to permit the document to go before the jury, in order that they may con-

sider and pass upon the issue as to its genuineness: *West v. Houston Oil Co.*, 56 Tex. Civ. App. 341, 120 S. W. 228.

⁸⁷ *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963; *Reynolds v. Weinman* (Tex. Civ. App.), 33 S. W. 302.

⁸⁸ *West v. Houston Oil Co.*, *supra*.

⁸⁹ *King v. Watkins*, 98 Fed. 913.

the presumption from lapse of time and length of possession of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession.⁹⁰ A recital in an ancient deed or will of any antecedent deed or document consistent with its own provisions will, after the lapse of such a period, be presumptive proof of the former existence of such deed or document, and especially where no deed, declaration, act or claim is shown to rebut such presumption.⁹¹ So, the recitals in an ancient deed as to the pedigree of the grantor are evidence against strangers. An ancient deed made by a commissioner to the heirs of a deceased purchaser of land, under an order of sale in a proceeding to sell it as forfeited for nonpayment of taxes, reciting the death of the purchaser, and inheritance by the grantees, is evidence of the facts recited, against strangers.⁹² Recitals of heirship and widowhood in deeds upward of thirty years old, under which possession has been continuously held, are presumptive evidence of the truth of the same, and admissible against strangers to the title claiming adversely.⁹³ The records of a county having been shown to have been destroyed by fire, the recitals in a deed, which was an ancient instrument, that a sale was made under the orders of the probate court, were sufficient in themselves to show that such sale was so made.⁹⁴ Even when neither party to the action claimed under it or the

⁹⁰ *Davis v. Gaines*, 104 U. S. 386, 26 L. Ed. 757; *Carver v. Jackson*, 4 Pet. (U. S.) 1, 7 L. Ed. 761.

⁹¹ *Saxton v. Fuller*, 20 N. J. L. 61; *Gillean v. Witherspoon* (Tex. Civ. App.), 121 S. W. 909; *Ryle v. Davidson* (Tex. Civ. App.), 116 S. W. 823.

⁹² *Russell v. Jackson*, 22 Wend. (N. Y.) 277; *Scharff v. Keener*, 64 Pa.

376; *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484; *Fulgerson v. Holmes*, 117 U. S. 389, 29 L. Ed. 915, 6 Sup. Ct. Rep. 780.

⁹³ *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409.

⁹⁴ *Williams v. Cessna*, 43 Tex. Civ. App. 315, 95 S. W. 1106; *White v. Jones*, 67 Tex. 638, 4 S. W. 161.

parties to it, a deed was held admissible upon the ground that, having been made more than thirty years, its recitals were competent evidence of the place where a certain way was located, upon the same principle upon which it has been held that recitals in ancient deeds are evidence upon a question of boundary to prove the position of a line from which the disputed bound can be determined.⁹⁵ The term "ancient documents" has been held sufficiently wide to include all kinds of instruments, deeds, contracts and, as we have already shown, maps and plans.⁹⁶ Public and private records have been held also subject to the ancient document rule. The United States supreme court, dealing with the production of certain ancient documents bound together styled a protocol, said:⁹⁷ "The production of the originals of these documents has given the court an opportunity to inspect them. They bear upon their face every evidence of age and authenticity. There is nothing about them to suggest that they have been forged or tampered with. They present an honest as well as ancient appearance, and come from official custody. To such public and proprietary records the courts have applied the rules of admissibility governing ancient documents." The court added that it was only necessary to show the age of over thirty years, and that they came from a natural and reasonable custody and

⁹⁵ *Randall v. Chase*, 133 Mass. 210; *Morris v. Callanan*, 105 Mass. 129; *Village of Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677; *Pierce v. Schram* (Tex. Civ. App.), 53 S. W. 716.

⁹⁶ *Barker v. Mobile Electric Co.*, 173 Ala. 28, 55 South. 364; *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 South. 415; *Jordan v. Cameron*, 12 Ga. 267; *McConnell v. Slappey*, 134 Ga. 95, 67 S. E. 440; *Thompson v. Louisville etc. R. Co.*, 110 Ky. 973, 63 S. W. 42; *Boston v. Richardson*, 105 Mass. 351; *Rider v. Legg*, 51 Barb. (N. Y.) 260; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 6 Am. Dec. 482;

Ryle v. Davidson (Tex. Civ. App.), 116 S. W. 823; *Nowlin v. Burwell*, 75 Va. 551; *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679; *Walton v. Coulson*, Fed. Cas. No. 17,132, 1 McLean, 120; *Vattier v. Hinde*, 7 Pet. (U. S.) 252, 8 L. Ed. 675; *Townsend v. Perry*, 124 N. Y. Supp. 143; *City of Lexington v. Hoskins*, 96 Miss. 163, 50 South. 561; *Norman v. Beekman*, 58 Fla. 325, 50 South. 876.

⁹⁷ *McGuire v. Blount*, 199 U. S. 142, 50 L. Ed. 125, 26 Sup. Ct. Rep. 1. See, also, *McClaskey v. Barr*, 47 Fed. 154; *Dodge v. Briggs*, 27 Fed. 160.

from a place where they might reasonably be expected to be found. Ancient records of a church are admissible on the same basis.⁹⁸ The minutes of an Odd Fellows' Lodge over thirty years old containing resolutions in regard to the death of one of their order prove themselves.⁹⁹ When ancient books, purporting to be the records of proprietors of land, contain obvious internal evidence of their own verity, and there is no evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings.¹⁰⁰ The rule which gives to a record thirty years old the evidential weight of an ancient instrument applies only to the record of such instruments as have been properly acknowledged and recorded in accordance with the registration laws of the state in which it is produced, and has no application to a record in another state of a deed to land in such first-mentioned state.¹ That portion of the rule which demands that either possession under ancient documents or other corroborative and explanatory evidence be shown, is imperative. When the explanation suffices, the documents have been regarded in themselves as evidence of acts of possession.² A recent case³ is interesting and unique, in that in the face of a chain of such deeds, the adversaries were able to show an entire absence of possession. The deeds extended over a period of forty years, and the defendant town was in a position to prove, as against them, that a large portion of the land was leased to and occupied by tenants of the defendant under written leases. The plaintiffs claimed to own this land and made their claim by recorded deeds when they had neither title nor possession. It was held that the recital

⁹⁸ *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72.

⁹⁹ *Wiener v. Zweib* (Tex. Civ. App.), 128 S. W. 699.

¹⁰⁰ *Goodwin v. Jack*, 62 Me. 414.

¹ *Hill v. Taylor*, 77 Tex. 295, 14 S. W. 366.

² *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. 107.

³ *McMahon v. Town of Stratford*, 83 Conn. 386, 76 Atl. 983.

in these deeds asserting title was admissible as bearing upon the question of possession, but, under the circumstances surrounding the transaction as disclosed by the record, the deeds were not entitled to any serious consideration by the court.⁴ It is also well settled that recitals in ancient instruments which are a part of the chain of title to the land in controversy are admissible as circumstances tending to show the execution of a lost deed in said chain.⁵

§ 308a (312). Same—Copies of ancient documents.—It is necessary to watch the distinction between recent copies of ancient documents and ancient copies of such documents, and thus avoid the confusion which necessarily arises when the two subjects are considered together, and more especially when the copy is offered, the original being lost. Copies, either office copies or certified copies,⁶ of such documents are admissible always as secondary evidence where the original cannot be obtained. In such case, of course, the usual and proper foundation must be laid for the introduction of the secondary evidence, and the age of the original does not really affect the question at all—the main factors being (1) the proof of the existence and due execution of such original, and (2) that the production of it is legally impracticable. We do not speak now of judicial or other public records, the proof of which by certified copy is almost universal; nor of those cases in which statutory provisions make the copies valid and effectual as the originals. There are many cases in which the admission in evidence of copies

⁴ The exhibition of a deed from one who appears to be an entire stranger to the estate, not having possession, the lowest evidence of title, only shows that the party has a right from one who claims title and who thereby conveys but a naked claim. And it is laid down as an elementary proposition that a deed from a person showing neither title nor possession of itself would have no effect; for its force and effect depends entirely

upon its connection with the acts of ownership and possession; and proof of the execution of deeds by parties wholly unconnected with the estate would avail nothing to prove title: *Davis v. Kingsley*, 13 Conn. 285.

⁵ *Brewer v. Cochran*, 45 Tex. Civ. App. 179, 99 S. W. 1033; *Freeman v. Wm. M. Rice Institute* (Tex. Civ. App.), 128 S. W. 629.

⁶ See § 523 et seq., *post*, for classification of copies.

of ancient recorded documents has been discussed,⁷ and it is to the few exceptional cases we find it necessary to address attention. One of the important elements controlling the admission of the originals is, as we have just pointed out, the conclusion to be drawn, among other things, from the appearance of the document itself. The consideration of the original in that aspect is swept away when a copy is the only evidence tendered of it, and some few cases to the contrary notwithstanding, it may be taken as a general rule that the principle which regulates the self-proving properties of an original ancient document do not apply to a copy, ancient or modern, of such document. It scarcely calls for discussion. The original produced proves itself—its execution and other necessary attributes. How can it be urged that an ancient copy can obviate the necessity of proving the prerequisites to admission in evidence of the original? If it proves itself as a copy, the foundation of the execution of the original cannot be dispensed with. The exceptional cases in England and in this country are themselves of comparatively ancient origin, and the weight of modern authority is clearly against the admission of ancient copies in such mode as to dispense with proof of the original. True, an ancient copy may prove itself, but until the element of identification is introduced, it is of no avail as compared with the original. At best it is a copy proved by time, but the necessity of proving the execution of the original has not been obviated. In a recent case in Maine this is expressly laid down. The plaintiff claimed and sought to prove title only under a deed of conveyance, which she claimed was executed and delivered to her mother in 1855, and conveying a life estate to her mother, with remainder to herself. The mother was deceased.

⁷ *Garrow v. Toxey*, 171 Ala. 644, 54 South. 556; *Allison v. Little*, 85 Ala. 512, 5 South. 221; *Jones v. Morgan*, 13 Ga. 515; *New York etc. R. Co. v. Benedict*, 169 Mass. 262, 47 N. E. 1027; *Little v. Downing*, 37 N. H. 355; *Goodhue v. Cameron*, 142

App. Div. 470, 127 N. Y. Supp. 120; *Duffield v. Brindley*, 1 Rawle (Pa.), 91; *Andrews v. Marshall*, 26 Tex. 212; *Townsend v. Downer*, 32 Vt. 183; *Northrop v. Columbian Lumber Co.*, 186 Fed. 770, 108 C. C. A. 640; *McClaskey v. Barr*, 47 Fed. 154.

The essential proposition of fact to be proved by the plaintiff was that such a deed had been, in fact, executed and delivered. She was not able to produce any witness that ever saw such a deed, or ever heard such a one read. She did, however, produce an office copy of what purported to be the record of such a deed in the proper registry of deeds, and offered it as admissible evidence that an original deed corresponding to the record had been executed and delivered prior to the date of the record.⁸ Emery, C. J., in the course of the opinion in the case referred to, said: "The plaintiff urges that the age of the record, an age of more than half a century, together with the fact that her mother occupied the land for a time after the date of the record, creates a presumption that there was, in fact, an original of the record duly executed and delivered. It is true that when a document, apparently an original deed, and shown to be thirty years old or more, is produced, it may be received in evidence without other proof of execution. But this presumption of due execution applies only to originals, not to copies. Further, the mere fact that the mother occupied the land, there being no evidence that her occupation was under any claim of title, creates no legal presumption that her occupation was under any particular deed. If neither the copy nor the occupation creates any presumption, both together cannot. Zero plus zero is still zero." In a Kentucky decision a year before the Maine case, Hobson, J., equally emphatically says, that where an original deed itself is produced which is an ancient document, and it is found in the proper custody, it may be read in evidence, especially where there has been correspond-

⁸ *McCleery v. Lewis*, 104 Me. 33, 19 L. R. A., N. S., 438, 70 Atl. 540. By the laws of Maine neither the copy of the record nor the record itself is admissible evidence to prove the existence of an original, the plaintiff being a grantee in the supposed deed. The statute (Rev. Stats., c. 84, § 125) authorizing the use of records, and

copies of records, of deeds as evidence of the existence, execution, and delivery of originals only applies to deeds prior to that in which the party is the grantee or heir of a grantee. It does not include the deed produced by the plaintiff: *Elwell v. Cunningham*, 74 Me. 127; *Webber v. Stratton*, 89 Me. 379, 36 Atl. 614.

ing possession under it. "But this rule has never been applied to a copy. We know of no principle by which age gives sanctity to a copy."⁹ Record copies of deeds have formed the subject of several decisions, both in the states where they are made evidence and in those in which no such statutory provision exists; but an examination of the cases will reveal that in the absence of statutory regulation the introduction of such copies has been safeguarded either by a demand for explanation of the absence of the original, proof of its existence *aliunde* the record, or proof of possession of the land, and the application of the ordinary rules of secondary evidence. From an excellently compiled collection,¹⁰ we take the following illustrations as showing that the cases are rare in which the decision has turned on the question of the admission of such copies untrammelled by the consideration of other principles. For example, one claiming under a deed cannot use a certified copy of the record thereof as proof of its existence, execution, and delivery, merely by proving that search for the original has been unavailing, as it is necessary that the original be proven by the subscribing witness, if to be found, or by the grantor or grantee, and, if the latter cannot be found, by the officer who recorded it, or any person who has seen the original and can testify as to the handwriting of the witness and grantor. The court said it did not mean to decide that a showing such as made would not warrant the admission of the certified copy, if it appeared that no other evidence existed and was in reach of the party by making a reasonable search and inquiry therefor.¹¹ It was held in Connecticut¹² that heirs claiming

⁹ Ball v. Loughridge, 30 Ky. Law Rep. 1123, 100 S. W. 275; Harlan v. Howard, 79 Ky. 373; Hedger v. Ward, 15 B. Mon. (Ky.) 106.

¹⁰ Note to McCleery v. Lewis, *supra*, in 19 L. R. A., N. S., 438.

¹¹ Wells v. Jackson Iron Mfg. Co., 48 N. H. 491.

¹² Cunningham v. Tracy, 1 Conn. 252, and in Kelsey v. Hammer, 18

Conn. 311, Hathaway v. Spooner, 9 Pick. (Mass.) 23, and Ward v. Fuller, 15 Pick. (Mass.) 185, it was held that one claiming title to land as devisee or heir may give in evidence a copy of the record of his testator's or ancestor's deed upon showing the loss of the original or his inability to produce it, as such copy furnishes evidence of the execution and exist-

under their ancestor's deed must produce the original and prove its execution, which could not be done by a certified copy of the record thereof without accounting for the absence of the original, as the heirs are presumed to have possession of their ancestor's deed. The court said that, where this presumption did not apply, upon accounting for the absence of the original deed, the production of a certified copy dispensed with proof of the execution of the original. Among the Georgia decisions, we find that where a lost deed, under which a party in ejectment claims, conveying lands in two counties, is of record in one county only, a copy from the record thereof is not admissible in evidence in the other county without proof of the execution of the original.¹³ So, an assignee for creditors cannot prove the title of the assignor to real estate by a copy of the record of the latter's deed, without showing the loss or destruction of the original, or that it is out of his power to produce it, as the assignee stands in his grantor's shoes, and to make title in himself must produce the original deed.¹⁴ Under a statute providing that a certified copy of

ence of the original as a genuine instrument.

¹³ *Kennedy v. Harden*, 92 Ga. 230, 18 S. E. 542. It was said in *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645, to be the general rule that the execution and genuineness of a lost or destroyed deed may be proven by a certified copy of the record. But the effect of such copy as evidence is destroyed when the opposite party files an affidavit alleging that the original deed under which the person producing the copy claims was a forgery; and this is true, notwithstanding that it appears from the certified copy that the original deed has been of record for more than thirty years, although Chief Justice Marshall held in *M'Keen v. Delaney*, 5 Cranch (U. S.), 22, 3 L. Ed. 25, that, in an action of ejectment, a certified copy of the record

of the deed of the defendant's lessor is competent evidence as proof of the execution thereof, even though it conveys lands in two counties and is recorded in the county other than that in which it is offered, where the statute provides that copies of records of deeds shall be allowed in all courts where produced, and they are declared to be as good evidence, and as valid and effectual in law, as the original deeds.

¹⁴ *Talcott v. Goodwin*, 3 Day (Conn.), 264. Among other interesting cases the following will be found to support the text: *Allison v. Little*, 85 Ala. 512, 5 South. 221; *Trammell v. Thurmons*, 17 Ark. 203; *Patterson v. Collier*, 75 Ga. 419, 58 Am. Rep. 472; *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546; *Boykin v. Wright*, 11 La. Ann. 531; *Gibson v. Poor*, 21

the record of a deed is sufficient evidence of the execution of the original, a copy of a deed to an ancestor of a defendant in ejectment, under which he claims, is *prima facie* evidence of its execution, notwithstanding it is disputed.¹⁵ The record of a deed under which a party to an action claims is competent to show the execution, if not delivery, thereof, under a statute providing that a copy or record may be received in evidence, as the delivery of a deed may be inferred from its execution and acknowledgment.¹⁶ So, such a copy is admissible as proof of the genuineness of the grantor's signature, under a statute providing that such copy shall be received to all intents and purposes as the original, and which shall be *prima facie* evidence of the deed, and the genuineness thereof.¹⁷ So far as the exceptions are concerned, they call for little consideration. The old English practice appears to have been that "where the possession has gone along with any deed for many years, then a very old copy of the deed may be given in evidence, with proof also that the original is lost."¹⁸ The rule thus stated may not be taken to mean that an ancient

N. H. 440, 53 Am. Dec. 216; Belcher v. Fox, 60 Tex. 527; Townsend v. Downer, 32 Vt. 183.

¹⁵ Love v. Harbin, 87 N. C. 249.

¹⁶ Serles v. Serles, 35 Or. 289, 59 Pac. 634.

¹⁷ Chrast v. O'Connor, 41 Wash. 360, 83 Pac. 238. Other cases dealing with the admission of the copy by statute are Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532; Burnet v. Brush, 6 Ohio. 32; Helton v. Belcher, 114 Ky. 172, 70 S. W. 295; Webb v. Holt, 113 Mich. 338, 71 N. W. 637; Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543, 22 L. R. A. 641, 57 N. W. 175; Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83; Hammond v. Gordon, 93 Mo. 223, 6 S. W. 93; Moss v. Anderson, 7 Mo. 357; Ratliff v. Ratliff, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; Elwell v. Cunningham, 74 Me. 127; Egan v. Horrigan, 96 Me. 46, 51

Atl. 246; Bell v. Kendrick, 25 Fla. 778, 6 South. 868; Skinner v. Pinney, 19 Fla. 42, 45 Am. Rep. 1; American Mtg. Co. v. Mouse River Livestock Co., 10 N. D. 290, 86 N. W. 965; McKinsty v. Clark, 4 Mont. 370, 1 Pac. 759; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; Manhattan Malting Co. v. Sweteland, 14 Mont. 269, 36 Pac. 84; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861; Logan v. Logan, 31 Tex. Civ. App. 295, 72 S. W. 416; Moody v. Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253; Galveston H. & S. A. R. Co. v. Stealey, 66 Tex. 468, 1 S. W. 186; Thompson v. Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030; Burleson v. Collins (Tex. Civ. App.), 29 S. W. 688; Buckley v. Carleton, Fed. Cas. No. 2093, 6 McLean, 125.

¹⁸ Gilbert, Evidence, 97.

original being lost, an ancient copy *per se* may be admitted to take its place, for that is an absolutely illogical proposition—the less to include the greater. It would intend that the original proves itself and no more—the copy proves itself and the original—therefore the best evidence is inferior to the next best. To be intelligible, it must be read by the light of the accompanying possession. We think no reliable parallel American authority can be found, and the reason is at hand. In England the registration or recording of deeds did not in those days take the important place which was always allowed it in American law, and consequently the decisions dating from different starting places cannot be identical. In fact, for all practicable purposes they are in this regard of little use for reference, and all that is needed can be found in the American authorities which we have cited. In a Connecticut case,¹⁹ it was sought to introduce a tracing of a map, such tracing having been made about twelve years prior to the action from a map made nearly thirty years previously. The map had been destroyed by fire, the tracing being made by the witness proving it. Part of the tracing was an inscription by the maker of the original map stating the purpose of the drawing. It was sought to treat the tracing made by the witness as original evidence of an ancient document needing no proof. The court, in refusing so to treat it, nevertheless properly admitted it as secondary evidence on the necessary foundation. “A tracing marked as one by Hartley, and dated in 1866, if found at the town clerk’s office thirty years afterward, would have proved itself. This rule of evidence as to ancient documents found in the proper custody is founded on two things—the appearance of the document itself, and the difficulty, if not impossibility, of making extrinsic proof.²⁰ In the case at bar the document was not offered for inspection. That it could not be is of no consequence. It never became an ancient document, and under the rule in question the tracing by

¹⁹ *Hamilton v. Smith*, 74 Conn. 374,
50 Atl. 884.

²⁰ *Enfield v. Town of Ellington*, 67
Conn. 459, 34 Atl. 818.

Sanford was no more admissible in 1900 than it would have been if offered in 1891, when he made it. But it was properly received as secondary evidence of the original, upon his testimony that in his opinion the inscription was in Hartley's handwriting. Hartley was dead. Both parties were claiming under one of his maps. That was before the court, and it was undisputed that its inscription bore his signature." As to copies of ancient documents, the originals being in existence but impracticable of production, the ordinary rules of secondary evidence apply on the proper foundation being laid.

§ 309 (313). Same—Documents to come from the proper custody.—It is a condition precedent to the admission of such documents, without proof of their execution, that they must come from the proper custody.²¹ What is the proper custody is a question which must be determined by all the circumstances of the case. While there may be but one place of deposit which is absolutely and strictly proper, there may be various places which are reasonable and natural. It is not necessary that the document should be traced to the place of custody which is strictly the most appropriate. The *test* is, "whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine";²² or, as put in a recent

²¹ Lollar v. Sloss-Sheffield Steel etc. Co., 170 Ala. 239, 54 South. 272; Williamson v. Mosley, 110 Ga. 53, 35 S. E. 301; Ball v. Loughridge, 30 Ky. Law Rep. 1123, 100 S. W. 275; Swafford v. Herd, 23 Ky. Law Rep. 1556, 65 S. W. 803; Carter v. Maryland & P. R. Co., 112 Md. 599, 77 Atl. 301; Fairly v. Fairly, 38 Miss. 280; Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764; Havens v. Seashore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Martin v. Rector, 24 Hun (N. Y.), 27; Meath v. Winchester, 3 Bing. N. C. 200, 10 Bligh, 462, 6

Eng. Reprint, 125; Wright v. Hull, 83 Ohio St. 385, 94 N. E. 813; Rogers v. Riddlesburg Coal etc. Co., 31 Leg. Int. 325; Byrd v. Phillips, 120 Tenn. 14, 111 S. W. 1109; Flores v. Hovel (Tex. Civ. App.), 125 S. W. 606; Chamberlain v. Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017; Rogers v. Shortis, 10 Grant Ch. (U. C.) 243.

²² Meath v. Winchester, 3 Bing. N. C. 201, 10 Bligh, 462, 6 Eng. Reprint, 125; Harris v. Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251. In McGuire v. Blount, 199 U. S. 142, 50 L. Ed. 125, 26 Sup. Ct. Rep. 1, Mr.

case,²³ it must be shown to have been in and come from some place where it would be natural to find a genuine document of such a tenor as the one in question. Each case must therefore depend upon its own circumstances.²⁴ Accordingly, when an ancient deed forms part of the original papers in a suit in a court of record to determine the title to land to which the deed relates, the record of the case is admissible against persons who are not parties or privies to the suit, in order to prove the antiquity of the deed and to account for its custody.²⁵ According to this view, ancient documents have been rejected where no connection between their possession and any persons having an interest in the estate has been proved.²⁶ On the other hand, it was held sufficient to trace the custody of an expired lease to the lessor.²⁷ When a lease, executed to the township apparently forty years before its present discovery, was found among other old papers in the office of a township clerk and there was no evidence or *indicia* of fraud, the instrument was treated as an ancient document

Justice Day said: "While the testimony tends to show that these documents were subjected to various changes of possession during the transition of the government of Florida from Spain to the United State, and upon the evacuation of Pensacola during the Civil War, there is nothing to establish that they were ever out of the hands of a proper custodian. Nor is there proof to show that the originals were lost, or an evidence of a fraudulent substitution of a made-up record in the interest of parties benefited thereby."

²³ Flores v. Hovel (Tex. Civ. App.), 125 S. W. 606.

²⁴ Sullivan v. Richardson, 33 Fla. 1, 14 South. 692; Doe v. Roe, 31 Ga. 593; Thursby v. Myers, 57 Ga. 155; Whitman v. Heneberry, 73 Ill. 109; Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333; Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Havens v. Sea-

shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679; Lewis v. Lewis, 4 Watts & S. (Pa.) 378; Polson v. Ingram, 22 S. C. 541; Crain v. Huntington, 81 Tex. 614, 17 S. W. 243; Warren v. Frederichs, 76 Tex. 647, 13 S. W. 643; Jones v. Neal, 44 Tex. Civ. App. 412, 98 S. W. 417; Nowlin v. Burwell, 75 Va. 551; Burns v. United States, 160 Fed. 631, 87 C. C. A. 533; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553.

²⁵ Applegate v. Lexington Co., 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 724.

²⁶ Meath v. Winchester, 3 Bing. N. C. 201, 1 Clark & F. 445, 7 Eng. Reprint, 171; Lygon v. Strutt, 2 Anstr. 601, 3 R. R. 631; Potts v. Durant, 3 Anstr. 789, 2 Eag. & Y. 432, 4 R. R. 864.

²⁷ Rees v. Walters, 3 Mees. & W. 527, 7 L. J. Ex. 138, 2 Jur. 378.

and proof of its execution dispensed with.²⁸ So it was held sufficient to trace an unproved will to the custody of a son of the testator, who with other devisees derived a benefit under it, although it was contended that it should have been deposited in the ecclesiastical court of the diocese.²⁹ By the weight of authority the *custodian* of the document *should be sworn*, giving such information to the court concerning the custody of the document as he may have; and it has been held sufficient if the present custodian testifies that he received the document as the *representative* or *successor* of the person originally entitled to it, as a paper which had belonged to him.³⁰ When ancient documents present strong *internal evidence* of their *verity*, they may be received from the present custodian, though they are not traced to their original source and though the present custodian may have no interest in the title. Thus, documents relating to a considerable tract of land were received from the librarian of a state historical society.³¹ In a case already referred to,³² the court said it was not aware of any rule which requires a party who offers an ancient instrument in evidence to account for its possession during a period of over one hundred years of its existence. The very reason that such a document is admissible as evidence without proof of its execution negatives the idea of any such requirement. It would be as impractical to show who was in possession of such an instrument one hundred years ago as it would be to prove by direct evidence by whom it was executed. When it has been shown that it is thirty years old and is brought from a proper custody, showing an honest face, it is admissible as evidence, upon the pre-

²⁸ *Jasper Township v. Martin*, 161 Mich. 386, 137 Am. St. Rep. 508, 126 N. W. 437.

²⁹ *Doe v. Pearce*, 2 Moody & R. 240; *Andrew v. Motley*, 12 Com. B., N. S., 526, 32 L. J. C. P. 128. See other illustrations, *Tayl. Ev.*, 10th ed., § 662.

³⁰ *Earl v. Lewis*, 4 Esp. 3.

³¹ *Goodwin v. Jack*, 62 Me. 414; *Ward v. Cameron* (Tex. Civ. App.), 76 S. W. 240. Certificate of recording officers on ancient deed to the effect that it was recorded received as a circumstance to show genuineness: *Applegate v. Lexington Mining Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742.

³² *Flores v. Hovel*, *supra*.

sumption that it is genuine. And on such presumption, a jury is authorized to find in favor of its validity without proof of anything else. According to the weight of authority, it is not necessary, as a condition to the admission of ancient documents, that *acts* in connection with such documents or in reliance upon them should be proved or that acts of *modern enjoyment* must be shown. The absence of such proof *affects the weight* and not the admissibility of the evidence;³³ and when proof of possession of the land under the instrument cannot be given, and there is no evidence raising suspicion as to its genuineness, such genuineness may be shown by other facts as well as that of possession.³⁴ But when no such corroborating evidence is given, the document should receive the *closest scrutiny*, especially when produced to benefit those in whose custody it is found.³⁵ An old New York case, which is good law to-day,³⁶ decides that a will concerning real property may, under certain circumstances, be given in evidence, as an ancient deed; and it is laid down as a general rule that a deed appearing to be of the age of thirty years may be given in evidence without proof of its execution, if possession be shown to have accompanied it; or where no possession has accompanied it, if such account be given of the deed as may be reasonably expected, under all the circumstances of the case; and will afford the presumption that it is genuine. The rule is founded on the necessity of admitting other proof, as a substitute for the production of

³³ *Malcomsen v. O'Dea*, 10 H. L. Cas. 614, 11 Eng. Reprint, 1155; *Clarkson v. Woodhouse*, 3 Doug. 189, 99 Eng. Reprint, 606; *Rogers v. Allen*, 1 Camp. 309, 10 R. R. 689; *City of Boston v. Richardson*, 105 Mass. 351; *Harlan v. Howard*, 79 Ky. 373; *Applegate v. Lexington Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742; *Barr v. Gratz*, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; *Havens v. Seashore Land Co.*, 47 N. J. Eq. 365, 20 Atl. 497, elaborate

discussion; *Tayl. Ev.*, 10th ed., §§ 665, 666.

³⁴ *Harlan v. Howard*, 79 Ky. 373; *Applegate v. Lexington Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742.

³⁵ *Malcomson v. O'Dea*, 10 H. L. Cas. 593, 11 Eng. Reprint, 1155; *Rogers v. Allen*, 1 Camp. 309, 10 R. R. 685; *Tayl. Ev.*, 10th ed., §§ 658, 665.

³⁶ *Jackson v. Laroway*, 3 John. Cas. (N. Y.) 283.

witnesses, who cannot be supposed any longer to exist. Where no possession appears, other circumstances are admitted to account for it, and raise a legal presumption in its favor. In commenting upon that case in a later one,³⁷ the court pointed out that the admission of the will in the suit referred to was on the latter ground, "for there had been no actual possession under it by the plaintiff. It is true that the peculiar situation of the property afforded an explanation of the want of possession. Yet, had possession under the will been deemed the only test, it is manifest that the court would not have allowed the will to be read. The decision then is put, not on the ground of possession, but other facts proven which raised the presumption that it was genuine. These appear to have been the indorsements on it, and proof of the handwriting of the clerks, and one of the judges, who certified. They were not received as proof of the due execution of the will, but with a view to show the antiquity of the instrument; and that it existed at the periods when those certificates bear date."

§ 310 (314). **Declarations must have been made before the controversy arose.**—Another important qualification of the rule we have been considering by which evidence of reputation or common fame is admitted is, that the declaration so received must have been made before any controversy arose touching the matter to which they relate, or as it is usually expressed, *ante litem motam*.³⁸ The in-

³⁷ Jackson v. Luquere, 5 Cow. (N. Y.) 221.

³⁸ Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; Muller v. Southern Pac. R. R. Co., 83 Cal. 240, 23 Pac. 265; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Barnum v. Barnum, 42 Md. 251; Commonwealth v. Felch, 132 Mass. 22; Stockton v. Williams, Walk. Ch. (Mich.) 120; Baker v. Taylor, 54 Minn. 71, 55 N. W. 823; Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec.

457; Hunt v. Johnson, 19 N. Y. 279; Caujolle v. Ferrie, 23 N. Y. 90; Caldwell etc. Co. v. Triplett, 151 N. C. 409, 66 S. E. 343; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823; Hodges v. Hodges, 106 N. C. 374, 11 S. E. 364; Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Bird v. Hueston, 10 Ohio St. 418; Sergeant v. Ingersoll, 15 Pa. 343; Coleman v. Frazier, 4 Rich. (S. C.) 146, 53 Am. Dec. 727; Hurt v. Evans, 49 Tex. 311; Overton v.

herent weakness of this class of testimony requires that it should at best *be received* with considerable *caution*; and it has been deemed a proper restriction that declarations of the character under discussion should not be received at all, if there is any reason to believe that a controversy had been commenced, the existence of which might prejudice the declarant or which might offer him any temptation to deceive. The reason why the declarations of deceased persons upon public rights made *ante litem motam*, when there was no existing dispute respecting them, are admitted, is, that these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or to mislead posterity. The same reason on which such declarations are admitted suffices to exclude those made *post litem motam*. The existence of the controversy alone may create partisanship which may be sufficiently aggressive to warrant withholding any confidence in or reliance upon them.³⁹ The court will not enter into any inquiry as to the probable *effect of such controversy*;⁴⁰ it is enough that such controversy existed. It need not be proved to have been known to the declarant; and even if the fact appear that the *controversy* was *unknown* to him, the rule remains the same.⁴¹ As was said by Lord Mansfield in the Berkeley peerage case:⁴² "If an inquiry were to be instituted in each instance whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced." As may be inferred from the statements already made, it is not necessary that the controversy should have ripened into an action. When declarations made after suit brought are only a repetition of

Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Pilkerton v. Roberson, 110 Va. 136, 65 S. E. 835; Whitelocke v. Baker, 13 Ves. 512, 33 Eng. Reprint, 385; Rex v. Cotton, 3 Camp. 444; 1 Greenl. Ev., § 131.

³⁹ Rex v. Cotton, 3 Camp. 446.

⁴⁰ Berkeley Peerage Case, 4 Camp. 417.

⁴¹ Berkeley Peerage Case, 4 Camp. 417; Sheddon v. Attorney General, 30 L. J. (Pr. & M.) 217, 2 Swab. & T. 170.

⁴² Berkeley Peerage Case, 4 Camp. 417.

the same declarations made years before, the rule to exclude them as *post litem motam* utterances does not apply.⁴³ The doctrine of *ante litem motam* received its prominence at the time of the Berkeley peerage case hereinbefore referred to, but it is not entirely accepted in this country, and the right to have declarations admitted is based rather on the fact of the absence of motive to make a false statement at the time. In a Minnesota case to which we have before referred,⁴⁴ the law is well summarized that declarations, whether verbal or written, made by a deceased person, as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence between third parties when it appears that: (a) the declarant is dead; (b) the declaration was against his pecuniary interest; (c) the declaration was a fact in relation to a matter of which he was personally cognizant; (d) the declarant had no probable motive to falsify the fact declared. Start, C. J., boldly expresses his opinion that the *ante litem motam* test for declarations is not the true one. Some of the adjudged cases contain statements, some of them *obiter*, to the effect that to entitle such declarations to be admitted in evidence it must appear that they were made before there was any controversy as to the matter to which they relate. "Upon principle and authority," says the learned chief justice, "it must be held, and we so hold, that the true test is not whether the declarations were made *ante litem motam*, but whether they were made under circumstances justifying the conclusion that there was no

⁴³ Coate v. Speer, 3 McCord (S. C.), 227, 15 Am. Dec. 627. The fine opinion in this case says: "The exception, if made *post litem motam*, seems to have been also generally adopted, but could only have originated in that extreme caution which it was deemed necessary to observe in the application of a rule which is opposed to the general principles laid down on the subject of evidence. For if a man made false declarations with

a view to affect a suit then pending, he must have also resolved on one of two things—either to die before the cause should be tried, so that his declarations might be given in evidence, or he must have determined to attend and perjure himself. Both are rather inconsistent with the nature of man."

⁴⁴ Halvorsen v. Moon etc. Lumber Co., 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28.

probable motive to falsify the facts declared.⁴⁵ The existence or nonexistence of a controversy at the time a declaration was made might be a material circumstance to enable the court to determine whether there was any probable motive for the declarant to falsify as to the facts declared. Whether the fact that the declaration was made after a controversy arose would tend to show such motive would depend upon the character and facts of each particular case." This seems to us a better test than the arbitrary line which is drawn between the time when there was no controversy and the time at which it may be said to arise. There are, however, several recorded cases where the evidence *post litem* has been rejected,⁴⁶ and in one of them, distinguished for the masterly opinion of Dillon, J.,⁴⁷ the fact of the declaration being *ante litem motam* is referred to as included in the consideration of the general proposition of probable motive to falsify.⁴⁸

§ 311 (315). Same—Meaning of the rule—*Lis mota*.—By reason of its present acceptance in connection with the admissibility of declarations, having regard to the point

⁴⁵ There is nothing that so strongly attests the truth of what a person declares, not even his oath and the searching light of a cross-examination, as when he has asserted the existence of a fact and it appears that his interest at the time lay the other way. The words of sacred writ, "He that sweareth to his own hurt and changeth not" (Psalms, xv, 4), were uttered long before the era of our jurisprudence, and set before us, not only one of the most exalted attributes possessed by the exemplar of true virtue and probity, but embodied at the same time the highest standard by which we can safely gauge our trust and confidence in human testimony. It is not at all a matter for surprise, therefore, that the common-law jurists should have regarded it as

a perfectly safe test for discerning the truth in judicial investigation: *Smith v. Moore*, 142 N. C. 277, 7 L. R. A., N. S., 684, 55 S. E. 275.

⁴⁶ *Abel v. Fitch*, 20 Conn. 90; *Jones v. Jones*, 3 Strob. (S. C.) 315.

⁴⁷ *Mahaska Co. v. Ingalls*, 16 Iowa, 81.

⁴⁸ The following extract from the opinion of Dillon, J., in *Mahaska Co. v. Ingalls*, *supra*, bears out the text. "In addition, the court should, under the circumstances of the particular case, be satisfied that there was no *probable motive to falsify* the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion": *Gilechrist v. Martin*, Ball Eq. (S. C.) 492, and cases *supra*.

of time at which they were made, it is necessary to inquire under what circumstances the term has come into use and to ascertain the meaning allowed to it in the courts. The term *lis mota* is used in a broad sense, and refers to the beginning of a controversy or dispute, and not to the commencement of a suit. It has sometimes been claimed that no actual controversy need have arisen, but that the term "*lis mota*" means simply the arising of that state of facts on which the claim is founded.⁴⁹ But by the weight of authority it is held that there must be not only facts which may lead to a dispute, but that there must be a *suit*, or a *controversy preparatory* to a suit, upon the *same subject matter* as that involved in the litigation.⁵⁰ But if the subject in dispute at the time of the trial was not in controversy when the declarations were made, they are inadmissible, if otherwise competent. In other words, the *controversy*, as used in this connection, must have related to the particular subject at issue in the trial. Where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply.⁵¹ But the former controversy need not have been between the same parties nor have related to the same property, if the *same matters* were *under discussion*.⁵² Although declarations of the character under discussion must have been made before the *lis mota*, "they will not be rejected in consequence of their having been made with the express view of preventing disputes."⁵³ Nor will they be rejected although they are made in direct *support* of the *title* of the declarant, nor although the declarant stood in the same right with the

⁴⁹ Walker v. Beauchamp, 6 Car. & P. 552.

⁵⁰ Davies v. Lowndes, 7 Scott N. R. 214, 6 Man. & G. 428; Elliott v. Piersol, 1 Pet. (U. S.) 328, 7 L. Ed. 164; Berkeley Peerage Case, 4 Camp. 401; Slaney v. Wade, 1 Mylne & C. 338, 356. In criminal cases, see In re Darrow, 175 Ind. 44, 92 N. E. 369.

⁵¹ Freeman v. Phillips, 4 Maule & S. 486, 16 R. R. 524.

⁵² Berkeley Peerage Case, 4 Camp. 417; Sussex Peerage Case, 11 Clark & F. 85, 99, 103, 8 Eng. Reprint, 1034; Tayl. Ev., 10th ed., § 633.

⁵³ Tayl. Ev., 8 Eng. Reprint, 1034, 10th ed., § 630.

party relying on the declaration.⁵⁴ The qualification that declarations as to matters of public or general interest should have been made before the controversy arose applies with equal force when declarations are offered in matters of *pedigree*. This appears from the cases already cited, most of which relate to questions of pedigree. It matters but little, however, to what particular subject the declarations are sought to be applied. All other prerequisites being satisfied, the mere fact of them having been made before the controversy arose is persuasive of the presumption that there was no probable motive to falsify, and therefore they are entitled to admission as evidence.

§ 312 (316).—Declarations as to pedigree—Reason for the exception.—Pedigree is the history of family descent, which is transmitted from one generation to another, by both oral and written declarations, and, unless proved by hearsay evidence, not competent in general issues, it cannot in most instances be proved at all. Matters of pedigree consist of descent and relationship evidence by declarations of particular facts, such as births, marriages, and deaths. In such cases hearsay evidence of declarations of persons who from their situation were likely to know is admissible when the person making the declaration is dead.⁵⁵ That pedigree may be proved by hearsay testimony is settled. Such testimony is admitted because of the great difficulty, often impossibility, of proving the fact or degree of kinship between alleged relatives, the subject of inquiry being frequently of an ancient date. Respecting what facts come within the meaning of the word “pedigree,” and by whom the declaration reproduced as hearsay must have been made, there was some divergence of

⁵⁴ Condensed from Tayl. Ev., 10th ed., § 630; Berkeley Peerage Case, 4 Camp. 417; Doe ex dem. Jenkins v. Davies, 10 Q. B. 314, 116 Eng. Reprint, 122; Caupolle v. Ferrie, 23 N. Y. 90.

⁵⁵ Layton v. Kraft, 111 App. Div.

842, 98 N. Y. Supp. 72; Young v. Shulenberg, 123 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; Eiselord v. Clum, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; Faulkerson v. Holmes, 117 U. S. 389, 29 L. Ed. 915, 6 Sup. Ct. Rep. 780.

opinion in the earlier cases. But it seems to be now settled that a declaration, to be admissible, must not only have been made by a person since deceased, and must have been made *ante litem motam*, but must also have been made by a person related by blood or affinity with some branch of the family, the pedigree respecting which is in question.⁵⁶ In cases of pedigree, both in this country and in England, the declarations of deceased members of the family, made *ante litem motam*, before there was anything to throw doubt upon them, are admissible to prove pedigree. Such declarations are received as original evidence, and upon the ground of the interests of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and therefore interested in the succession in question. The term "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events occurred.⁵⁷ In England the rule is limited strictly to cases involving pedigree, and does not apply to proof of the facts which go to make up pedigree, such as birth, death, and marriage, when they have to be proved for other purposes.⁵⁸ In Vermont, and generally in this country, we think, the rule goes further, and these facts may be proved in that manner in any case where they become material.⁵⁹ This well-known exception to the general rule excluding hearsay, under which certain declarations of deceased persons may be admitted in cases of pedigree, rests in part on the supposed necessity of receiving such evidence to *avoid a failure of justice*, and in part on the ground that individuals are generally supposed to know and to be interested in those facts of

⁵⁶ From the valuable opinion of Reed, J., in *Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929.

⁵⁷ 1 Greenl. Ev., § 104; *Stein v. Bowman*, 38 U. S. (13 Pet.) 209, 10 L. Ed. 129.

⁵⁸ *Haines v. Guthrie*, L. R. 13 Q. B. D. 818.

⁵⁹ *In re Estate of Hurlburt*, 68 Vt. 366, 35 L. R. A. 794, 35 Atl. 77.

family history about which they converse, and that they are generally under little *temptation* to state untruths in respect to such matters which might be readily exposed.⁶⁰ Said Lord Chancellor Eldon: "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."⁶¹ In other words, the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest in the declarations of the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question. From necessity, in cases of pedigree hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one

⁶⁰ Stark Ev., 45; Best, Ev., 10th ed., § 498; Greenl. Ev., § 103. As to family tradition, see note to *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024.

⁶¹ *Whitelocke v. Baker*, 13 Ves. 514, 33 Eng. Reprint, 385; *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205; *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. Ed. 915, 6 Sup. Ct. Rep. 780. Of course, when better evidence is shown to be accessible, the hearsay must be excluded. See on the subject of entries in Bibles, § 316, *post*. From the nature of the case,

a question of pedigree forms an exception to the general rule as to the proof of a particular fact by hearsay, reputation, or tradition; and, in addition to the declarations of deceased persons who were likely to know, unauthenticated facts and entries, made presumably with no motive to deceive—such as an entry in a family Bible, and inscription on a tombstone, a pedigree hung up in a family mansion, and recitals in deeds—are competent evidence upon that issue: *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Young v. Schulenberg*, *supra*.

to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. It is not every statement or tradition in the family that can be admitted in evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken.⁶² We purpose considering the various kinds of evidence which may be received in cases of pedigree, and in which, of course, personal knowledge of the circumstance in issue is first, and is within the ordinary rules of evidence; and next hearsay among relations, and family conduct, and general reputation of such long standing as to preclude the idea of fabrication.⁶³ The declarations of deceased persons may be received, subject to the qualifications hereafter named, when such declarations refer to the birth,⁶⁴ living or survival,⁶⁵ marriage,⁶⁶ issue or want of issue,⁶⁷ death,⁶⁸ the time, either definite or relative, of those facts,⁶⁹ relative age or seniority,⁷⁰ name,⁷¹ relationship generally, and its degree,⁷² *or the legitimacy*, of persons

⁶² Northern Pac. Ry. Co. v. King, 181 Fed. 913, 104 C. C. A. 351; Stein v. Bowman, 13 Pet. (U. S.) 209, 10 L. Ed. 129.

⁶³ McCarty v. Hodges, 2 Edm. Sel. Cas. (N. Y.) 433.

⁶⁴ North Brookfield v. Warren, 16 Gray (Mass.), 171; American Life Ins. & T. Co. v. Rosenagle, 77 Pa. 507.

⁶⁵ Doe v. Pembroke, 11 East, 504, 103 Eng. Reprint, 1098.

⁶⁶ Caujolle v. Ferrie, 23 N. Y. 90; Cunninghams v. Cunninghams, 2 Dow. 482, 511, 3 Eng. Reprint, 939; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Hill v. Burger, 3 Bradf. (N. Y.) 432; Lyle v. Ellwood, L. R. 19 Eq. 98, 11 Moak Eng. Rep. 702.

⁶⁷ People v. Fulton Fire Ins. Co.,

25 Wend. (N. Y.) 205; King v. Fowler, 11 Pick. (Mass.) 302, 22 Am. Dec. 370.

⁶⁸ Mason v. Fuller, 45 Vt. 29; Northern Pac. Ry. Co. v. King, 181 Fed. 913, 104 C. C. A. 351; 1 Tayl. Ev. 570.

⁶⁹ Roe v. Rawlings, 7 East, 290, 103 Eng. Reprint, 107; Webb v. Richardson, 42 Vt. 465; Bridger v. Huett, 2 Fost. & F. 35.

⁷⁰ Doe v. Pembroke, 11 East, 504, 103 Eng. Reprint, 1098.

⁷¹ Monkton v. Attorney General, 2 Russ. & M. 158, 39 Eng. Reprint, 350.

⁷² Doe v. Raudall, 2 Moore & P. 20; Vowles v. Young, 13 Ves. 147, 33 Eng. Reprint, 247; Webb v. Richardson, *supra*; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277.

legally related by blood or marriage to the declarant.⁷³ But the declarations must have been made *before the controversy* in relation to which they are to be proved arose.⁷⁴ And here may be noted the use of the word "tradition," generally in the sense of reputation. This inaccurate application no doubt arises from the careless use of the terminology in cases of pedigree. Tradition is knowledge, belief or practices, transmitted orally from father to son, or from ancestors to posterity. When repute, reputation or tradition in matters of pedigree are spoken of, they mean such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that even though it cannot be said or determined which of the deceased relatives originally made them, or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history, *ante litem motam*, by a deceased person connected by blood or marriage with the person whose pedigree is to be established.⁷⁵ The erudite opinion in the case last cited contains among many valuable statements of law the following: "On reason and authority, we think that the phrase 'general repute in the family,' or 'general reputation in the

⁷³ Elder v. State, 123 Ala. 35, 26 South. 213; Kelly v. McGuire, 15 Ark. 555; Anderson v. Parker, 6 Cal. 197; Malone v. Adams, 113 Ga. 791, 84 Am. St. Rep. 259, 39 S. E. 507; Harland v. Eastman, 107 Ill. 535; De Haven v. De Haven, 77 Ind. 236; Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188, 16 Ky. Law Rep. 52; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Jones v. Jones, 36 Md. 447, 11 Am. Rep. 505; Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12; Morrill v. Foster, 33 N. H. 379; Bernards Tp. v. Bedminster Tp., 74 N. J. L. 92, 64 Atl. 960; Eisenlord v. Clum, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; George v. United States, 1 Okl. Cr. 307, 97 Pac. 1052, 100 Pac. 46; State v. McDonald,

55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444; Gehr v. Fisher, 143 Pa. 311, 22 Atl. 859; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679; Wall v. Lubbock, 52 Tex. Civ. App. 405, 118 S. W. 886; Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030; Mason v. Fuller, 45 Vt. 29; Du Pont v. Davis, 30 Wis. 170; Cox v. Brice, 159 Fed. 378, 86 C. C. A. 378; Blackburn v. Crawford, 3 Wall. (U. S.) 175, 18 L. Ed. 186.

⁷⁴ Nehring v. McMurrian, 94 Tex. 45, 57 S. W. 943; People v. Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205. See §§ 310, 311, *ante*.

⁷⁵ In re Hurlburt, 68 Vt. 366, 35 L. R. A. 794, 35 Atl. 77.

family,' when applied to cases of pedigree, means declarations of deceased members of the family made *ante litem motam*, and family history and tradition, handed down by declarations of deceased members of the family, made *ante litem motam*." The same would be the case when it is necessary to prove marriage, birth, or death for any other purpose. It has been suggested that a *dictum* of Lord Mansfield lent color to the statement that tradition was evidence of pedigree. But Lord Eldon⁷⁶ says: "It was not the opinion of Lord *Mansfield*, or any judge, that tradition, generally, is evidence even of pedigree: the tradition must be from persons, having such a connection with the party, to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."⁷⁷ The whole goes upon that: declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles, and registry books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But there may be many circumstances, forming part of the tradition, which you would reject, taking the body of the tradition." The declarations of persons connected by *marriage* are received, since they are more likely to be informed of the family of which they have become members than a relative who is only distantly connected by blood.⁷⁸ Although it was formerly considered doubtful whether the declarations of *friends*, *servants* and *neighbors* might not be received,

⁷⁶ In *Whitelocke v. Baker*, 13 Ves. Jr. 510, 511, 33 Eng. Reprint, 385. For Canadian cases, see *Walker v. Murray*, 5 O. R. 638; *Dunlop v. Servos*, 5 U. C. R. 284.

⁷⁷ *Vowles v. Young*, 13 Ves. 140, 33 Eng. Reprint, 247. See the note, 13 Ves. 147.

⁷⁸ *Doe v. Randall*, 2 Moore & P. 25; *Monkton v. Attorney General*, 2 Russ.

& M. 165, 39 Eng. Reprint, 350; *Slaney v. Wade*, 7 Sim. 611, 1 Mylne & C. 355, 58 Eng. Reprint, 965; *Robson v. Attorney General*, 10 Clark & F. 500, 8 Eng. Reprint, 820; *Davies v. Lowndes*, 7 Scott N. R. 211, 6 Man. & G. 525, 134 Eng. Reprint, 978; *Jewell v. Jewell*, 1 How. (U. S.) 219, 11 L. Ed. 108; *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205.

the rule is declared by nearly all the authorities that the declarations are confined to those made by *legal relatives*.⁷⁹ In some states evidence of common reputation is permissible by statute.⁸⁰ The declarations of the deceased parents as to the legitimacy or *illegitimacy* of their own children are admissible.⁸¹ And so is the declaration of a

⁷⁹ *Chambers v. Morris*, 149 Ala. 606, 48 South. 687; *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277; *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 11 L. R. A., N. S., 1052, 81 N. E. 808; *De Haven v. De Haven*, 77 Ind. 236; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Barnum v. Barnum*, 42 Md. 251; *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088; *Commonwealth v. Felch*, 132 Mass. 22; *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. 454; *Caujolle v. Ferrie*, 23 N. Y. 90; *Jackson v. Browner*, 18 Johns. (N. Y.) 36; *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444 (founded on the local statute); *Boone v. Miller*, 73 Tex. 557, 11 S. W. 551; *Lewis v. Bergess*, 22 Tex. Civ. App. 252, 54 S. W. 609; *Branch v. Texas Lumber Mfg. Co.*, 56 Fed. 707, 6 C. C. A. 92; *Stein v. Bowman*, 13 Pet. (U. S.) 209, 10 L. Ed. 128; *Conn. Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. Ed. 294; *Flora v. Anderson*, 75 Fed. 217; *Berkeley Peerage Case*, 4 Camp. 401.

⁸⁰ *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444.

⁸¹ As to *legitimacy*: *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Picken's Estate*, 163 Pa. 14, 25 L. R. A. 477, 29 Atl. 875; as to *illegitimacy*: *Heaton's Estate*, 135 Cal. 385, 67 Pac. 321; *Haddock v. Boston etc. Ry. Co.*, 3 Allen (Mass.), 298, 81 Am. Dec. 656; *State v. McDonald*, *supra*.

So are the declarations of foster parents: *Alston v. Alston*, 114 Iowa, 29, 86 N. W. 55. The rule that declarations of the supposed parent and deceased members of his or her family may be proven to establish the parentage, where the relationship is illegitimate, is supported in *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 18 L. Ed. 186; *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407; and in all these cases it is held that the declarations of the putative father may be proven. Unquestionably, by the great weight of authority, the declarations of the mother and the members of her family are competent to prove the relation of parent and child, without regard to whether the claim is that the child was legitimate or illegitimate. It is, of course, to be understood that this rule is applicable only in cases where the child was born before marriage of the mother, or in cases where she had never been married: *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 11 L. R. A., N. S., 1052, 81 N. E. 808. As to the declarations of parents on the question of the heirship by statute of illegitimate children, see *Smith v. Smith*, 140 Wis. 599, 123 N. W. 146. As to evidence of declarations to show maternity of illegitimate child, see note to *Champion v. McCarthy*, 11 L. R. A., N. S., 1052. See note on "Admissibility of Declarations to Show Legitimate Relationship," to *Champion v. McCarthy*, 10 Ann. Cas.

deceased illegitimate child that he had an illegitimate brother, and of a deceased legitimate child that his mother had had a child before marriage, and of a man deceased that his mother in law had borne an illegitimate child.⁸² But it has been held that the declarations of a brother of the father of such children should be rejected on the ground that the declarant was not a legal relative.⁸³ The declarations of a deceased person as to his own marriage⁸⁴

521. See, also, *In re Slaveley*, Attorney General, v. Brunnsden, 24 O. R. 324.

⁸² *Champion v. McCarthy*, *supra*.

⁸³ *Crispin v. Doglioni*, 3 Swab. & T. 44, 32 L. J. Mat. 109, 11 W. R. 500; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615. But declarations of mother's deceased sister received: *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; deceased husband's statement as to legitimacy of his wife received: *Vowles v. Young*, 13 Ves. 140, 33 Eng. Reprint, 247; *Doe v. Harvey*, Ryan & M. 297; but the declarations of an illegitimate son that his natural brother had died without issue were rejected: *Doe v. Barton*, 2 Moody & R. 28; *Doe v. Davies*, 10 Q. B. 314, 116 Eng. Reprint, 122. But it must be noted that the rule limiting proof to cases of legitimate relationship has undergone changes, principally statutory. *Flora v. Anderson*, 75 Fed. 217, is not in harmony with the great weight of authority. That case followed the English case of *Crispin v. Doglioni*, 3 Swab. & T. 44, 32 L. J. Mat. 109, 11 W. R. 500, which appears to have been based upon the common-law rule that an illegitimate is *filius nullius*. This common-law rule has been abrogated in several states by statute: *Miller v. Pennington*, 218 Ill. 220, 1 L. R. A., N. S., 773, 75 N. E. 919; *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421; and,

where such statutes have been enacted, *Crispin v. Doglioni* cannot be regarded as authority to be followed. The declarations sought to be proved in that case were those of a deceased brother of the intestate putative father, and the court held that the putative father had no relationship with a bastard son, and his declarations, or those of members of his family, were therefore incompetent: *Champion v. McCarthy*, *supra*.

⁸⁴ *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; *Rex v. Brambley*, 6 Term Rep. 330, 101 Eng. Reprint, 579; *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Washington v. Bank for Savings*, 171 N. Y. 166, 89 Am. St. Rep. 800, 63 N. E. 831. On the admissibility of declarations of person since deceased against his or her own marriage, see note to *Drawdy v. Hesters*, in 15 L. R. A., N. S., 190, from which it appears that the courts are about equally divided upon the question. The following cases hold such declarations to be admissible: *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203; *Imboden v. St. Louis etc. Trust Co.*, 111 Mo. App. 220, 86 S. W. 263; *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323; *Henderson v. Cargill*, 31 Miss. 367; *Greenawalt v. McEnelley*, 85 Pa. 352. While they have been held inadmissible in *Hill v. Hill*, 32 Pa. 511; *Hull v. Rawes*,

and legitimacy⁸⁵ have been received. But it has been said to be a question of great doubt whether, under any circumstances, the declarations of a deceased person in which he asserted his *own illegitimacy* can be received, except as an admission against himself and those who claim under him by some title derived subsequently to the declarations.⁸⁶ The fact that a man was unmarried may be established by general reputation in the family.⁸⁷ Evidence of reputation relating to descent, birth, marriage, failure of issue, age or death among those relatives whose declarations might be given in evidence after their death is received on questions of pedigree.⁸⁸ It has even been held, however, that declarations as to time, place and residence are admissible to identify certain persons as belonging to a certain family.⁸⁹ So far as *blood relations* are concerned, the law

27 Miss. 471; *Thompson v. Nims*, 83 Wis. 261, 17 L. R. A. 847, 53 N. W. 502; *Moore's Estate*, 9 Pa. Co. Ct. 338.

⁸⁵ *Procur. General v. Williams*, 31 L. J. (P. M. & Adm.) 157.

⁸⁶ *Rex v. Rishworth*, 2 Q. B. 476, 487, 114 Eng. Reprint, 187; *Procur. General v. Williams*, 31 L. J. (P. M. & Adm.) 157; *Tayl. Ev.*, 10th ed., § 637; *State v. McDonald*, *supra*.

⁸⁷ *Jacobs v. Fowler*, 135 App. Div. 713, 119 N. Y. Supp. 647.

⁸⁸ *Rogers v. De Bardeleben Coal etc. Co.*, 97 Ala. 154, 12 South. 81; *Kelly v. McQuire*, 15 Ark. 555; *In re Heaton*, 135 Cal. 385, 67 Pac. 321; *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958; *Harland v. Eastman*, 107 Ill. 535; *Dupoyster v. Gagani*, 84 Ky. 403, 1 S. W. 652; *Ewing v. Savary*, 3 Bibb (Ky.), 235; *Barnum v. Barnum*, 42 Md. 251; *Pancoast v. Addison*, 1 Har. & J. (Md.) 350, 2 Am. Dec. 520; *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088; *Fraser v. Jenkinson*, 42 Mich. 206, 3 N. W. 882; *Henderson v. Cargill*, 31 Miss. 367;

Eastman v. Martin, 19 N. H. 152; *Clark v. Owens*, 18 N. Y. 434; *Morgan v. Purnell*, 11 N. C. 95; *In re Pickens*, 163 Pa. 14, 25 L. R. A. 477, 29 Atl. 875; *American Life Ins. etc. Co. v. Rosenagle*, 77 Pa. 507; *Watson v. Brewster*, 1 Pa. 381; *Viall v. Smith*, 6 R. I. 417; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Flowers v. Haralson*, 6 Yerg. (Tenn.) 494; *Swink v. French*, 11 Lea (Tenn.), 78, 47 Am. Rep. 277; *Weiss v. Hall* (Tex. Civ. App.), 135 S. W. 384; *Odom v. Woodward*, 74 Tex. 41, 11 S. W. 925; *In re Hurlburt*, 68 Vt. 366, 35 L. R. A. 794, 35 Atl. 77; *Webb v. Richardson*, 42 Vt. 465; *Rosecommon's Claim*, 6 Clark & F. 97, 7 Eng. Reprint, 634; *Doe v. Griffin*, 15 East, 293, 13 Rev. Rep. 474, 104 Eng. Reprint, 855; *In re Gregory's Settlement*, 34 Beav. 600, 55 Eng. Reprint, 767; *Doe v. Auldjo*, 5 U. C. Q. B. 171.

⁸⁹ *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; *Young v. State*, 36 Or. 417, 47 L. R. A. 548, 59 Pac. 812, 60 Pac. 711.

does not seem to have limited the inquiry within any particular degree of relationship, although the declarations of very remote relatives might be entitled to very little weight.⁹⁰ The dissolution of the marriage relation does not render inadmissible declarations subsequently made by one of the parties.⁹¹ "Although there is some conflict in the cases, the weight of authority seems to be that while a declarant must be shown by evidence *aliunde* to belong to the family, it does not appear to be necessary to show that he belonged to the same branch of it."⁹² We need scarcely add that the rule of law admitting any kind of hearsay evidence in cases of pedigree rests upon the presumption that the declaration, family history, or family tradition, constituting the evidence offered, comes from persons having competent knowledge in respect to the subject matter of the declaration, family history, or tradition. When it appears that the evidence of this kind offered does not come from such a source, this presumption is rebutted, and it becomes inadmissible.⁹³

§ 313 (317). Same — Declarant's relationship — How proved—Particular facts.—A very careful perusal of the cases, and indeed of the text-books, is necessary to resolve what is apparently a confused idea as to when the relationship of the declarant may be proved by the declaration itself and when it must be supported by evidence *aliunde*.

⁹⁰ *Davies v. Lowndes*, 7 Scott N. R. 188; *Shrewsbury Peerage Case*, 7 H. L. Cas. 23, 11 Eng. Reprint, 1; *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205; *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760. As to "Admissibility of Declarations of Relatives of Claimant upon the Issue of His Relationship or Heirship to Decedent," see note to *In re Hartman*, in 36 L. R. A., N. S., 530, which contains valuable references to the leading English and American cases.

The Californian case to which it is appended also clearly expresses the modern law of the subject.

⁹¹ *Vowles v. Young*, 13 Ves. 140, 33 Eng. Reprint, 247; *Doe ex dem. Northey v. Harvey*, Ryan & M. 297; *Johnson v. Lawson*, 2 Bing. 92, 9 Moore, 194, 130 Eng. Reprint, 237.

⁹² *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207; *Robb's Estate*, 37 S. C. 19, 16 S. E. 241; *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854.

⁹³ *Lynch v. Ruthland*, 66 Vt. 570, 29 Atl. 1015; *In re Hurlburt*, *supra*.

One distinction to be noted is that where it is sought to set up some right derived through the declarant and to establish that right by his own statements as to the pedigree of the family of which he claimed to be a member, this cannot be done without precedent proof from other sources that he is what he claimed to be, namely, a member of the family. In other words, the declaration is of a self-serving nature. But when the case is reversed and the statement of the declarant is as to the rights of another, and the plaintiff is seeking to reach the estate of the declarant by evidence of what he said with reference to his family and kindred, then while the general rule is, that the declarations of a deceased person are not admissible in evidence on a question of pedigree, until there is some proof outside of such declarations that the declarant was in fact a member of the family about which he was speaking, nevertheless, the declarations of a decedent, whose estate is in controversy, that he was related to the one who claims his estate, are admissible in evidence without other proof of the fact of relationship. While the nature of the declaration is then disserving, that is not the real ground for its admission. Such declarations do not derive their evidential value from that consideration, which is nevertheless a useful, if an artificial, aid in determining the class to which the declarations belong. The distinction we have noted is sufficiently apparent; in the one case the declarations are self-serving, in the other they are competent from reasons of necessity.⁹⁴ Dealing, then, with the first of

⁹⁴ *Malone v. Adams*, 113 Ga. 791, 84 Am. St. Rep. 259, 39 S. E. 507. In the opinion in this case the following instructive reference to the subject is made. A case peculiarly in point is that of *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381. One Charles Wise, who had lived in Mississippi for forty years and whose antecedents were entirely unknown, died intestate. His supposed heirs at law proved that they were the

children of one Thomas Wise, of a named town in Amelia county, Virginia; that their father had a younger brother Charles, who left that state forty years previously, and that nothing had been heard of him since. They then sought to introduce the testimony of two witnesses to the effect that Charles Wise, whose estate was in question, had told them that he had a brother Thomas, who lived in the town above

these propositions, the relationship of the declarant cannot be proved by the declaration itself. There must be some

mentioned, and that he himself had lived there. The court held that these declarations were admissible. Judge Chalmers, who delivered the opinion in that case, discusses the question so clearly and so forcibly that we cannot attempt to better express our views in regard thereto than by quoting and adopting as our own the following admirable presentation by him of the law on the subject: "The general rule undoubtedly is, that before hearsay declarations in matters of pedigree can be introduced in evidence, some proof *dehors* the declarations must be made that the declarant was in fact a member of the family about which he is speaking. It was unanimously so ruled, by all the judges in the Banbury Peerage Case, 2 Sel. N. P. 764, where the petitioner sought to introduce in evidence the statements and depositions contained in a chancery litigation conducted more than one hundred and fifty years before, in which an ancestor of the petitioner styled himself and was styled by those who professed to belong to the family, the legitimate son of A B. It was held that such statements were not admissible, though upon a question of pedigree, until it could be shown by proof *aliunde* that those making these statements actually were members of the family as to which the claim was preferred. The same doctrine is announced in *Monkton v. Attorney General*, 2 Russ. & M. 147, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine. But in these and many

other cases of a similar character which might be cited, the attempt was to set up some right derived through the declarant, and to establish that right by his own statements as to the pedigree of the family of which he claimed to be a member. It seems manifest that this cannot be done without precedent proof from other sources that he is what he claims to be, to wit, a member of the family. Thus, if Charles Wise had married here and left children, it is clear that those children could not have claimed any interest in the estate of Thomas Wise, in Virginia, by virtue alone of their father's statement that Thomas was his brother. But how is it when the case is reversed, and a plaintiff is seeking to reach the estate of the declarant by evidence of what he said with reference to his family and kindred. It is quite clear that I cannot establish my right to share in the estate of A by proof alone of the fact that my father declared in his lifetime that A was his brother; but I may not do so by showing that A himself so declared? Upon this question we find a singular dearth of authorities. In *Adie v. Commonwealth*, 25 Gratt. (Va.) 712, a case strikingly like this in all its features, testimony of this character seems to have been admitted without objection, and so, also, in *Cuddy v. Brown*, 78 Ill. 415. In *Moffit v. Witherspoon*, 10 Ired. (32 N. C.) 185, persons who claimed to be the nephews and nieces of Mrs. Donahoe in an ejectment suit brought after her death to recover certain real estate belonging to her during

independent proof of this fact.⁹⁵ Thus, the declarations as to the marriage which constitutes the affinity of the declarant are not such evidence *aliunde* as the law requires. In *Doe v. Fuller*, Chief Justice Best said: "If there were no other evidence than the declarations of John to show that James was a member of the family, they could not have been received as that would be carrying the rule as to the admissibility of hearsay evidence further than has been ever yet done, viz., to allow a party to claim an alliance

her life, were permitted to prove that she had declared, many years before her death, that the mother of the plaintiffs was her only sister, and no proof of heirship other than this seems to have been offered. In *Shields v. Boucher*, 1 De Gex & S. 40, 63 Eng. Reprint, 962 (a case to which we have not had access, but which is referred to at length in Wharton on Evidence, § 208, note 4), Sir Knight Bruce expressed the strong conviction that, in a controversy purely genealogical, declarations made by a deceased person, as to where he or his family came from, of what place his father was designated, and what occupation he followed, would be admissible, and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Independently of these or any authorities, we think, *ex necessitate rei* and as a matter of common sense, that declarations such as were offered here and under the circumstances here existing, should always be received in evidence. They stand to some extent upon the footing of declarations against interest, or of what Wharton calls 'self-dis-serving declarations.' If they be not admitted, there must be in many cases a fail-

ure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and if we reject his own statements as to who he was, and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travelers who die amongst strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were."

⁹⁵ Berkeley Peerage Case, 4 Camp. 419; *Rex v. All Saints*, 7 Barn. & C. 789, 108 Eng. Reprint, 916; *Attorney General v. Cohler*, 9 H. L. Cas. 660, 11 Eng. Reprint, 885; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 18 L. Ed. 186; *Thompson v. Woolf*, 8 Or. 454; *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207; *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. Ed. 915, 6 Sup. Ct. Rep. 780. Proof of presence in the family has been held sufficient: *In re Heaton's Estate*, 135 Cal. 385, 67 Pac. 321. See note on "Admissibility of Declarations of Relationship to Decedent in Behalf of Relative of Declarant Who is Claimant of Decedent's Estate," to *In re Hartman*, 21 Ann. Cas. 1305.

with a family by the bare assertion of it.”⁹⁶ This is a *preliminary question* for the judge to determine,⁹⁷ and finds ample support in authoritative cases.⁹⁸ As to the second proposition, there is also abundant and clear support from modern cases. In a proceeding involving the establishment of relationship with a testator, declarations made by a father to his daughter, during the lifetime of a testator, to the effect that the testator was his brother, are admissible in evidence to prove that the declarant and the testator were brothers, and that the person to whom the declarations were made was the niece of the testator, notwithstanding there was no other preliminary proof of the relationship. Such declarations are rendered competent from reasons of necessity, but as a safeguard against the possibility of their being declarations in the interest of the party making them, it is required that they must have been made before any controversy over property arose.⁹⁹ The question of the relationship of the declarant to both branches has died a natural death, and there is no longer need to discuss such a self-evident proposition: “It is sometimes said that where, for example, the question is whether A is B’s heir, the declarant must appear to be related to B, and not merely to A: this seems erroneous, however, since all relationship is mutual, and the question whether

⁹⁶ *Doe v. Randall*, 2 Moore & P. 22; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 18 L. Ed. 186.

⁹⁷ *Doe v. Davies*, 11 Jur. 607, 10 Q. B. 314, 116 Eng. Reprint, 122.

⁹⁸ *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71; *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. 1038; *Anderson v. Smith*, 2 Mackey (D. C.), 275; *Green v. Norment*, 5 Mackey (D. C.), 80; *Welch v. Lynch*, 30 App. D. C. 122; *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72; *Doe ex dem. Dunlop v. Servos*, 5 U. C. Q. B. 284.

⁹⁹ *Estate of Hartman*, 157 Cal.

206, 21 Ann. Cas. 1302, 107 Pac. 105, approved and followed in *Re Clark’s Estate*, 13 Cal. App. 786, 110 Pac. 828. The same case holds that in such a proceeding evidence that two men, having the same surname, called each other brother, that each spoke to the other by his first name, and that their conversation and conduct indicated relationship and was consistent with the fact that they were brothers, suffices to establish the fact of such relationship. The presumptions of legitimacy and from the identity of name supply the fact that they were legitimate children of the same father.

A is related to B or a member of B's 'family' is also and just as much a question as whether B is related to A or a member of A's family, and on this point a person claiming to belong to A's family is competent to speak; the circumstance that the estate to be claimed is A's or B's family being immaterial."¹⁰⁰ Another distinction has been pointed out which goes to the root of the rule as to *aliunde* establishment of relationship. In the important California case to which frequent reference has been made,¹ the court says: "But, for the most part the statements to this effect in the opinions mean no more than that the declarations of persons not of kin, either to the claimant or to the person from whom descent is claimed, cannot be admitted to prove kinship."² We prefer, however, that laid down in the Mississippi case we have cited.³ In cases where the relationship is difficult of proof, *slight evidence* may suffice;⁴ since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.⁵ Nor need the exact degree of relationship be proved;⁶ nor is it necessary that the declarant should name the person from whom he obtained his information.⁷ When the declarations come from the proper source, that is, from legal relatives since deceased, they are admissible although they consist of *hearsay upon hearsay*. "Even *general repute* in the family, proved by the testimony of a surviving member of it, has been considered as falling within the rule. Moreover, it is *not necessary* to show that the declarations were contemporaneous with the events to which they relate, for, as Lord Brougham has well observed, such a restriction in pedigree 'would defeat the purpose for which hearsay is let in by preventing it from ever

¹⁰⁰ 1 Greenl. Ev., 16th ed., § 114c.

¹ Estate of Hartman, *supra*.

² Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; Estate of James, 124 Cal. 653, 57 Pac. 578, 1008.

³ Wise v. Wynn, *supra*.

⁴ Doe v. Randall, 2 Moore & P. 20; Young v. Shulenberg, 165 N. Y.

385, 80 Am. St. Rep. 730, 59 N. E. 135.

⁵ Fulkerson v. Holmes, *supra*.

⁶ Vowles v. Young, 13 Ves. 147, 33 Eng. Reprint, 247.

⁷ Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. Ed. 108.

going back beyond the lifetime of the person whose declaration is to be adduced in evidence'; and, to use a homely illustration, it would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother."⁸ In cases of pedigree the declarations, to be admissible, need not be part of the *res gestae*; if they were they would be admissible on that ground irrespective of any question of their admissibility as in a case of pedigree.⁹ Nor need the declarations, to be admissible, be upon the *knowledge of the declarant*, as this requirement would defeat the main object of permitting this class of testimony.¹⁰ The witness testifying as to the fact need not be related to the declarant; any person otherwise competent may testify.¹¹ In cases of pedigree the hearsay testimony is *not confined to ancient facts*, but extends also to matters which have recently transpired; and is not to be rejected although there may be living witnesses to the same fact.¹² While this last proposition has the *imprimatur* of the case cited, it is qualified in a much later case,¹³ which says: "To satisfy the rule that the best evidence must be produced and to show necessity, it is made a condition of their admission that the declarant is dead at the time they are offered, or out of the jurisdiction; and they are sometimes excluded when it appears that they are living persons whose testimony on the subject could be produced." And in an ejectment case in New York, which involved the ques-

⁸ Tayl. Ev., 10th ed., § 639, and cases cited; *Eaton v. Tallmadge*, 24 Wis. 217.

⁹ *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024.

¹⁰ *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; *Monkton v. Attorney General*, 2 Russ. & M. 147.

¹¹ *Elder v. State*, 124 Ala. 69, 27 South. 305; *Anderson v. Parker*, 6 Cal. 197; *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 11 L. R. A., N. S., 1052, 81 N. E. 808; *Dupoyster v. Gagani*, 84 Ky. 403, 1

S. W. 652, 8 Ky. Law Rep. 392; *Waldron v. Tuttle*, 4 N. H. 371; *Arents v. Long Island R. Co.*, 156 N. Y. 1, 50 N. E. 422; *Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 746; *Nunn v. Mayes*, 9 Tex. Civ. App. 366, 30 S. W. 479; *Mason v. Fuller*, 45 Vt. 29; *Du Pont v. Davis*, 30 Wis. 170.

¹² *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; *Vowles v. Young*, 13 Ves. 140, 103 Eng. Reprint, 247. See § 318, *post*.

¹³ *In re Hartman*, *supra*.

tion of heirship,¹⁴ we find the question discussed in these terms: "The burden of showing the death or in other words, a complete title in the plaintiffs, was incumbent on them. The proof of death entirely fails, because wholly inadmissible as hearsay. The fact was susceptible of definite proof; it was of recent occurrence, and should have been positively established. Family tradition of the death of a member, except the declarants be themselves dead, is inadmissible.¹⁵ Hearsay evidence, as applied to the fact of death, is governed by the same rules applicable to any other fact in litigation. It is only admitted, because of the necessity of the case, to establish propositions which cannot be established by direct or primary evidence. In this case, there was no necessity of a resort to secondary evidence. The alleged death was recent. It occurred in the state of Texas. It could have been proved by living witnesses, whose testimony could have been obtained upon commission, and when thus attainable it is the only competent evidence, and must be adduced."¹⁶ As we have

¹⁴ *Fosgate v. Herkimer Mfg. Co.*, 12 Barb. (N. Y.) 352.

¹⁵ *Stein v. Bowman*, 13 Pet. (U. S.) 209, 10 L. Ed. 129; 1 Phil. Ev. 194, 197; *Jackson ex dem. Garland et al. v. Browner*, 18 Johns. (N. Y.) 36.

¹⁶ *Mima Queen v. Hepburn*, 7 Cranch (U. S.), 290, 3 L. Ed. 348; 1 Greenl. Ev., § 124; *Jackson ex dem. People v. Etz*, 5 Cow. (N. Y.) 314. It is well settled that hearsay of death is only admissible under the same limitations and restrictions as on a question of pedigree. (Cowen & Hill's Notes, p. 612, and cases cited.) And the ground upon which the admission of secondary evidence, in cases of pedigree, rests, is, that from the great lapse of time, remoteness of the occurrence, or other circumstances, the law presumes, for the ends of justice, that original or

direct evidence is not attainable; that all memorials of the fact are lost; and that there are no witnesses living. (2 Phil. Ev., 4th Am. ed., 238; *Jackson v. Browner*, 18 Johns. (N. Y.) 136.) In the last case, Spencer, C. J., alluding to the case of *Higham v. Ridgway*, 10 East, 109, 103 Eng. Reprint, 717 says: "Mr. Justice Le Blanc lays down the rule of evidence in cases of pedigree with perspicuity, and places it on a reasonable ground. He considers it as a departure from the strict rules of evidence, on account of the great difficulty of proving remote facts in the ordinary way by living witnesses"; and on this ground, he says, "hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another), have

seen, when the inquiry relates to matters of public or general interest, statements in regard to *particular facts* are excluded; and only declarations as to general reputation are admitted. But in matters of pedigree the reputation depends upon particular facts such as marriage, birth or death; and necessarily the hearsay of the family as to these particular facts is admitted.¹⁷ There have been exceptional cases in which it has been held that general reputation among a person's friends and acquaintances is admissible to prove his death;¹⁸ but they established dangerous precedents on unsatisfactory reasons.¹⁹ The *times* when any of these events happened may be proved by the same kind of evidence.²⁰ Thus, such declarations were received to show the time of birth of a child in the family,²¹ and to show the relative seniority of three sons born at one time.²² In England such declarations seem to be admitted, if coming from the proper source, when they relate to the

been admitted in cases of pedigree." Under this reasonable rule, relationship, family membership, and death have been allowed to be proved by family tradition, when there are no witnesses living who could testify to the fact. So, too, evidence of long absence in a foreign land, and reputed death, has been allowed. *Jackson ex dem. Miner v. Boneham*, 15 Johns. (N. Y.) 226. Entries in family Bibles are admitted in cases of pedigree: *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; but only when there is no living witness who can speak to the recorded fact.

¹⁷ *Berkeley Peerage Case*, 4 Camp. 415; *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; 1 Greenl. Ev., § 104.

¹⁸ *Ringhouse v. Keever*, 49 Ill. 470, and *Ewing v. Savary*, 3 Bibb (Ky.), 235. In the former of these cases, it was admitted, as was said, because the deceased left no

kindred that was known. In the latter the court said such evidence was admissible when, as in that case, the death happened out of the state.

¹⁹ In *re Hurlburt*, *supra*, where they are keenly criticised and cases opposing are carefully noted. The opinion says that the better rule is that which excludes as evidence such general reputation of death among friends and acquaintances. Some of the cases holding such reputation admissible limit its admissibility to cases where the fact to be proved is ancient, and better evidence is not attainable. Such a case is *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167.

²⁰ *Beatty v. Nail*, 6 Ir. L. Rec., N. S., 17; *Kidney v. Cockburn*, 2 Russ. & M. 168, 39 Eng. Reprint, 358; *Du Pont v. Davis*, 30 Wis. 170.

²¹ *Clements v. Hunt*, 1 Jones (46 N. C.), 400.

²² *Tayl. Ev.*, 10th ed., 644.

place at which any such fact occurred.²³ But by the weight of authority in this country the place of a person's birth or death cannot be proved by hearsay evidence.²⁴ So hearsay is not admissible under this exception to prove the *legal*

²³ From Reynolds' Stephen on Evidence, we extract Article 31, which contains the English rule: "A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage or death of any person, by which such relationship was constituted or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence. Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants. They may be made in any form and in any document or upon anything in which statements as to relationship are commonly made. The conditions above referred to are as follows: (1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue. (2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person. (3) They must be made before the question in relation to which they are to be proved has arisen; but they do

not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising. This condition applies also to statements as to public and general rights or customs and matters of public and general interest." One of Stephen's illustrations calls for reproduction: "The question is which of the three sons (Fortunatus, Stephanus and Achaicus) born at a birth is the eldest. The fact that the father said Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi, 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant": Tayl. Ev., 10th ed., § 646. See *Rex v. Erith*, 8 East, 539, 103 Eng. Reprint, 450; *Doe v. Griffin*, 15 East, 293, 104 Eng. Reprint, 855; *Adams v. Swansea*, 116 Mass. 591.

²⁴ *Union v. Plainfield*, 39 Conn. 563; *Greenfield v. Camden*, 74 Me. 56; *Tyler v. Flanders*, 57 N. H. 618; *McCarty v. Terry*, 7 Lans. (N. Y.) 236; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174; *Braintree v. Hingham*, 1 Pick. (Mass.) 245. But such declarations have been held admissible for the purpose of identification: *Young v. State*, 36 Or. 417, 47 L. R. A. 548, 59 Pac. 812, 60 Pac. 711; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

status of a person, as that such person was a slave or a freeman,²⁵ or that he was under guardianship.²⁶

§ 314 (318). Are the declarations limited to cases where pedigree is the direct subject of the suit.—By the weight of authority a case is not necessarily one of pedigree because it may involve questions of birth, parentage, age or relationship. Where these questions are merely *incidental*, and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper or other things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired into.²⁷ But if the question of pedigree is incidental, the declarations are equally by the weight of authority admissible. The word "pedigree," however, in this connection is used in its strict sense, and excludes that which may be only an element of it. For example, a question of age *per se* is not a question of pedigree. Equally a question of age may involve or be involved in one of pedigree. Taylor, while approving the statement that there appears to be no foundation for any distinction between cases where a matter of pedigree is the direct subject of the suit and other cases where it occurs, incidentally said: "Yet the declarations of relatives will not necessarily be admissible whenever the birth, marriage or death of a party forms the subject of controversy; but such proof would seem to be confined to cases which directly or indirectly involve some question of relationship,

²⁵ *Mima Queen v. Hepburn*, 7 Cranch (U. S.), 290, 3 L. Ed. 348. In *Vaughan v. Phebe*, Mart. & Y. (Tenn.) 5, 17 Am. Dec. 770, a person was allowed to establish his freedom.

²⁶ *Jones v. Letcher*, 13 B. Mon. (Ky.) 363.

²⁷ *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024;

Whittuck v. Waters, 4 Car. & P. 375; *Haines v. Guthrie*, 13 Q. B. Div. 818, 53 L. J. (Q. B.) 521; *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 554; *Commonwealth v. Felch*, 132 Mass. 22; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; *Fidelity Mutual L. Ins. Co. v. Mettler*, 185 U. S. 308, 46 L. Ed. 922, 22 Sup. Ct. Rep. 662.

and in which the fact sought to be established by hearsay is required to be proved for some genealogical purpose.”²⁸ Taylor also cites the illustration, among others, that in proof of the plea of infancy, hearsay is inadmissible;²⁹ and in an insurance case in the supreme court of the United States,³⁰ among the pleas of the defendant was a challenge of the age of the assured. In the course of the trial the defendant, in order to prove that the age of the assured was different from that stated in the application for insurance, offered in evidence an entry in a minute-book of an Odd Fellows’ Lodge of which the deceased was a member. The court refused to admit the evidence, and the defendant excepted. In passing upon the ruling the court, per Strong, J., said: “Again it is urged that a man’s age is one of the elements of his pedigree, and that in proving pedigree, hearsay evidence is admitted. The argument is fallacious. It is true the age of a person may become material in questions of pedigree; but even then the hearsay evidence of strangers, persons not related by blood or marriage, are inadmissible to prove it. Moreover, the present case involves no question of pedigree. The proof of age was not offered for the purpose of showing parentage or descent, both of which were impertinent to the issue between the parties.”³¹ Two cases have been cited as illustrations of the rejection of the English rule in Massachusetts and New

²⁸ Tayl. Ev., 10th ed., § 645; Shield v. Boucher, 1 De Gex & S. 40, 63 Eng. Reprint, 962.

²⁹ Figg v. Wedderburne, 6 Jur. 218, 11 L. J. (Q. B.) 45; Haines v. Guthrie, 53 L. J. (Q. B.) 521, 13 Q. B. Div. 818.

³⁰ Connecticut Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294.

³¹ In Haines v. Guthrie, *supra*, which was an action for the price of a horse and the defense was infancy, and hearsay was tendered as to the age of the defendant, Brett, M. R., said: “What the family of

the defendant is is immaterial, whose son he is is immaterial, whether he is a legitimate or an illegitimate son is immaterial, and whether he is an elder or a younger son is immaterial. No question of family is raised in the case. . . . I think Lord Blackburn intended to make an exhaustive definition of the exceptions to the rule against the admission of hearsay evidence, and he distinctly states that, ‘in questions of pedigree,’ the statements of deceased members of the family ‘are evidence to prove pedigree.’ If that is true, and if what I have

York. They are, however, instances of a widened rather than a restricted application. In the former of these cases,³² which was an action of contract for the support of a pauper, the question of pedigree was incidentally involved because the legal settlement in controversy depended on the question whether the father of the pauper was born prior to the marriage of his parents. Bigelow, C. J., said: "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened are directly put in issue. But upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation. We are, therefore, of opinion that the rejection of the proof offered at the trial to establish the date of the death of a person who deceased more than fifty years previously was erroneous."³³ In the New York case,³⁴ the question of ad-

stated (that no question as to the family is at issue in the present case) is right, how can anyone say that the evidence in this case was given on a question of pedigree or to prove pedigree? Therefore, this evidence is not brought within the exceptions."

³² North Brookfield v. Warren, 16 Gray (Mass.), 171.

³³ In the course of this valuable opinion the learned chief justice said: "It is not denied that this evidence would have been competent, if it had been introduced to prove a fact directly in issue, such, for instance, as the date of the pauper's birth; but it is contended that it was inadmissible to establish a fact collateral in its nature, from which the main fact in issue was to be deduced by inference. But we know

of no such distinction in the rules of evidence. The competency of proof cannot be made to depend on the inference or conclusion which is sought to be drawn from it. If it is competent to prove a particular fact in controversy when it is directly in issue, it is equally competent when the same fact is to be established in order to form the ground of an inference or presumption from which the material subject of inquiry can be deduced. The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue."

³⁴ Washington v. Bank for Savings, 171 N. Y. 166, 89 Am. St. Rep. 800, 63 N. E. 831.

mitting hearsay as to the declaration of a decedent that she never had any children was raised. It was urged that as the form of the action was debt, or to recover money upon an implied promise to pay it, no question of pedigree was involved. The decedent had lodged money with the defendant in trust for her alleged children who, plaintiff alleged, were named fictitiously for some reason known only to the decedent, and hence the disputed question of fact was one of title depending upon the nature of the deposits. O'Brien, J., said: "If the deceased never in fact had any children, the money deposited was her own and subject to her order, or that of her personal representative after her death intestate. In this respect the case is not materially different, in principle, from the ordinary action of ejectment, where the plaintiff's right to recover depends upon proof that a person in the direct line of descent died without issue. In such a case proof of pedigree is admitted to establish title to land, and here, where the subject matter of the action is money left by the deceased, there is no good reason for excluding the same class of proof in a controversy to determine the real owner. . . . It was admitted to prove the nonexistence of any children, heirs or next of kin to the deceased. The declarations of the deceased which were admitted related to her family history. They were, in substance, that she had no children or relatives, and if such declarations related to pedigree they were just as admissible to prove a negative as an affirmative."³⁵ From these authorities it is sufficiently plain that hearsay is admissible when pedigree is incidentally involved, and that where it is neither directly nor indirectly involved, that is to say, where the fact does not relate to pedigree in the particular case in which it is to be proved, though

³⁵ The learned judge added that an issue of fact concerning the birth or survival of children capable of taking the estate of a deceased person, whether the estate be real or personal, is fairly within the principle that permits hearsay evidence in

matters of pedigree. In this case it may be said that the issue involved the question whether, in fact, any children had ever been born to the deceased, and her own declarations on that subject were, under the circumstances, admissible.

it might, under other circumstances, be an element in establishing or defeating a pedigree, the weight of authority is opposed to its admissibility.³⁶ There are, however, several states in which the opinion of Bigelow, C. J., has been given a wider meaning, and its terms extended to actions not relating to pedigree, most frequently where the question of age or infancy was in issue. These states permit the introduction of the hearsay, elsewhere limited to pedigree, on issues wherein the facts may be entirely dissociated from that question. In Minnesota and Pennsylvania it has been admitted on the question of the age of the maker of a note;³⁷ in Alabama and North Carolina on the question of the age of a minor to whom liquor was illegally sold;³⁸ in California, in an action for seduction, the plaintiff was permitted to state her age from what her aunt and her relations told her;³⁹ and in Texas on the age of the assured under a life policy, the court saying that the declaration objected to had a tendency to prove some fact of family history coming within the meaning of the term "pedigree."⁴⁰

³⁶ *Bowen v. Preferred Acc. Ins. Co.*, 68 App. Div. 342, 74 N. Y. Supp. 101; *Hunt v. Order of Chosen Friends*, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67; *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024.

³⁷ *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; *Watson v. Brewster*, 1 Pa. 381.

³⁸ *Bain v. State*, 61 Ala. 75; *State v. Best*, 108 N. C. 747, 12 S. E. 907. Although in *Rogers v. De Bardeleben etc. Co.*, 97 Ala. 154, 12 South. 81 (personal injury action), the evidence of a minor's brother and brother in law as to the plaintiff's age was excluded and age was treated as pedigree.

³⁹ *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. 580, and in *People v. Ratz*,

115 Cal. 132, 46 Pac. 915, the same rule was followed even to the extent of admitting entries in a family Bible in a foreign language unknown to the mother of the girl, who merely proved it to be the family Bible; but in *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 252, 50 Pac. 654, the court in a prosecution for rape adopted the better rule that although the age of the female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proved by the written declaration of a third person.

⁴⁰ *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286. In *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942, the court said: "Our supreme court has acted upon a much more liberal doctrine

§ 315 (319). **Acts and conduct of relatives admissible as well as declarations—Written declarations.**—Thus far the discussion has had reference to verbal declarations in matters of pedigree. But the evidence of this character may also consist of proof of acts showing the *conduct of relatives* and the mode of treatment of those whose parentage or descent is in question. For instance, if a son is treated in the family as a legitimate child, “this amounts to a daily assertion that the son is legitimate.”⁴¹ On the other hand, if the birth of a child is concealed, and if it is never recognized in the family as legitimate, these and other similar circumstances may be shown in the same manner as verbal declarations.⁴² So the giving or withholding property may be a circumstance from which inferences may fairly be drawn as to the question of relationship.⁴³ On the same principle *written declarations* have often been received in matters of pedigree.⁴⁴ When the proper foundation is laid by showing that they are the statements of relatives since deceased, it makes no difference, so far as competency is concerned, whether the entries or writings have been made in the most formal and solemn manner or whether they are of an *informal* character.⁴⁵ Thus,

with regard to hearsay testimony in proof of such facts, and has adopted the rule that the declarations of relatives are admissible to prove the facts of death, birth, and marriage, in all cases where they are the subjects of investigation, under the same limitations as would apply in case of pedigree; that is, such declarations must have been made before the beginning of the controversy, and the declarant must be dead at the time the evidence is offered.”

⁴¹ Berkeley Peerage Case, 4 Camp. 416; Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008.

⁴² Hargrave v. Hargrave, 2 Car. & K. 701; Goodright v. Saul: 4 Term Rep. 356, 100 Eng. Reprint, 1062;

Morris v. Davies, 5 Clark & F. 163, 241, 7 Eng. Reprint, 365; Banbury Peerage Case, 1 Sim. & S. 153, 57 Eng. Reprint, 62; Reg. v. Mansfield, 1 Q. B. 444, 113 Eng. Reprint, 1203; Townshend Peerage Case, 10 Clark & F. 289, 8 Eng. Reprint, 752; Atchley v. Sprigg, 33 L. J. (Ch.) 345, 3 N. R. 360, 10 Jur., N. S., 144.

⁴³ Robson v. Attorney General, 10 Clark & F. 498, 8 Eng. Reprint, 820; Hungate v. Gaseoyne, 2 Phill. 25, 2 Coop. 414, 41 Eng. Reprint, 850; De Roos Peerage Case, 2 Coop. 540.

⁴⁴ Mason v. Fuller, 45 Vt. 29; Murray v. Supreme Hive etc., 112 Tenn. 664, 80 S. W. 827.

⁴⁵ Jennings v. Webb, 8 App. Cas. D. C. 43.

solemn entries in the family Bible made by a relative⁴⁶ and letters of deceased relatives containing statements as to family matters⁴⁷ are admissible on the same ground, although, of course, entitled to very different degrees of credibility. In an action involving title to land by inheritance, letters of deceased persons showing family conduct, and containing tacit recognitions and declarations of relationship, are admissible as such on the question of pedigree.⁴⁸ Other illustrations of written declarations which have been admitted as to questions of pedigree are entries made in almanacs,⁴⁹ charts of pedigree,⁵⁰ school census,⁵¹ or other books or papers which mention births, marriages, and deaths.⁵² Of the same character are inscriptions on *monuments*,⁵³ recitals in *wills*⁵⁴ and in *deeds* of conveyance,⁵⁵ as

⁴⁶ Berkeley Peerage Case, 4 Camp. 401; Weaver v. Leiman, 52 Md. 708. See note to Grand Lodge etc. v. Bartes, 111 Am. St. Rep. 586, 588.

⁴⁷ Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442; Green v. Norment, 5 Mackey (D. C.), 80; State v. Joest, 51 Ind. 287; Byers v. Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Elliott v. Peirsol, 1 Pet. (U. S.) 328, 7 L. Ed. 164.

⁴⁸ Butcher v. Sommerville, 67 W. Va. 261, 67 S. E. 726, which contains an interesting illustration of the admission of correspondence.

⁴⁹ Herbert v. Tuckal, T. Ryan, 84, 83 Eng. Reprint, 46.

⁵⁰ Monkton v. Attorney General, 2 Russ. & M. 163, 39 Eng. Reprint, 350; Eastman v. Martin, 19 N. H. 152.

⁵¹ Bertram v. Witherspoon, 138 Ky. 116, Ann. Cas. 1912A, 1217, 127 S. W. 533.

⁵² Collins v. German-American Mut. L. Assn., 112 Mo. App. 209, 86 S. W. 891; Derby v. Salem, 30 Vt. 722.

⁵³ Slaney v. Wade, 1 Mylne & C. 338, 40 Eng. Reprint 404; De Roos Peerage Case, 2 Coop. 544; Camoys Peerage Case, 6 Clark & F. 801, 7 Eng. Reprint, 895.

⁵⁴ Russell v. Langford, 135 Cal. 356, 67 Pac. 331; Pearson v. Pearson, 46 Cal. 609; Russell v. Jackson, 22 Wend. (N. Y.) 277; Shuman v. Shuman, 27 Pa. 90; Neal v. Wilding, 2 Str. 1151, 93 Eng. Reprint, 1094; Skeene v. Fishback, 1 A. K. Marsh. (Ky.) 356; Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942; Gaines v. New Orleans, 6 Wall. (U. S.) 642, 18 L. Ed. 950; De Roos Peerage Case, 2 Coop. 541.

⁵⁵ Mann v. Cavanaugh, 110 Ky. 776, 62 S. W. 854; Barnum v. Barnum, 42 Md. 251; Rollins v. Atlantic City R. Co., 73 N. J. L. 64, 62 Atl. 929; Jackson v. Cooley, 8 Johns. (N. Y.) 128; Scharff v. Keener, 64 Pa. 376; Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894; Fulker-son v. Holmes, 117 U. S. 389, 6 Sup. Ct. Rep. 780, 29 L. Ed. 915; Smith v. Tebbitt, L. R. 1 Pro. & D. 354, 36

well as the entries of material reference in marriage settlements and certificates.⁵⁶

§ 316 (320). **Same—Family recognition of writings and records.**—In the case of informal declarations of this character, greater strictness may be required in proving the handwriting than is necessary in those more solemn statements which are contained in family records.⁵⁷ In general, *proof must be given that the entry in question was made by some member of the family or that it has been recognized as genuine by members of the family.*⁵⁸ In such case, recognition by the family of writings and records operates in the same way as ratification in principal and agent. In a Georgia case, the court in construing the code section, which provides that “pedigree, including descent, relationship, birth, marriage and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, family trees, and similar evidence,”⁵⁹ said that they knew of no rule requiring that the “genealogy, inscription, family tree, or similar evidence,” should be actually written by the father or mother. If the registry is recognized by either as such—that is, by the mother, the father being dead—is kept by her, and after her death goes into the possession of a daughter, is in the handwriting of another daughter, who is deceased, and is still preserved in the family, it comes within the terms “similar evidence,” and is certainly equivalent to “declaration of a deceased person related by blood or marriage,” even if it be not competent under other words used in the section

L. J. (Pr. & Mat.) 35; Doe v. Davies, 10 Q. B. 325, 116 Eng. Reprint, 122. A *recital in a deed* by deceased grantor that she is a “widow” is evidence as to the death of her husband: Harman v. Stearns, 95 Va. 58, 27 S. E. 601.

⁵⁶ Doe v. Davies, 10 Q. B. 314, 116 Eng. Reprint, 122; parish records of baptism: Hancock v. Su-

preme Council, 67 N. J. L. 614, 52 Atl. 301.

⁵⁷ Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442.

⁵⁸ Crawford v. Lindsay Peerage Case, 2 H. L. Cas. 558, 9 Eng. Reprint, 1196; Hood v. Beauchamp, 8 Sim. 26, 59 Eng. Reprint, 11.

⁵⁹ § 3772, now § 5764, Ga. Code 1910.

quoted.⁶⁰ Where there is no proof that the deed or other instrument has been executed or recognized by a lawful relative, it will be rejected.⁶¹ This rule has, however, been relaxed in respect to entries in the *family Bible* on the ground that entries therein are presumed to be known to the members of the family and to have been adopted as correct.⁶² But it must be remembered that notwithstanding the relaxation of the rule in favor of Bible entries, they cannot be used where better evidence is attainable. The question received attention in a Texas case,⁶³ in an action in a liquor dealer's bond for permitting one under twenty-one years of age to enter and remain on the licensed premises. The prosecution sought to prove the minor's age by the family Bible although the father and mother had both testified on the subject. The court affirmed the doctrine laid down in a previous case:⁶⁴ "The entries in the family Bible, offered to prove the date of the defendant's birth, were excluded upon the ground that there was better evidence accessible, his mother being within reach of the

⁶⁰ Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535. The fact that the witness who stated all this added that the mother said it was copied by the daughter, and that he and the family did not acknowledge the record as correct, does not render it incompetent. He did not say in what it was not considered correct, nor did he say that the mother, or the daughter in whose handwriting it was, did not consider it correct. The facts stated by him might be considered by a jury in determining the weight to be given to the registry as evidence, for it certainly is not conclusive, and it is subject to be weakened or strengthened by all the proof in reference to it.

⁶¹ Slaney v. Wade, 1 Mylne & C. 338, 40 Eng. Reprint, 404; Fort v. Clarke, 1 Russ. 604, 38 Eng. Reprint, 231.

⁶² Berkeley Peerage Case, 4 Camp. 421; Monkton v. Attorney General, 2 Russ. & M. 162, 39 Eng. Reprint, 350; Rex v. All Saints, 7 Barn. & C. 789, 108 Eng. Reprint, 916; Greenleaf v. Dubuque etc. R. R. Co., 30 Iowa, 301; People v. Ratz, 115 Cal. 132, 46 Pac. 915; People v. Slater, 119 Cal. 620, 51 Pac. 957; Union Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 36 L. R. A. 271, 26 S. E. 421. See note on "Admissibility of Entry in Family Bible to Show Age, When Person Making Entry is Dead or Unknown," to Bertram v. Witherspoon, Ann. Cas. 1912A, 1218.

⁶³ Smith v. Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108.

⁶⁴ Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67.

process of the court. In this there was no error. It has been considered that these entries stand on the ground of family acknowledgments, and that they are admissible on account of their publicity, without proof that the entries were made by a member of the family. But, when better evidence is shown to be accessible, they are excluded by the rule that excludes the secondary when primary evidence can be obtained. When admitted, it is in general, as the declarations of the persons to whom they were made. But they cannot be received where the father or mother or other declarant is present in court or within reach of process.⁶⁵ Thus the mother's entry in the family Bible was held to have been properly rejected, she being in court."⁶⁶ In a memorable case, the supreme court of the United States attached great importance to a declaration in a will as to the legitimacy of a child;⁶⁷ and it has been held that even a canceled will, which was never acted upon, might be admitted on proof that it came from the custody of a descendant of the testator.⁶⁸ On the same principle inscriptions on tombstones,⁶⁹ family portraits,⁷⁰ rings⁷¹ and other *family memorials* have been long and frequently re-

⁶⁵ Taylor v. Hawkins, 1 McCord (S. C.), 164.

⁶⁶ Leggett v. Boyd, 3 Wend. (N. Y.) 376.

⁶⁷ Gaines v. New Orleans, 6 Wall. (U. S.) 642, 699, 18 L. Ed. 950. Mr. Justice Davis said in that case: "This case seems to have been defended on the idea that every presumption was against the legitimacy of Mrs. Gaines, and the inclination of courts would be so to decide. But, as she was declared legitimate by her father in his last will and testament, common justice, not to speak of legal rules, would require that such a declaration should only be overborne by the strongest proof; and yet detached portions of evidence, scattered through the record here and there,

are invoked to destroy the dying declarations of an intelligent man, that a beloved child was capable of inheriting his property."

⁶⁸ Doe v. Pembroke, 11 East, 504, 103 Eng. Reprint, 1098.

⁶⁹ Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088; Monkton v. Attorney General, 2 Russ. & M. 162, 39 Eng. Reprint. 350; Goodright v. Moss, 2 Cowp. 594, 98 Eng. Reprint, 1257. Before such declarations are received there must be some proof of the identity of the person whose name is so inscribed: Gehr v. Fisher, 143 Pa. 311, 22 Atl. 859.

⁷⁰ Camoy's Peerage Case, 6 Clark & F. 801, 7 Eng. Reprint, 895.

⁷¹ Vowles v. Young, 13 Ves. 144, 33 Eng. Reprint, 247.

ceived as evidence of the facts they recite; and the courts hold that they are entitled to more or less weight according to the circumstances of the case. Of course, if the entries in family Bibles are to be proved, under the familiar rule the entries themselves are the best evidence. When a *copy* of a Bible record was tendered on the ground that the original, being worn and blotched, could not be distinctly read, and the witness did not know what had become of the original leaf, its absence was not sufficiently accounted for to justify the admission of the secondary evidence of the copy.⁷²

§ 317 (321). **Weight of such testimony.**—In a large majority of cases in which pedigree is involved, the real importance of the evidence adduced lies in its weight as much as in its admissibility, and as we have shown, for instance, in the case of Bible entries and others of a like nature, the circumstances around the testimony are of paramount interest. An entry made at the time of an event by the person most interested, if without motive to falsify, is, of course, more forcible than a similar entry made perfunctorily.⁷³ Doubtless in the majority of cases there is no motive for making false statements in inscriptions of this character,

⁷² *McDeed v. McDeed*, 67 Ill. 545; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232. As to entries in family Bible or other religious book, see note to *Supreme Council etc. v. Conklin*, 41 L. R. A. 449.

⁷³ An interesting illustration of the weight accorded to an unsatisfactory Bible record is furnished in *Greenwood v. City of New Orleans*, 12 La. Ann. 426. In that case the Bible was produced to show the minority of a party to a suit when it had been heard. The Bible purported to contain a record of the births and deaths in the family. In the entry for the minor in question

a blank had been left which was filled in in pencil. The entry showed him to be twenty years of age at the time of the decree. The remainder of the entries appeared to have been made at the same time with the same pen and ink. The minor survived the decree ten years and never complained of it. The witnesses who verified the entries spoke after the lapse of fifty years, and in the face of positive evidence opposed to the Bible record the court held that the testimony was insufficient to set aside proceedings which had been acted upon and tacitly acquiesced in for nearly thirty years.

but the instances cited by Phillips well illustrate the fact that even inscriptions on tombstones are to be received in evidence with due allowance for the errors to which both carelessness and family pride contribute.⁷⁴ As to such inscriptions, they fall within the general rule that monumental inscriptions, if sufficiently authenticated as genuine, and as having been received as such by the family, are regarded as admissible, but not always as credible, evidence.⁷⁵ "In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and, if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that."⁷⁶ It is hardly necessary to add that, while hearsay declarations as to pedigree in other forms are admissible, and often valuable in the absence of other evidence, it must be borne in mind that such declarations are subject to many of the objections which may be urged against other hearsay evidence, and hence are to be received with considerable caution. Family pride may have tempted the declarant to allege or deny a relationship contrary to the fact; and although persons may be presumed to know the facts connected with their own family history, yet, as is well known, this presumption is often contrary to the fact. Moreover, it is evident that prejudicial and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and that they can do so with comparative impunity from exposure or punishment. Evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency.⁷⁷ The hearsay testimony of aged and deceased members of the family

⁷⁴ Phill. Ev. 222, notes; McGoon v. Irvin, 1 Pinn. (Wis.) 526, 44 Am. Dec. 409.

⁷⁵ McClaskey v. Barr, 54 Fed. 781; Pow. Ev., 3d ed., 147, 150; Davies

v. Lowndes, 6 Man. & G. 527, 134 Eng. Reprint, 978.

⁷⁶ Bacon, V. C., in Haslam v. Cron, 19 W. R. 969.

⁷⁷ Estate of Williams, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670.

is very proper, and admissible in suits of this kind, and it is allowed from the necessity of the case; for in many instances it is the only evidence possible to establish pedigree and consanguinity. In fact, anything which affords reasonable grounds of belief is competent to be considered to establish relationship; but loose declarations and expressions implying heirship, uncertain in their character, have not much influence in determining such relationship. The reliance placed upon this kind of evidence depends upon the circumstances attending the declarations, as well as the knowledge that the declarant is supposed to have possessed of the matters spoken of.⁷⁸ Once, however, such testimony has stood the ordeal of the close scrutiny to which it should always be subjected, it is, especially in cases of reputation, to be accorded persuasive weight. Reputation of pedigree is the result of the public mind, founded upon actual knowledge of the whole community; and experience and knowledge of the nature and habits of men teach the unerring certainty of the public knowledge and conclusion in relation to family history. "Individuals may fail in their investigations of particular facts; but, where marriages, births, and deaths are the facts to be learned, human curiosity saves us the trouble and expense of proving the occurrences by witnesses present, or by the hearsay of those who were, or of the family connection. No individual investigations or testimony can generally be equal in certainty to the curious' scrutiny; and if secrecy be attempted, public curiosity sets on foot an anxious search for the truth. General reputation of such facts is not only competent, but highly credible."⁷⁹ The testimony of living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and the periods of their death, are entitled to more weight than that of persons unconnected with the family, strangers to its blood, and, therefore, having no feeling nor interest in keeping accurate information upon the subject. Of course, such

⁷⁸ *Denoyer v. Ryan*, 24 Fed. 77.

⁷⁹ 3 Stark. Ev. 1117; *Flowers v. Haralson*, 6 Yerg. (Tenn.) 494.

proof is not entitled to more weight than the positive information of other witnesses, who speak from their own personal knowledge and observation.⁸⁰ In a leading English case the remarks of Sir John Romilly⁸¹ may well be adopted in concluding this section: "Slight reliance is to be paid to the declarations of deceased persons, said to have been made before, but remembered after the cause of litigation has arisen. Such evidence is usually given with minute particularity, but is subject to no worldly sanction. Declarations of deceased members of the family afford important evidence, on questions of pedigree, if supported by entries and documents, but the court has been compelled to reject a case which depends, exclusively, on evidence of such declarations. In pedigree cases, resting on the declarations of deceased persons, the court is compelled to regard with great suspicion the evidence of persons interested. It requires very strong evidence to satisfy the court that a parish register is not to be trusted in so material a matter as the Christian name of a child whose baptism is recorded. In pedigree cases, the question usually mainly turns on one link in the pedigree."

§ 318 (322). Declarations only admissible if declarant dead or unavailable.—It is evident from the discussion which has preceded and the authorities cited that declarations are not admissible under this exception to the general rule, unless it is shown that the *declarant is dead*; hence it is incumbent upon him who offers testimony of this character to prove the declarant's death.⁸² But when this

⁸⁰ Saunders v. Fuller, 4 Humph. (Tenn.) 516.

⁸¹ Webb v. Haycock, 19 Beav. 342, 52 Eng. Reprint, 382.

⁸² Chambers v. Morris, 159 Ala. 606, 48 South. 687; Rogers v. De Bardeleben Coal etc. Co., 97 Ala. 154, 12 South. 81; In re Hartman, 157 Cal. 206, 21 Ann. Cas. 1302, 107 Pac. 105; Champion v. McCarthy,

228 Ill. 87, 10 Ann. Cas. 517, 11 L. R. A., N. S., 1052, 81 N. E. 808; Harland v. Eastman, 107 Ill. 535; Greenleaf v. Dubuque etc. R. Co., 30 Iowa, 301; Dupoyster v. Gagani, 84 Ky. 403, 1 S. W. 652, 8 Ky. Law Rep. 392; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Haddock v. Boston etc. R. Co., 3 Allen (Mass.), 298, 81 Am. Dec. 656; Mooers v.

condition is complied with, it is no objection to the competency of the declarations that other persons are living who have the requisite knowledge, and who might be produced as witnesses. Although this fact might afford an unfavorable inference, it would not exclude legal testimony.⁸³ In a recent West Virginia case, on a question of pedigree, the letters of a deceased person were objected to on the ground that they contained declarations of a living witness present and actually examined. The court, overruling the objection, held that the letters were admitted, not as the declarations of the living witness, but as those of two members of the family, both deceased.⁸⁴ And the fact that the declarant is *not available to testify* is equivalent to that of his death. It has not been clearly laid down that there is an exception to this rule requiring the death of the declarant to be proved; but it is sufficiently plain by implication that when the declaration of some member of the family is tendered, it is sufficient to prove either his death or that he is unavailable. "To render the evidence competent it must appear that the declarant, or source of the witness' information, was a member of the family, or related to the family, whose history the fact concerns, and was deceased or out of the state. The witness must name the source of his information, and show

Bunker, 29 N. H. 420; Nolan v. Nolan, 35 App. Div. 339, 54 N. Y. Supp. 975; Kaywood v. Barnett, 20 N. C. 88; State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444; Robinson v. Blakely, 4 Rich. (S. C.) 586, 55 Am. Dec. 703; Rowan v. State, 57 Tex. Cr. 625, 136 Am. St. Rep. 1005, 124 S. W. 668; Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942; Butcher v. Sommerville, 67 W. Va. 261, 67 S. E. 726; Branch v. Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92; Pendrell v. Pendrell, 2 Str. 924, 93 Eng. Reprint, 945; Butler v. Mountgarret, 6 Ir. L. Rec., N. S., 77,

7 H. L. Cas. 633, 11 Eng. Reprint, 252. In Dupoyster v. Gagani, *supra*, it was held that general reputé of the claimant in the family may be shown by the testimony of the surviving members of the family. See note on "Admissibility of Entry in Family Record to Show Age, Marriage, or Pedigree, Where Person Making Entry is Alive," to State v. Miller, 6 Ann. Cas. 59.

⁸³ Butler v. Mountgarrett, 6 Ir. L. Rec., N. S., 77, 7 H. L. Cas. 633, 11 Eng. Reprint, 252; 2 Phil. Ev. 212. See § 313, *ante*.

⁸⁴ Butcher v. Sommerville, 67 W. Va. 261, 67 S. E. 726.

affirmatively that it was a relative or connection.”⁸⁵ And in an earlier West Virginia case⁸⁶ we find: “Oral declarations are equally primary as family records or other documents of the nature of hearsay, but the competency of each depends not, indeed, on entire absence of more satisfactory evidence, but on the death of the declarant; and if he is alive and present or within reach of process, the declaration, whether oral or written, is incompetent.” Some confusion on this subject is attributable to a passage in the important New York case already referred to.⁸⁷ The portion of the opinion referred to says that the exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. While authority is cited for that part of the opinion, it is necessary to note that there are *dicta* that such evidence should be excluded where the same matter could be testified to by living witnesses, that is, in cases of ordinary hearsay, as opposed to the individual declarations of a deceased member of the family as to his own knowledge. For example, when hearsay evidence of a marriage had been erroneously received, Gibson, C. J., said:⁸⁸ “Such evidence is admissible in cases of pedigree depending on legitimacy; for it is often necessary in them to mount up to a remote period for evidence of marriage, and the traditions of the family, or the declarations of deceased persons whose relation to the parties qualified them to speak with certainty, are frequently the best evidence of which the case is susceptible, and admissible by a species of necessity; not so where one of the parties produces them as evidence of a comparatively recent marriage, which is as susceptible

⁸⁵ Abbott, Tr. Ev. 91; State v. gett v. Boyd, 3 Wend. (N. Y.) McDonald, 55 Or. 419, 103 Pac. 512, 376.
104 Pac. 967, 106 Pac. 444.

⁸⁶ Peterson v. Ankrom, 25 W. Va. 552, 27 N. E. 1024.
⁸⁷ Eisenlord v. Clum, 126 N. Y.

56, citing Abbott, Tr. Ev. 96; Leg-
⁸⁸ Covert v. Hertzog, 4 Pa. 145.

of the ordinary proof as any other fact of the same date." In a Texas case⁸⁹ Wheeler, C. J., said: "The entries in the family Bible, offered to prove the date of the defendant's birth, were excluded upon the ground, that there was better evidence accessible, his mother being within reach of the process of the court. In this, there was no error. . . . When better evidence is shown to be accessible, they are excluded, by the rule that excludes the secondary, when primary evidence can be obtained. When admitted it is, in general, as the declaration of the persons by whom they were made. But they cannot be received where the father, mother, or other declarant, is present in court, or within reach of process. Thus, the mother's entry in the family Bible was held to have been properly rejected, she being in court." Again, in the oft-cited Vermont case,⁹⁰ we learn that: "When all the facts relative to a question of pedigree are within the knowledge of living witnesses and none of such facts are derived from the declarations of deceased members of the family, there is no necessity for resorting to so-called 'family reputation,' created wholly by the living, any more than in any other kind of case not involving pedigree. The testimony of such witnesses can be produced in court, and from it the triors can find such facts as they think it proves." In an Illinois case,⁹¹ where facts involved in a question of pedigree were sought to be established by proof of general reputation in the family emanating from the husband of a grandchild of an intestate, the court said, that when it was shown that two of the children of the intestate were living, and within reach of the process of the court the testimony of the witness as to reputation, founded on what he had heard them or his wife say, could not be deemed sufficient, "because they are all living, and their sworn testimony is better than their unsworn statements." While there is a dearth of direct au-

⁸⁹ Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67.

⁹¹ Harland v. Eastman, 107 Ill. 535.

⁹⁰ In re Hurlburt's Estate, 68 Vt. 366, 35 L. R. A. 794, 35 Atl. 77.

thority on the point, there need be little or no hesitation in interpreting the hard-and-fast rule to this extent. Having regard always to the rule of necessity which controls for the most part the admission of hearsay in pedigree, it may be gathered from the authorities: 1. That in cases of individual declarations by a member of the family which it is sought to introduce in evidence, the declarant must be dead or unavailable; 2. That evidence of such individual declarations is admissible notwithstanding that living witnesses could testify to the same matter, such as a deceased mother's declaration as to the time of her child's birth, the father being alive and within reach of the court; 3. That in cases of ordinary hearsay which could have been proven by such member alone, the rule as to death or not being available applies; 4. That where such ordinary hearsay as distinguished from individual declaration could be proved as well by living witnesses in the same family, the evidence of such witnesses is also admissible; 5. That where such ordinary hearsay could only be proved by living witnesses outside the family, such evidence is admissible; 6. That where the event, the subject of proof, is of such recent occurrence that it could be proved by direct testimony of living witnesses, then such testimony is to be preferred to that which is hearsay. It must be noted that with regard to this last proposition, there is not so much a conflict, as an uncertainty, which is in part derived from the language in two United States cases. In one of them,⁹² Story, J., speaking of the admission of hearsay upon the ground of necessity in pedigree cases, refers to the great difficulty of proving "remote facts" by living witnesses, and in the other,⁹³ Woods, J., speaks of facts which occurred many years before the trial. On the maxim of *expressio unius, exclusio alterius*, it may therefore be assumed that in cases of hearsay (always distinguished from the individual declaration), where the matter is recent and

⁹² *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 9 L. Ed. 475.

⁹³ *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. Ed. 915, 6 Sup. Ct. Rep. 780.

can be directly proved as indicated, such form of proof is to be preferred. It will be found that these propositions are with one exception all related to the rule of necessity which calls for the best evidence attainable, and while they may not cover every case which combinations of circumstances may produce, they will offer a guide on a subject which has become a little difficult by reason, perhaps, of misconstruction of opinions on the one hand and misapprehension of the underlying principles of the laws of evidence on the other. Of these one of the most common is that declarations of a deceased member of the family are admissible or not, according to the necessity of the particular case. That is not so. They are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application. Nor do such declarations stand upon the footing of secondary evidence, to be excluded where a witness can be had who speaks upon the subject from his own knowledge.⁹⁴ As in the case of declarations respecting matters of public or general interest, the declarations of deceased relatives concerning pedigree will not be excluded, although they were made *for the purpose of preventing the question from arising*.⁹⁵ Nor will the declarations be excluded, if otherwise competent, although the *declarant* may have *had an interest* in the matters about which the declaration was made. This is a fact affecting the weight and not the competency of the evidence.⁹⁶ We have already discussed the rule, which is alike applicable in questions of pedigree and in matters of public and general interest, that the declarations must have

⁹⁴ *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323. "Hearsay evidence is, of course, inadmissible, if the person making the declaration is alive and can be called. But the declarations of a deceased mother, as to the time of the birth of her son, are admissible, though the

father is living and not called." Hubback on Evidence of Succession, 660 (48 Law Lib.).

⁹⁵ *Berkeley Peerage Case*, 4 Camp. 401; Steph. Ev., art. 31.

⁹⁶ *Doe v. Davies*, 10 Q. B. 325, 116 Eng. Reprint, 122,

been made *before the controversy arose*.⁹⁷ This is the rule generally sustained by the authorities.

§ 319 (323). Entries in the course of business by deceased persons.—The rule for the admissibility of entries made by private parties in the ordinary course of their business requires “not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.”⁹⁸ It has long been a settled rule of law both in England and in this country that a minute or memorandum in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that the fact occurred, is admissible in evidence.⁹⁹ Entries of this class are not received on the

⁹⁷ *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 7 L. Ed. 164; *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942.

⁹⁸ *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. Ed. 908, followed in *Rosenthal v. McGraw*, 138 Fed. 721, 71 C. C. A. 277.

⁹⁹ *McDonald v. Carnes*, 90 Ala. 147, 7 South. 919; *Everly v. Bradford*, 4 Ala. 371; *Railway Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878; *Culver v. Marks*, 122 Ind. 554,

17 Am. St. Rep. 377, 7 L. R. A. 489, 23 N. E. 1086; *Williamson v. Doe*, 7 Blackf. (Ind.) 12; *Bank of Tennessee v. Smith*, 9 B. Mon. (Ky.) 609; *Lathrop v. Lawson*, 5 La. Ann. 238, 52 Am. Dec. 585; *Dow v. Sawyer*, 29 Me. 117; *Heiskell v. Rollins*, 82 Md. 14, 51 Am. St. Rep. 455, 33 Atl. 263; *Clarke v. Magruder*, 2 Har. & J. (Md.) 77; *Parker v. Nickerson*, 137 Mass. 487; 1 Smith's Lead. Cas. 344; *Union Bank v.*

theory that they are declarations against the interest of the person who made them, but on the ground that they were made in the *due course of business* as part of the *res gestae*; and this is deemed to afford sufficient presumption that the facts are as stated in the memorandum.¹⁰⁰ American cases have settled the very reasonable and useful rule that all entries made in the regular course of business, private or public, are admissible, though not against interest. "And though the circumstance that an entry in the regular course of business is against interest will undoubtedly add to its credibility, yet it cannot be considered as settled in our law that the mere circumstances of an entry or declaration being against a person's interest, renders it evidence of the fact between third persons, after his death."¹ Said a learned judge. "What a man has said when not under oath may not, in general, be given in evidence when he is dead; because his words may be misconstrued and misrecollections; as well as because it cannot be known that he was under any strong motive to declare the truth. Yet there are well known exceptions to this rule, as in questions concerning pedigree. But what a man has actually done and committed to writing, when under obligation to do the act, it

Knapp, 3 Pick. (Mass.) 96; Boston v. Weymouth, 4 Cush. (Mass.) 538; Wheeler v. Walker, 45 N. H. 355; Merrill v. Ithaca & O. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Bland v. Warren, 65 N. C. 372; Sterrett v. Bull, 1 Binn. (Pa.) 234; Rigby v. Logan, 45 S. C. 651, 24 S. E. 56; Champneys v. Peck, 1 Stark, 404; Bacon v. Vaughn, 34 Vt. 73; Nichols v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908; Doe v. Turford, 3 Barn. & Ad. 898, 110 Eng. Reprint, 327; Pitman v. Maddox, 2 Salk. 690, 91 Eng. Reprint, 585; Price v. Torrington, 1 Salk. 285, 91 Eng. Reprint, 252;

Pritt v. Fairelough, 3 Camp. 305, 13 R. R. 811. A full discussion will be found in 1 Smith's Lead. Cas. 567. See, also, extended note to Union Bank v. Knapp, 15 Am. Dec. 191. Cases applicable to particular records will be found well arranged in 5 Ency. of Ev. 268-280. See, also, the following Canadian cases: Ganton v. Size, 22 U. C. R. 473; Watson v. Harrington, 21 N. S. R. 218; Lloyd v. Adams, 27 N. B. R. 590.

¹⁰⁰ Chambers v. Bernasconi, 4 Tyrw. 531, 1 C. M. & R. 347; Welsh v. Barrett, 15 Mass. 380.

¹ 2 Smith's Lead. Cas. 271, 3d Am. ed., 286, 287, notes to Higham v. Ridgway, 10 East, 109;

being the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury.'"² The entries to be thus admissible should be *contemporaneous* with the act to be proved, that is, within so short a time thereafter as reasonably to be considered a part of the transaction,³ in the due discharge of duty,⁴ and by persons having *knowledge of the facts*.⁵ Such memoranda do not generally afford evidence, except as to those matters necessary to be recorded;⁶ in other words, they are *not evidence of collateral matters*. Thus, although the return of an officer, since deceased, was held admissible to show that an arrest was made and also its date, yet such certificate was deemed no evidence of the particular spot where the arrest was made, as it was no part of the officer's duty to state such fact.⁷ The rule has been applied to entries made by deceased *clerks* and agents in the sale of goods or other regular course of business;⁸ entries by deceased *notaries* to prove such acts as presentment, demand and notice of nonpayment;⁹ by *attorneys* in

² *Welsh v. Barrett*, 15 Mass. 380.

³ *Doe v. Turford*, 3 Barn. & Ad. 897, 110 Eng. Reprint, 327; *Lassone v. Boston & L. R. Ry. Co.*, 66 N. H. 345, 17 L. R. A. 525, 24 Atl. 902; *Poole v. Dicus*, 1 Bing. N. C. 654, 1 Scott, 600, 7 Car. & P. 79; *Price v. Torrington*, 1 Salk. 235, 91 Eng. Reprint, 252; *Ray v. Jones*, 2 Gale, 220; *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730.

⁴ *Lloyd v. Wait*, 1 Phil. 61, 41 Eng. Reprint, 554; *Chambers v. Bernasconi*, 1 Tyrw. 342, 4 Tyrw. 531, 1 C. M. & R. 347; *Doe ex dem. Patteshall v. Turford*, 3 Barn. & Ad. 890, 110 Eng. Reprint, 327; *Smith v. Blakey*, L. R. 2 Q. B. 326.

⁵ *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. Ed. 908; *Lewis v. Kramer*, 3 Md. 265; *Smith v. Lane* 12 Serg. & R. (Pa.) 80.

⁶ *Chambers v. Bernasconi*, 1

Tyrw. 342, 4 Tyrw. 531, 1 C. M. & R. 347.

⁷ *Chambers v. Bernasconi*, 1 Tyrw. 342, 4 Tyrw. 531, 1 C. M. & R. 347.

⁸ *Livingston v. Tyler*, 14 Conn. 493; *Jones v. Howard*, 3 Allen (Mass.), 223; *Raski v. Wise*, 56 Or. 72, 107 Pac. 984; *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; *James v. Wharton*, Fed. Cas. No. 7187, 3 McLean (U. S.), 492; *Hodge v. Higgs*, Fed. Cas. No. 6558, 2 Cranch C. C. 552; *Pitman v. Mad-dox*, 1 Ld. Raym. 732, 91 Eng. Reprint, 1389; *Price v. Earl of Torrington*, 2 Ld. Raym. 873, 92 Eng. Reprint, 84; *Pritt v. Fairclough*, 3 Camp. 305, 13 R. R. 811.

⁹ *Halliday v. Martinet*, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262; *Porter v. Judson*, 1 Gray (Mass.), 175; *Nicholls v. Webb*, 8 Wheat. (U. S.)

their dockets of the issuing of executions or other process;¹⁰ by *magistrates* as to the acknowledgment of deeds;¹¹ by *surveyors* and deputy surveyors containing results of their labors;¹² receipts by *sheriffs* or other officers since deceased for the payment of money;¹³ entries in *insurance agents'* register of policies;¹⁴ books of a *bank* showing the receipt and payment of money in a controversy with a depositor;¹⁵ entries in time book of teaming done;¹⁶ private entries of officers containing memoranda of *official acts*;¹⁷ weather records kept at an asylum;¹⁸ and entries by *clergymen* of a record of baptism.¹⁹ In an action between third parties, charges in the day-book of a *physician* for a surgical operation were admitted where it became material to show the date of such operation;²⁰ and the account-book of a deceased *mechanic* has been received to show the character and extent of the injuries to a wagon wheel alleged to have been caused by a collision with defendant's locomotive.²¹ Press copies of waybills issued by a railroad company, the originals of which are not shown to be lost or destroyed, nor incapable of production, are not admissible in evidence in an action between third parties, where the person who issued the waybills and made the copies is not shown to be dead.²²

326, 5 L. Ed. 628; *Poole v. Dicas*, 1 Bing. N. C. 649, 1 Scott, 600, 7 Car. & P. 79; *Gawtry v. Doane*, 51 N. Y. 84.

¹⁰ *Leland v. Cameron*, 31 N. Y. 115.

¹¹ *Nourse v. McCay*, 2 Rawle (Pa.), 70.

¹² *Walker v. Curtis*, 116 Mass. 98.

¹³ *Livingston v. Arnoux*, 56 N. Y. 507.

¹⁴ *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237.

¹⁵ *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

¹⁶ *Dicken v. Winters*, 169 Pa. 126, 32 Atl. 289.

¹⁷ *Linthicum v. Remington*, Fed. Cas. No. 8377, 5 Cranch C. C. 546; *Reg. v. Buckley*, 13 Cox C. C. 293.

¹⁸ *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174.

¹⁹ *Kennedy v. Doyle*, 10 Allen (Mass.), 161.

²⁰ *Augusta v. Windsor*, 19 Me. 317.

²¹ *Lassone v. Boston & L. R. Ry. Co.*, 66 N. H. 345, 17 L. R. A. 525, 24 Atl. 902, in which the subject is fully discussed and many cases cited.

²² *Haas v. Chubb*, 67 Kan. 787, 74 Pac. 230.

§ 320 (324). **Same—Principle extended to declarations by persons still living.**—It will be noticed from some of the illustrations above cited that under this principle entries may be admitted, although there is no absolute duty to make such entries. “It is sufficient if the *entry* was the *natural concomitant of the transaction* to which it relates and usually accompanies it.”²³ Of course the handwriting of the person who made the entries must be proved.²⁴ Although the rule has generally been applied where the person who made the entries was since deceased, entries of the character under discussion made by one who has since become *insane* have been admitted.²⁵ In some of the states entries of this class have been held admissible on proof that the person by whom they were made is beyond the *jurisdiction* of the court, as where he is permanently out of the state.²⁶ The United States supreme court has held

²³ Fisher v. Mayor, 67 N. Y. 73; Leland v. Cameron, 31 N. Y. 115; Nourse v. McCay, 2 Rawle (Pa.), 70; Costello v. Crowell, 133 Mass. 352.

²⁴ Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

²⁵ McDonald v. Carnes, 90 Ala. 147, 7 South. 919; Town of Bridgewater v. Town of Roxbury, 54 Conn. 213, 6 Atl. 415; Mahaska County v. Ingalls, 16 Iowa, 81; Holbrook v. Gay, 6 Cush. (Mass.) 215; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562; Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. ed. 908.

²⁶ Sands v. Hammell, 108 Ala. 624, 18 South. 489; McDonald v. Carnes, 90 Ala. 147, 7 South. 919; St. Louis, I & M. S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878; Town of Bridgewater v. Town of Roxbury, 54 Conn. 213, 6 Atl. 415;

New Haven etc. Co. v. Goodwin, 42 Conn. 230; Godfrey v. Rowland, 17 Haw. 577; Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Sims v. American Ice Co., 109 Md. 68, 71 Atl. 522; Heiskell v. Rollins, 82 Md. 14, 51 Am. St. Rep. 455, 33 Atl. 263; Reynolds v. Manning, 15 Md. 510; Gurley v. Springfield St. Ry. Co., 206 Mass. 534, 92 N. E. 714; North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Holbrook v. Gay, 6 Cush. (Mass.) 215; Cameron Lumber Co. v. Somerville, 129 Mich. 532, 89 N. W. 346; Shipman v. Glynn, 31 App. Div. 425, 52 N. Y. Supp. 691; Sterrett v. Bull, 1 Binn. (Pa.) 234; Crouse v. Miller, 10 Serg. & R. (Pa.) 155; Alter v. Berghaus, 8 Watts (Pa.), 77; Kinney v. Flynn, 2 R. I. 319; Rigby v. Logan, 45 S. C. 651, 24 S. E. 56; Elms v. Chevis, 2 McCord (S. C.), 349; Cummings v. Fullam, 13 Vt. 434; Vinal v. Gilman, 21 W.

that when the witness lived in another state, more than one hundred miles from the place of trial, and the process of the court could not reach him, he was, for all jurisdictional purposes as if he were dead.²⁷ At the same time there are cases holding that it should be made to appear that some effort has been made to secure the attendance of the witness. "This court has invariably decided that the best testimony that it is within the power of the parties to procure by ordinary or extraordinary means shall be exhausted before the books of a party shall be given in evidence."²⁸ Temporary absence is not sufficient. As was well said, since this temporary absence may be readily brought about for the very object of obtaining the advantage of using such entries, without the accompanying statement and explanation of the bookkeeper, it would be probably unwise to relax the rule so far as to dispense with the presence of the witness when he was only temporarily absent from the state, especially as the alternative of a temporary continuance of the cause till his return to the state might be but a small inconvenience.²⁹ In earlier

Va. 301, 45 Am. Rep. 562; *Clarke v. Rist*, 3 McLean, 494, 5 Fed. Cas. 2861.

²⁷ *Burton v. Driggs*, 20 Wall. (U. S.) 125, 22 L. Ed. 299.

²⁸ *Werbiskie v. McManus*, 31 Tex. 116; *Little Rock Granite Co. v. Dallas County*, 66 Fed. 522, 13 C. C. A. 620. It is incumbent on the party offering entries of this kind, unauthenticated by the oath of the person who made them, to show as a prerequisite to their admission that such person cannot be produced as a witness; and when he is living, some discretion must be allowed to the trial court in deciding whether proof offered as preliminary to the introduction of the entries is sufficient to admit them as in case of the witness' death: *St. Louis etc. Ry. Co. v. Henderson*, 57 Ark. 402,

21 S. W. 878; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68. See, also, *Bartholomew v. Farwell*, 41 Conn. 107; *Reynolds v. Manning*, 15 Md. 510; *Alter v. Berghaus*, 8 Watts (Pa.), 77. Other useful cases on the admission of books in evidence are *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; *Bates v. Preble*, 151 U. S. 149, 38 L. Ed. 106, 14 Sup. Ct. Rep. 277; *Glenn v. Liggett*, 47 Fed. 472; *Kent v. Garvin*, 1 Gray (Mass.), 148; *Jackson v. Evans*, 8 Mich. 476.

²⁹ *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562. In *Hay v. Kramer*, 2 Watts & S. (Pa.) 137, the entries of one temporarily absent was admitted, but the ruling is not squarely in point. The West Virginian decision is sound law.

cases and in other states the rule has not been extended beyond the cases where the person making the entry was dead.³⁰ Upon a trial for embezzlement of bank funds, it was proved that all the entries in the bank's books were made either by the bookkeeper, the assistant bookkeeper, the cashier, the president or the teller. Each of such employees gave evidence to the effect that the entries made by them in the books were correct, except the cashier, who was a fugitive from justice and without the jurisdiction of the court, and the bookkeeper, who was dead at the time of the trial; but all of the entries made by the bookkeeper were shown to have been made in the regular course of business, and many of them were shown to be correct, and in addition it was proven that settlements had been made from the books and had been found correct. The books were properly received in evidence.³¹ The principle under discussion has, however, been extended and applied in the United States to cases where the *person making the entries is still living* and authenticates the entries by his oath, even though he has forgotten the circumstances. But such entries are not admissible in the lifetime of the one making them, unless they would have been admissible after his death on proof of his handwriting.³²

§ 321 (325). Recollection of the fact by the person making the entry.—In such cases as those discussed in the last section, it is not necessary that the witness should remember the facts recorded in the memoranda, if the other conditions are complied with. When properly authenticated, the memoranda themselves constitute evidence, although

³⁰ Moore v. Andrews, 5 Port. (Ala.) 107; Mahaska County v. Ingalls, 16 Iowa, 81; Welsh v. Barrett, 15 Mass. 380; Brewster v. Doane, 2 Hill (N. Y.), 537.

³¹ State Bank v. Brown, 96 App. Div. 441, 89 N. Y. Supp. 381.

³² Bank of Monroe v. Culver, 2 Hill (N. Y.), 531; Spann v. Balt-

zell, 1 Fla. 301, 46 Am. Dec. 346; Farmers' etc. Bank v. Boraef, 1 Rawle (Pa.), 152; Shove v. Wiley, 18 Pick. (Mass.) 558; Sickles v. Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; Redden v. Spruance, 4 Harr. (Del.) 265; Underwood v. Parrott, 2 Tex. 168.

the witness has no recollection on the subject, and even though his memory is not refreshed by such memoranda. When the party is living who made such an entry in the regular course of business, though he remembers and can testify nothing about the facts recorded in the entry, but simply testifies that he made the entry in the usual course of business at the time of the transaction, such an entry is of itself primary evidence of the facts recorded.³³ Thus, where a bank kept a book in which a clerk regularly made memoranda of notices given by him to indorsers, and the clerk testified that it was his practice to give the notices personally and that he had no doubt they were given as usual, though he could not recollect the fact, the book was admitted to prove a notice mentioned therein.³⁴ Said Justice Shaw: "It is very obvious to remark that, if such evidence is not sufficient, it would be extremely difficult to prove such acts done. Where bank messengers, notaries and such official persons do hundreds and thousands of such acts every year, it would be contrary to all human experience to believe that they could recall the recollection of each by force of present memory, even after looking at a written memorandum; but the witness may testify to other facts which, with the aid of a memorandum, will afford a very satisfactory inference that the act was done; such as his usual practice and habit, his caution never to make such memoranda, unless such acts were done and his consciousness of the importance and necessity of accuracy in this particular. In this respect it is like the testimony of an attesting witness to an instrument. He recognizes his handwriting, he knows he put his hand there, he testifies that he believes he would not have put it there if he had not seen the instrument executed, but he has no present recollection of the fact other than that derived from the recognition of his handwriting. Such evidence, we think, it is

³³ *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562, and cases cited in preceding note.

³⁴ *Shove v. Wiley*, 18 Pick. (Mass.) 558. As to books of account in general, see § 567 et seq., *post*.

every day's practice to admit and, if not controlled by other evidence, a jury might and ought to infer from it the fact of execution."³⁵ The question is elaborately discussed in a modern case,³⁶ and Boyce, J., delivered an opinion after a careful examination into the origin and expansion of the principle of the hearsay exception applicable to the question, concluding with the *dictum*, "We think that the extension of the exception to such regular entries, in the lifetime of the entrant, if verified and adopted by him, is sustained by principle and the weight of authority." A careful perusal of the opinion shows that it may be authoritatively taken that the extension covers the case when the witness verifies his entry, irrespective of his recollection of it.

§ 322 (326). **Entries by a party himself.**—This species of testimony forms one of the exceptions to the common-law rule that no party to an action should use therein evidence which he had created for himself, to which class, of course, entries of transactions properly belonged. In the cases cited under the preceding section to illustrate the reception of this class of evidence, the entries were made by third persons having no interest in the transactions. But the authorities seem agreed on the proposition that entries made by the parties themselves are admissible on the ground that they are a part of the *res gestae*, and not on the ground that they are made by disinterested persons. It would seem to follow that entries of this class are admissible, although *made by a person in respect to his own business* or by one otherwise interested; but of course the weight to be given to the entry might depend very greatly upon the interest or motive of the person making the entry.³⁷ Accordingly, we find that long before statutes were enacted allowing parties to testify generally in their own behalf, the

³⁵ *Shove v. Wiley*, 18 Pick. (Mass.) 558; *Costello v. Crowell*, 133 Mass. 352.

³⁶ *Remington Mach. Co. v. Wil-*

mington Candy Co., 6 Penne. (Del.) 288, 66 Atl. 465.

³⁷ 1 Greenl. Ev., § 120. See note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

practice came to prevail of allowing parties by their own testimony to *verify* their *books of account*. Although the practice was conceded to be repugnant to general common-law principles, it was sustained on grounds of necessity.³⁸ If the person who made the entry be still living, though out of the state, he must be called or his deposition taken.³⁹ It is a sufficient *authentication*, if the witness states under oath that the entries were made in the regular course of business, and that they were correct and made at the time they purport to have been made.⁴⁰ "The entries must purport to be made with a view to charge the opposite party, and alterations and additions in the account sued on, apparent on their face, must be satisfactorily accounted for. No mode is prescribed by law in which a book must be kept to make it evidence, and the question of competency must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his employment, the manner of his charges against other people, and all the circumstances of the case; and it will not be evidence of any charge not within the regular course of the business of the party, nor of any fact that may arise collaterally in the case."⁴¹ Irrespective of statutes, the American rule⁴² may be said to

³⁸ Sheehan v. Hennessey, 65 N. H. 101; Eastman v. Moulton, 3 N. H. 156; Bradley v. Goodyear, 1 Day (Conn.), 104; Foster v. Sinkler, 1 Bay (S. C.), 40; Pratt v. White, 132 Mass. 477; Poultney v. Ross, 1 Dall. (Pa.) 238, 1 L. Ed. 117. As to the admissibility in evidence of books of account, see note to Sheridan Coal Co. v. C. W. Hull Co., 138 Am. St. Rep. 441.

³⁹ Chaffee v. United States, 18 Wall. (U. S.) 516, 21 L. Ed. 908; Brewster v. Doane, 2 Hill (N. Y.), 537; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Merrill v. Ithaca & O. Ry. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Pratt v. White,

132 Mass. 477. See note to Union Bank v. Knapp, 15 Am. Dec. 193.

⁴⁰ Shove v. Wiley, 18 Pick. (Mass.) 588; Moots v. State, 21 Ohio St. 653.

⁴¹ Moody v. Roberts, 41 Miss. 74.

⁴² "In the United States this principle has been carried further, and extends to entries made by the party himself in his own shop books. Though this evidence has sometimes been said to be admitted contrary to the rules of the common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it is evidently contemporaneous with the fact, and

be general now throughout the United States.⁴³ And it and its basic reason are clearly given by Black, J., in an important Missouri case.⁴⁴ It is conceded that a party, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify as to the facts with his memory thus refreshed. In cases of an account composed of many items, all this means nothing more than reading the book in evidence. "This," says the learned judge, "we all know from daily experience in the trial courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt. Account-books are admitted in evidence for the person by whom they are kept when the entries are made at the time, or nearly so, of doing the principal fact, because entries made under such circumstances constitute a part of the *res gestae*. An entry thus made is more than a mere declaration of the party. It is a verbal act following the principal fact in the orderly conduct of business. Such is certainly the custom and course of business at the present day. We, therefore, conclude that an account-book of original entries, fair on its face and shown to have been kept in its usual course of business is evidence, even in favor of the party

part of the *res gestae*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury": 1 Greenl. Ev., 14th ed., § 118. See, also, Wood on Practice Evidence, § 139.

⁴³ Alabama Iron Co. v. Smith, 155 Ala. 287, 46 South. 475; Bolling v. Fannin, 97 Ala. 619, 12 South. 59; Stanley v. Wilkerson, 63 Ark. 556, 39 S. W. 1043; White v. Whitney, 82 Cal. 163, 22 Pac. 1138; Butler v. Cornwall Iron Co., 22 Conn. 335; Wilber v. Scherer, 13 Ind. App. 428, 41 N. E. 837; Graham v. Dillon, 144 Iowa, 82, 121 N. W. 47; Silver v. Worcester, 72 Me. 322; Holmes v.

Marden, 12 Pick. (Mass.) 169; Moody v. Roberts, 41 Miss. 74; Anderson v. Kannow, 72 Neb. 32, 99 N. W. 824; Remick v. Rumery, 69 N. H. 601, 45 Atl. 574; Inslee v. Prall, 23 N. J. L. 457; Smith v. Smith, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300; Harmon v. Decker, 41 Or. 587, 93 Am. St. Rep. 748, 68 Pac. 11, 1111; Jones v. Long, 3 Watts (Pa.), 325; Seagrove v. Redman, 4 Dall. (Pa.) 153, 1 L. Ed. 779; Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214; Baldrige v. Penland, 68 Tex. 441, 4 S. W. 565.

⁴⁴ Anchor Milling Co. v. Walsh, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. 904.

by whom they are kept." Under the statutes which now exist permitting the use of books of account it seldom becomes necessary to rely upon this exception to the hearsay rule. The use of account-books as evidence under statutes is elsewhere discussed.⁴⁵

§ 323 (327). **Declarations of deceased persons against interest—In general—Absentees—Those physically or mentally incapacitated.**—In several of the preceding sections the discussion has related to the admissibility of declarations or entries made in the regular course of business and as part of the *res gestae*. In another chapter we discussed the admissibility of declarations of *parties* and those identified in interest with parties, that is, *admissions*. We now come to the consideration of an entirely different class of declarations which should not be confused with those already mentioned; namely, declarations made by *strangers*, that is, by persons not in privity with the parties to the suit; declarations which are not necessarily made in the regular course of business, but which are received on the ground that they were *against the interest of such stranger* and *irrespective of the fact whether any privity exists* between the person who made them and the party against whom they are offered. It has long been settled as one of the exceptions to the general rule, excluding hearsay, that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his *pecuniary* or *proprietary interest*.⁴⁶

⁴⁵ See § 567 et seq., *post*.

⁴⁶ *Higham v. Ridgeway*, 10 East, 109, 103 Eng. Reprint, 717; 2 *Smith's Lead. Cas.* 361; *Gleadow v. Atkin*, 1 *Crompt. & M.* 423, 3 *Tyr.* 289; *Livingston v. Arnoux*, 56 N. Y. 507; *Sussex Peerage Case*, 11 *Clark & F.* 85, 8 Eng. Reprint, 1034; *Middleton v. Melton*, 10 *Barn. & C.* 317, 109 Eng. Reprint, 467; *Bowen v. Chase*, 98 U. S. 254, 25

L. Ed. 47; *Taylor v. Gould*, 57 *Pa.* 152; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 *Am. Rep.* 407; *Scott v. Crouch*, 24 *Utah*, 377, 67 *Pac.* 1068; *Bartlett v. Patton*, 33 *W. Va.* 71, 5 *L. R. A.* 523, 10 *S. E.* 21; *Hart v. Kendall*, 82 *Ala.* 144, 3 *South.* 41; 1 *Phil. Ev.* 293; 1 *Greenl. Ev.*, §§ 147, 148; *Steph. Ev.*, art. 28.

Thus, in a leading case on the subject an entry of a charge for services made in a ledger on a certain day by a man-midwife for attendance upon a woman when she was delivered of a child was admitted as evidence to show the age of such child.⁴⁷ It is a fair presumption that men will neither falsify accounts nor commit mistakes, when such falsehoods or mistakes would be prejudicial to their own pecuniary interests. This consideration, together with the facts that the declaration is not admissible during the lifetime of the author, that any fraudulent motive for making the statement may be shown, and that such declarations are frequently the only mode of proof available, are deemed of sufficient force to justify the admission of such declarations, although the sanction of an oath and the test of cross-examination are wanting.⁴⁸ It is not enough to warrant the admission of declarations against interest that the person who made them cannot be produced as a witness; *his death must be shown*,⁴⁹ or what for this purpose is regarded as the equivalent, that he is legally unavailable either from absence from the jurisdiction, from being physically unable to attend the court, being mentally incapable from giving testi-

⁴⁷ Higham v. Ridgeway, 10 East, 109, 103 Eng. Reprint, 717, 2 Smith's Lead. Cas., 8th ed., 361, and valuable notes; Smith v. State (Tex. Cr. App.), 73 S. W. 401.

⁴⁸ Phil. Ev. 294; 1 Greenl. Ev., § 148; Mahaska County v. Ingalls, 16 Iowa, 81; Quinby v. Ayres, 1 Neb. (Unof.) 70, 95 N. W. 464, to prove insolvency; German Ins. Co. v. Bartlett, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075, to prove indebtedness and that declarant was trustee; Keesling v. Powell, 149 Ind. 372, 49 N. E. 265.

⁴⁹ Hart v. Kendall, 82 Ala. 144, 3 South. 41; Fitch v. Chapman, 10 Conn. 8; Chandler v. Mutual Life etc. of Georgia, 131 Ga. 82, 61 S. E. 1036; Cunningham v. Schley, 41 Ga. 426; Doe v. Evans, 8 Blackf. (Ind.),

322; Mahaska County v. Ingalls, 16 Iowa, 81; Goyette v. Keenan, 196 Mass. 416, 82 N. E. 427; Currier v. Gale, 14 Gray (Mass.), 504, 77 Am. Dec. 343; Howell v. Howell, 37 Mo. 124; Rand v. Dodge, 17 N. H. 343; Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189; Bird v. Hueston, 10 Ohio St. 418; Lowry v. Moss, 1 Strob. (S. C.) 63; Scott v. Crouch, 24 Utah, 377, 67 Pac. 1068; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Bartlett v. Patton, 33 W. Va. 71, 5 L. R. A. 523, 10 S. E. 21; Sussex Peerage Case, 11 Clark & F. 85, 8 Jur. 793, 8 Eng. Reprint, 1034; Phillips v. Cole, 10 Ad. & E. 106, 113 Eng. Reprint, 41; Spargo v. Brown, 9 Barn. & C. 935, 109 Eng. Reprint, 348; Smith v. Whittingham, 6 Car. & P. 78.

mony or being legally immune from testifying, with each of which propositions it is necessary to deal. Many of the cases referred to in discussing such declarations in connection with questions of pedigree⁵⁰ are applicable to those against interest and may be safely utilized, but the inquiry has been well limited by Dillon, J., in the Iowa case regarded as a leading one on the subject.⁵¹ By the decided preponderance of authority, he says that verbal declarations are receivable when accompanied by the following prerequisites: 1. The declarant must be dead (and this he slightly modifies as to insanity or absence, though as we shall show, the alternatives referred to by us are now accepted). 2. That the declaration must have been *against the interest* of the declarant at the time, and that interest must be a *pecuniary* one. 3. The declaration must be of a *fact* or *facts* in relation to a matter concerning which the declarant was *immediately* and personally cognizable. 4. In addition, the court should, under the circumstances of the particular case, be satisfied that there was no *probable motive to falsify* the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion. Dealing in this section, then, with death or its equivalent, the main proposition is established that the declarant must be dead. In England the fact of the witness being in *articulo mortis* was not held sufficient. In a case where the declarant had had an apoplectic fit and was said to be *in extremis*, Lord Ellenborough rejected the statement, saying: "No case has gone so far, and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hopes of cure. If such a relaxation of the

⁵⁰ §§ 312-318, *ante*.

⁵¹ *Mahaska County v. Ingalls*, 16 Iowa, 81. Preceding his classification the learned judge says that this species of evidence, being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly

favorable by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least to require the evidence to be brought *clearly* within all the conditions requisite for its reception.

rules of evidence were permitted, there would be sudden indispositions and recoveries.”⁵² In this country the law is more liberal, and it has been held that absence from the state, so far as it affects the admissibility of secondary evidence, has the same effect as the death of the witness.⁵³ As to physical incapacity, there appears to be good authority differing from that from which we have extracted Lord Ellenborough’s *dictum*. In a Texas case,⁵⁴ where evidence of the declarations of one physically incompetent had been received over objection, the court said: “If the party whose statements would be admissible if he was dead, from advanced age, or other irremediable cause, has lost the power of speech, and the ability to testify either orally or by deposition, what good would it do to produce him? In what would he be better than a dead man, in so far as the production of his testimony is concerned?” As to mental incapacity, the authority is equally sound. “But it is further objected, that the clerk who made the entries in the blotter is not produced, and, therefore, that the blotter should not have been admitted in evidence; but it is alleged and not denied, that he has become insane. If he were dead his handwriting might be proved, as was done in the case of the clerk who kept the journal, and who has deceased: his insanity renders him as unable to testify as his death would have done. His handwriting was, therefore, properly proved by another witness.”⁵⁵ As to legal immunity from testifying, in a well-known Virginia case,⁵⁶ the court, after a clear exposition of the rules guard-

⁵² *Harrison v. Blades*, 3 Camp. 458. See *Mahaska County v. Ingalls*, 16 Iowa, 81; *Jones v. Henry*, 84 N. C. 320, 37 Am. Rep. 624.

⁵³ *Alter v. Berghaus*, 8 Watts (Pa.), 77. In *Walnut Ridge etc. Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413, the court, on the question of the admissibility of receipts, said, “The weight of authority, as well as reason, is against the admission

of receipts executed by persons not parties to the action unless it be shown that the person executing the receipt is dead or beyond the jurisdiction of the court.”

⁵⁴ *Griffith v. Sauls*, 77 Tex. 630, 14 S. W. 230.

⁵⁵ *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

⁵⁶ *Harriman v. Brown*, 8 Leigh (Va.), 697.

ing the admission of this class of testimony, said that the declarations of the witness "against his own interest (if they are to be considered as declarations) were properly introduced; for that is a sanction for his veracity which the law has always respected; and as he could not be compelled to testify, his admissions ought to be received as if he were dead."

§ 324 (327). Same—The declaration must be against pecuniary or proprietary interest.—It is well settled that the declaration must be *against the pecuniary or proprietary interest* of the declarant.⁵⁷ The conflict of the declaration with the pecuniary interest of the party must be clear and undoubted, as this is the main ground upon which the admissibility of this species of evidence rests.⁵⁸ This was illustrated in a celebrated case where, for the

⁵⁷ *Burton v. Phillips*, 161 Ala. 664, 49 South. 848; *Hart v. Kendall*, 82 Ala. 144, 3 South. 41; *Woodmen of the World v. Jackson*, 80 Ark. 419, 97 S. W. 673; *Oliver v. Warren*, 16 Cal. App. 164, 116 Pac. 312; *Donnelly v. Rees*, 141 Cal. 56, 74 Pac. 433; *Rountree v. Gauden*, 128 Ga. 737, 58 S. E. 346; *Work v. Kinney*, 8 Idaho, 771, 71 Pac. 477; *Carroll v. Rabberman*, 240 Ill. 450, 88 N. E. 995; *Deuterman v. Ruppel*, 103 Ill. App. 106; *Unger v. Mellinger*, 43 Ind. App. 524, 88 N. E. 74; *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394; *Britt v. Hall*, 116 Iowa, 564, 90 N. W. 340; *Jones v. Tennis Coal Co.*, 29 Ky. Law Rep. 623, 94 S. W. 6; *Royal v. Chandler*, 79 Me. 265, 1 Am. St. Rep. 305, 9 Atl. 615; *Dixon v. Union Iron Works*, 90 Minn. 492, 97 N. W. 375; *Richburger v. State*, 90 Miss. 806, 44 South. 772; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. 209; *Chambers v. Chambers*, 227 Mo. 262, 137 Am. St. Rep. 567, 127 S. W. 86; *Cobb v. Macfarland*, 87 Neb. 408, 127 N. W. 377; *Quinby*

v. Ayers, 1 Neb. (Unof.) 70, 95 N. W. 464; *Perkins v. Towle*, 59 N. H. 583; *Moore v. Fingar*, 138 App. Div. 929, 122 N. Y. Supp. 851; *Card v. Moore*, 173 N. Y. 598, 66 N. E. 1105; *Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422; *Ellis v. Harris*, 106 N. C. 395, 11 S. E. 248; *McAdams v. McAdams*, 80 Ohio St. 232, 88 N. E. 542; *State v. McDonald*, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444; *Roberts' Appeal*, 126 Pa. 102, 17 Atl. 538; *Williams v. Mower*, 29 S. C. 322, 7 S. E. 505; *Southern Pac. Co. v. Godfrey*, 48 Tex. Civ. App. 616, 107 S. W. 1135; *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. 40; *Anderson v. Hanson*, 34 Utah, 183, 96 Pac. 1092; *Mower v. McCarthy*, 79 Vt. 142, 118 Am. St. Rep. 942, 7 L. R. A., N. S., 418, 64 Atl. 578; *Bartlett v. Patton*, 33 W. Va. 71, 5 L. R. A. 523, 10 S. E. 21; *Higham v. Ridgway*, 10 East, 109, 10 Rev. Rep. 235, 103 Eng. Reprint, 717.

⁵⁸ *Mahaska County v. Ingalls*, 16 Iowa, 81.

purpose of proving a marriage, the statements of a clergyman, since deceased, who had performed the ceremony at Rome were offered in evidence on the theory that they were against his interest, since they were admissions that he had violated a statute and exposed himself to a prosecution for penalties. But such statements were rejected on the ground that the interest of the declarant was not a *pecuniary* interest within the meaning of the rule. Said Lord Brougham: "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him all that was said by him is to be taken as evidence in every action and prosecution against another person is one of the most monstrous and untenable propositions that can be advanced."⁵⁹ There is, however, a decided conflict both in England and here upon the point, and Lord Mansfield has held such evidence admissible in the case of a forged will;⁶⁰ and in the South Carolina case cited in the note there is this strong expression of opinion: "The only remaining question is, whether Meig's admission that he stole the letter containing the money was competent. I placed its admission on two grounds: 1. That the defendant was present, heard it and received it as true; and 2. That it was the admission of an act committed by the party making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial. In either or both of these points of view, I think the evidence was admissible, but more especially when both are combined." These latter decisions notwithstanding, the law of the Iowa case that such interest is not pecuniary is the sounder, and Dillon, J., is supported when he says that the fact that the declaration would have subjected the party to penal con-

⁵⁹ *Sussex Peerage Case*, 11 Clark & F. 85, 8 Eng. Reprint, 1034; *Davis v. Lloyd*, 1 Car. & K. 276; *Bartlett v. Patton*, 33 W. Va. 71, 5 L. R. A. 523, 10 S. E. 21; *Hosford v. Rowe* (*Hosford v. Hosford*), 41 Minn. 245, 42 N. W. 1018.

⁶⁰ *Wright, Lessee of Clymer, v. Littler*, 1 W. Black. 345, 96 Eng. Reprint, 192, cited in *Coleman v. Frazier*, 4 Rich. (S. C.) 146, 53 Am. Dec. 727.

sequences is not sufficient, although it would add to the weight of the testimony.⁶¹ Many cases might be cited in which *confessions* of persons since deceased have been excluded.⁶² Although most of the cases illustrating the rule are those in which the declarations related to the payment of money, the rule has been frequently declared where other issues⁶³ were involved, and when the effect of the declaration would be to furnish evidence of facts which could be made the basis of a pecuniary claim against declarant, or of a claim affecting his proprietary interest; for example, when the facts showed actionable *negligence* on the part of the declarant, or when the statement tended to cut down or *limit the interest* of the declarant in land;⁶⁴ or in chattels or choses in action;⁶⁵ or when the statement was to the effect that nothing was owing on a particular

⁶¹ *Davis v. Lloyd*, 1 Car. & K. 275; *Sussex Peerage Case*, 11 Clark & F. 85, 8 Eng. Reprint, 1034.

⁶² *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *Commonwealth v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *State v. Young*, 107 La. 618, 31 South. 993; as to *bastardy*: *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *abortion*: *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *murder*: *State v. Sale*, 119 Iowa, 1, 92 N. W. 680, 95 N. W. 193; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *perjury*: *Reavis v. State*, 6 Wyo. 240, 44 Pac. 62.

⁶³ *Halvorsen v. Moon & Kerr L. Co.*, 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28; *State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014; *Walker v. Brantner*, 59 Kan. 117, 68 Am. St. Rep. 344, 52 Pac. 80. See *Georgia R. & B. Co. v. Fitzgerald*, 108 Ga. 507, 49 L. R. A. 175, 34 S. E. 316.

⁶⁴ *Knight v. Hunter*, 155 Ala. 238, 46 South. 235; *Manuel v. Flynn*, 5 Cal. App. 319, 90 Pac. 463; *Allen v.*

Shires, 47 Colo. 433, 107 Pac. 1070; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Bird v. Bird*, 218 Ill. 158, 75 N. E. 760; *Stacy v. Alexander*, 143 Ky. 152, 136 S. W. 150; *Stafford v. Tarter*, 29 Ky. Law Rep. 1184, 96 S. W. 1127; *Walsh v. Wheelright*, 96 Me. 174, 52 Atl. 649; *Dixon v. Union Iron Works*, 90 Minn. 492, 97 N. W. 375; *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28; *Helm v. State*, 67 Miss. 562, 7 South. 487; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778; *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *Ruedas v. O'Shea* (Tex. Civ. App.), 127 S. W. 891; *Freeman v. Wm. M. Rice Inst.* (Tex. Civ. App.), 128 S. W. 629; *Scott v. Crouch*, 24 Utah, 377, 67 Pac. 1068, 22 Morr. Min. Rep. 117; *Powers v. Silsby*, 41 Vt. 288; *Bowen v. Chase*, 98 U. S. 254, 25 L. Ed. 47.

⁶⁵ *Riggs v. Powell*, 142 Ill. 456, 32 N. E. 482; *Dean v. Wilkerson*, 126 Ind. 338, 26 N. E. 55; *Goodson v. Johnson*, 35 Tex. 622; *Gross v. Smith*, 132 N. C. 604, 44 S. E. 111.

note or otherwise stating the amount of indebtedness of the declarant on any particular transaction;⁶⁶ or entries in the books of a person, since deceased, made by him, admitting or declaring facts at the time against his interest, such, for example, as charge him with sums of money in favor of other parties.⁶⁷ While, however, the declaration derives its value exclusively from the fact that the effect of it will be to render him pecuniarily liable to some third person,⁶⁸ the liability must not be remote, must not be conjectural, contingent or improbable.⁶⁹ The tendency of the courts is not to enlarge the scope of admission of these declarations, and where the interest of the declarant is so remote as scarcely to be deemed of a pecuniary or proprietary nature, and not so direct and obvious as presumably to have been present in his mind at the time he made the declaration, it will be rejected.⁷⁰

§ 325 (328). Sufficient if the entries are *prima facie* against interest.—If the entries are *prima facie* against the interest of the declarant, it is sufficient to render such en-

⁶⁶ Hart v. Kendall, 82 Ala. 144, 3 South. 41; Humes v. O'Bryan, 74 Ala. 64; Field v. Boynton, 33 Ga. 239; Deuterman v. Ruppel, 103 Ill. App. 106; Keesling v. Powell, 149 Ind. 372, 49 N. E. 265; Parker v. State, 8 Blackf. (Ind.) 292; Scott County v. Fluke, 34 Iowa, 317; Story v. Story, 22 Ky. Law Rep. 1731, 61 S. W. 279; Jones v. Howard, 3 Allen (Mass.), 223; Scammor v. Scammon, 33 N. H. 52; Rand v. Dodge, 17 N. H. 343; Swan v. Morgan, 83 Hun, 378, 34 N. Y. Supp. 829; Livingston v. Arnoux, 56 N. Y. 507; Peace v. Jenkins, 32 N. C. 355; Taylor v. Gould, 57 Pa. 152; Duncan v. Seaborn, Rice L. (S. C.) 27; Lowry v. Moss, 1 Strob. (S. C.) 63; Nichol v. Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254; Heidenheimer v. Johnson, 76 Tex. 200, 13 S. W. 46;

Scott v. Crouch, 24 Utah, 377 67 Pac. 1068; Holladay v. Littlepage, 2 Munf. (Va.) 316; Bartlett v. Patton, 33 W. Va. 71, 5 L. R. A. 523, 10 S. E. 21.

⁶⁷ Rand v. Dodge, 17 N. H. 343. Where a miller had kept a record of business done at his mill, it was held admissible after his death: Hutchins v. Berry, 75 N. H. 416, 75 Atl. 650.

⁶⁸ 2 Smith's Lead. Cas. 338; 1 Taylor, Ev. 670, 680.

⁶⁹ Tate v. Tate, 75 Va. 522; Smith v. Blakey, L. R. 2 Q. B. 326.

⁷⁰ Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057 (the case of a person whose life was insured making a statement to a physician after the policy was completed).

tries admissible, even if, taken in connection with other entries they may seem to operate in his favor.⁷¹ Thus, the entries will not be rejected although they not only include the receipt of moneys by the declarant, but form a part of a general debtor and creditor account *where the balance is in favor of the person making the entries*; in other words, if the entry charges the one making it with liability, it is admissible, although other entries in the same book may wholly discharge him from liability.⁷² It has been urged in such cases as an objection that the declaration is the sole evidence of the demand, and that to admit such declarations might lead to the fabrication of evidence. But it is answered that in such case, "in an action brought against the receiver by his employer, the entry would be evidence against him and the jury might, if they thought proper or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of moneys and disbelieve the part which went to his discharge."⁷³ Moreover, men are not likely to charge themselves for the purpose of getting a discharge.⁷⁴ The question of the entries being *prima facie* against the interest of the declarant frequently arises with reference to entries of payment on account taking a claim out of the statutes of limitation. The rule in such cases has been well summarized as follows: An indorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the statutes

⁷¹ Taylor v. Witham, 3 Ch. Div. 605, 24 W. R. 877; Raines v. Raines, 30 Ala. 425.

⁷² Rowe v. Brenton, 3 Moody & R. 267; Williams v. Graves, 8 Car. & P. 592; Clark v. Wilmot, 1 Younge & C. Ch. 53, 62 Eng. Reprint, 787; Steph. Ev., art. 28; Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92. When the declarations or entries are equally bal-

anced, the whole will be excluded: Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165.

⁷³ Chamberlain v. Chamberlain, 116 Ill. 480, 6 N. E. 444; 2 Smith's Lead. Cas., 8th ed., 374, note. See §§ 293, 294, *ante*.

⁷⁴ Rowe v. Brenton, 3 Moody & R. 288; 2 Smith's Lead. Cas., 8th ed., 374.

of limitation, unless it be satisfactorily shown that it was thus made before the statutory period had elapsed, in which case it is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned; but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.⁷⁵ In a Pennsylvania case, Gibson, C. J., said: "But the rule, guarded as it was in England, and as it still is here, allows not such a memorandum to go to the jury, unless it appear to have been made when the creditor had no motive to give a false credit, but when, on the contrary, he had the all-prevailing inducement of interest to avoid the appearance of it; that is, when the period necessary to give effect to the statute or to raise a presumption of payment had not elapsed, and consequently when to give a false credit would have been to throw so much away. With this qualification, such evidence cannot operate injuriously; for it is not to be supposed that a creditor could so far mistake his interest, as to sacrifice a part of his debt to save the residue, when no part of it was in danger. It is possible that a weak man might do so; but it is inconsistent with the ordinary course of human action."⁷⁶ It is scarcely necessary to add that "statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such."⁷⁷

§ 326 (329). Same — Evidence of collateral facts.— There is a distinction between declarations against interest and the declarations of deceased persons made in the course of business; which is that the former may furnish evidence of *collateral* matters forming part of the declaration which

⁷⁵ Reynolds' Steph. Ev., art. 28; Beatty v. Clement, 12 La. Ann. 82 (indorsement of partial payment in the handwriting of the holder of a bond).

⁷⁶ Addams v. Seitzinger, 1 Watts & S. (Pa.) 243. To the same effect

is Coffin v. Buckman, 12 Me. 471, where the indorsement was made by the plaintiff's testator.

⁷⁷ Reynolds' Steph. Ev., art. 28; Western Md. R. R. Co. v. Manro, 32 Md. 280.

are relevant to the issue, although such collateral matters in themselves are not against the interest of the declarant.⁷⁸ This rule was illustrated in a case where one entry admitted the payment of money and another, referring to the former, alleged a custom, and both entries were received;⁷⁹ and in another case two separate entries were admitted, the one showing a receipt of money by the declarant from his employer, and the other that, in the discharge of duty, he had made a tender of such money to another party.⁸⁰ But the collateral or independent facts thus stated must be *part of the same entry*, or referred to in it, or necessary to explain it.⁸¹ The authorities are practically unanimous. In England, such judges as Lord Ellenborough, Le Blanc, and Sir George Jessel have stamped it with their approval, and Blackburn, J., said:⁸² "And no doubt when entries are against the pecuniary interest of the person making them and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in, or knit up with, the statement." In the United States, while there are but few decisions, they are all consonant.⁸³ In an important Georgia case⁸⁴ an excellent syllabus prepared by the court embraces the law on the subject: 1. Declarations and entries of a person since deceased, against his interest, and not made with

⁷⁸ Reg. v. Birmingham, 1 Best & S. 763, 121 Eng. Reprint, 897; Stead v. Heaton, 4 Term Rep. 669, 100 Eng. Reprint, 1235; Marks v. Lahee, 3 Bing. N. C. 408, 132 Eng. Reprint, 467; Milne v. Leisler, 7 Hurl. & N. 786, 31 L. J. Ex. 257; Davies v. Humphreys, 6 Mees. & W. 153; Livingston v. Arnoux, 56 N. Y. 507.

⁷⁹ Stead v. Heaton, 4 Term Rep. 669, 100 Eng. Reprint, 1235.

⁸⁰ Marks v. Lahee, 3 Bing. N. C. 408, 132 Eng. Reprint, 467.

⁸¹ Doe ex dem. Kinglake v. Bevis, 7 Com. B. 456, 18 L. J. C. P. 128; Livingston v. Arnoux, 56 N. Y. 507; Steph. Ev., art. 28.

⁸² In Smith v. Blakely, L. R. 2 Q. B. 326.

⁸³ Hart v. Kendall, 82 Ala. 144, 3 South. 41; Lowry v. Moss, 1 Strob. (S. C.) 63; Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70.

⁸⁴ Massee-Felton Lumber Co. v. Sirmaus, 122 Ga. 297, 50 S. E. 92.

a view to pending litigation, are admissible in any case. 2. If the declaration or entry contains statements both in favor of the declarant and against his interest, the statements are to be balanced, and, if those in favor of interest equal or preponderate over those against interest, the declaration is not admissible; otherwise it is. 3. Such declarations or entries, when admitted, are evidence as to any fact stated therein which was within the knowledge of the declarant, or which it was his duty to know.

§ 327 (330). Rule when the declaration is made by an agent.—It sometimes happens that an entry will show upon its face that it was made by some person in an agential character. It is not necessary that the entries should have been personally made by the party charged with liability, or signed by him.⁸⁵ It is sufficient if it is shown that they were written by his *agent* or by another person, and adopted or sanctioned by him.⁸⁶ But when the entry purports to have been made by a person acting as agent for another, or in some other special capacity, there should be some *proof of the agency* or other special relation as a prerequisite to the admission of the entry.⁸⁷ The opinion of the master of the rolls in one of the cases cited⁸⁸ sets forth the law and the reasoning supporting it. “The foundation for the admissibility of this species of evidence is to be had by ascertaining clearly the character filled by the writer. Though the cases have gone a great way in

⁸⁵ Rowe v. Brenton, 3 Moody & R. 267; Doe v. Colcombe, Car. & M. 155; Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 Com. B. 822, 1 C. L. R. 294.

⁸⁶ Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 Com. B. 822, 1 C. L. R. 294; Doe v. Hawkins, 1 Gale & D. 551, 2 Q. B. 212, 114 Eng. Reprint, 83; Doe v. Mobbs, Car. & M. 1; Mayor v. Warren, 5 Q. B. 773, 114 Eng. Reprint, 1441; Attorney Gen. v. Stephen, 1 Kay & J. 740, 3 Eq. Rep. 1072.

⁸⁷ Short v. Lee, 2 Jac. & W. 489; Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 Com. B. 822, 1 C. L. R. 294; Baron de Rutzen v. Farr, 4 Ad. & E. 53, 5 Nev. & M. 617, 111 Eng. Reprint, 707; 1 Greenl. Ev., § 154. The agency cannot be proved by the declaration of the agent: Larson v. American Bridge Co., 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294.

⁸⁸ Short v. Lee, *supra*.

favor of rectors, in making the books and papers of their predecessors evidence for them, yet in all these cases, the first point is to prove the character of the individual who wrote them; if you fail in this, they cannot be evidence. If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that Beale (an alleged collector) was not the person authorized to collect the tithes, but nevertheless had for some purpose made these entries; then if after his death the book, purporting to be a collector's book, was to be evidence to prove that he was collector, and his being collector was to prove the entries to be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the other, would be exposed to the greatest danger, and perhaps from the writing of a person having a contrary interest. In *Jones v. Waller*,⁸⁹ I suppose they must have found by some evidence that the book was written by a collector; when you fix him with that character, his entries become evidence, and the principle is the same with stewards' books, and in the case of the midwife's memorandum."⁹⁰ In the private relations of life, the existence of the particular character is not presumed, nor does a person's acting in that character prove that he possessed it. While the rule is different as to parties acting in public capacities, it has never been extended to private situations. Later in the same opinion the learned master of the rolls said: "How extremely mischievous it might be in commerce. It would let in a very dangerous latitude if the court were once to dispense with that which is an essential preliminary before any writing, not verified on oath, can be made evidence, and which must be established by proof *aliunde*." As we have said, if the declaration is made in the course of public and *official employment*, it will be presumed that the acting officer had proper authority;⁹¹ and if

⁸⁹ *Jones v. Waller*, Gwill. 847.

⁹¹ *Short v. Lee*, 2 Jac. & W. 489;

⁹⁰ *Higham v. Ridgway*, 10 East, 1 Greenl. Ev., § 154.

109, 103 Eng. Reprint, 717.

the entries are *ancient* and came from the proper custody, it will be presumed from slight proof that the person making them acted in the capacity which he assumed, especially if the books themselves have the appearance of genuineness.⁹² Where the book comes from the proper custody after thirty years have passed, the handwriting need not be proved.⁹³ The same distinction between the two classes of interests referred to in the last section exists as to these declarations, and therefore it is not a condition to the admission of entries of this class that they must be made in the regular course of business, hence they *need not be contemporaneous* with the act recorded.⁹⁴

§ 328 (331). Declarant need not have actual knowledge of the transaction.—Although it has sometimes been assumed that actual knowledge on the part of the declarant of the facts recorded is a necessary condition, it seems to be settled that the person charged with liability need not have actual knowledge of the transactions. Thus, where a person was liable to his employers for the amount of merchandise received, and he made his entries, not on personal knowledge, but upon reports made to him by others, it was held that such entries were admissible against all persons and that, although he gained his information by hearsay, this fact affected not the admissibility, but only the weight of the testimony.⁹⁵ In considering this prerequisite, the distinction must be taken between *actual* and *adequate* knowledge. While it is laid down that the declaration must be of a fact in relation to a matter concerning which the declarant was immediately and personally cognizant, and that it is not indispensable that it should accompany an act,

⁹² Doe v. Thynne, 10 East, 206, 103 Eng. Reprint, 753; Brune v. Thompson, Car. & M. 34; Mayor v. Warren, 5 Q. B. 773, 114 Eng. Reprint, 1441; Doe v. Michael, 17 Q. B. 276, 117 Eng. Reprint, 1286; Attorney General v. Stephens, 1 Kay & J. 740, 3 Eq. Rep. 1072.

⁹³ Wynne v. Tyrwhitt, 4 Barn. & Ald. 376, 106 Eng. Reprint, 975. See § 531, *post*.

⁹⁴ Doe v. Turford, 2 Barn. & Ald. 890, 110 Eng. Reprint, 327; Short v. Lee, 2 Jac. & W. 489.

⁹⁵ Crease v. Barrett, 1 Crompt., M. & R. 295, 5 Tyr. 458.

though, if not so accompanied, its value is greatly depreciated, this has been construed to mean that the declarant should have adequate knowledge of that concerning which he has made the declaration.⁹⁶ The rule requires that it should appear that the person had competent knowledge, that is, was cognizant of the fact, or that it was his duty to know. If he were not so situated as to make it his duty to know, an inference that he might have known, or very probably would have known, will not suffice. There must be enough to create a presumption that he did in fact have knowledge.⁹⁷ In a well-known case,⁹⁸ the rule appears with some slight variations, the words "competent knowledge" being used in lieu of "actual" or "adequate." "Declarations, or statements of facts, made by a deceased person, at variance with his interest, which he is presumed to have had a competent knowledge of, or which it was his duty to know, and in respect to which he could have been examined as a witness if alive, are, if pertinent to the matter of inquiry, admissible in evidence as between third parties, whether made at the time of the fact declared, or afterward."

§ 328a (331). **Absence of probable motive to falsify.**—Another of the prerequisites to the admissibility of such declarations is that the court should, under the circumstances of the particular case, be satisfied that there was no *probable motive to falsify* the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion.⁹⁹ This prerequisite, however,

⁹⁶ Friberg v. Donovan, 23 Ill. App. 58; Halvorsen v. Moon etc. Lumber Co., 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28; Bird v. Hueston, 10 Ohio St. 418; Long v. Moore, 19 Tex. Civ. App. 363, 48 S. W. 43; Smith v. Hanson, 34 Utah, 171, 18 L. R. A., N. S., 520, 96 Pac. 1087.

⁹⁷ Bird v. Hueston, 10 Ohio St. 418. See, also, Arbuckle v. Tem-

pleton, 65 Vt. 205, 25 Atl. 1095 (indorsement on a note).

⁹⁸ White v. Chouteau, 1 E. D. Smith (N. Y.), 493.

⁹⁹ Mahaska County v. Ingalls, 16 Iowa, 81; Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Baker v. Taylor, 54 Minn. 71, 55 N. W. 823; Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457; McDonald v. Wesen-

is almost a part of that which declares the necessity of the declaration being against pecuniary or proprietary interest, the mere fact of its so being against the declarant's interest furnishing the presumption of absence of any motive on his part falsely to charge himself.¹⁰⁰ It is difficult to imagine such an exceptional case as where a declarant would falsely charge himself with a liability so that his descendants should profit by it. Such cases as have occurred where entries have been alleged to have been made to defeat the statutes of limitations are rare, and are, for the most part, easily exposed.

§ 329 (332). Such declarations inadmissible to prove contracts.—Although it may suffice if the entry shows only a *prima facie* liability on the part of the declarant, yet the entry is not admissible where it merely shows a *contract* and consequent mutual obligations. In speaking of an entry recording an informal agreement for labor, it was said by Lord Coleridge: "This was not an entry against the party's interest, unless the mere making of a contract be so, and if that were the case, the existence of a contract would be against the interest of both parties to it."¹ In such cases it is to be presumed that the agreement is on fair and equitable terms, and not to the disadvantage of either party.² It is on the same ground that *declarations* by a person *that he had made a will*, or that he had *not executed a will*, or that he had *revoked his will* are not admissible on the principle under discussion. They are not in general regarded as declarations against interest, since the acts to which the declarations relate and the consequences of such acts are wholly within the control³ of the person

donck, 30 Misc. Rep. 601, 62 N. Y. Supp. 764; Gilchrist v. Martin, Bail. Eq. (S. C.) 492; Lewis v. Bergess, 22 Tex. Civ. App. 252, 54 S. W. 609.

¹⁰⁰ Humes v. O'Bryan, 74 Ala. 64; Peace v. Jenkins, 32 N. C. 355.

¹ Reg. v. Worth, 4 Q. B. 132, 139.

² See case last cited.

³ Hosford v. Hosford (Hosford v. Rowe), 41 Minn. 245, 42 N. W. 1018. As to declarations of the testator in general, see § 482 et seq., *post*. As to admissibility of declarations of testator on issue of his intention in destroying his will, see note to Managle v. Parker, 24 L. R. A., N. S., 180.

whose declaration is in question; and it cannot be presumed that the acts are prejudicial to himself. If he has made a will, he can revoke it at pleasure or make another. If he has not executed a will, he can do so whenever he may deem it best. An oral declaration cannot fill the place of a deed. The admissions or declarations of parties are competent evidence against them where parol evidence of the fact sought to be shown by such admissions or declarations would be competent. There are many cases which hold that the parol declarations of a person having title to land are inadmissible as evidence to defeat that title. This rule also excludes declarations when the fact sought to be established by them cannot be proved by parol evidence. To illustrate: When a party shows he has a legal title to land, it cannot be taken from him by evidence that he has said he had no title to it.⁴ But while such declarations showing contracts are not against the pecuniary interest of the party, it may happen that something connected with a contract may form the subject of an admissible declaration. In a Minnesota case such a declaration was admitted on these facts. A man having a large estate, who had been once married, and who had six children living, entered into an antenuptial contract prior to a second marriage. He was over seventy years of age, and the proposed wife thirty-nine years of age. This contract provided that the wife should, upon his death, have absolutely one-seventh of all his estate in lieu of the one-third interest to which by law she would be entitled, and also that in case the husband should survive the wife the same interest

⁴ Keator v. Dimmick, 46 Barb. (N. Y.) 158, cited in Marsh v. Neha-sa-ne Park Assn., 18 Misc. Rep. 314, 42 N. Y. Supp. 996. In this latter case it was sought to establish a title to lands without production of any deeds or records, simply on certain memoranda of a man to the effect that he had sold his interest in the lands. No proof of loss of deeds or the execution was

made. As the court said, the declarations could not be received as proof of any fact which the declarant would not be permitted to testify to if living. In Hosford v. Hosford, *supra*, the declaration admitted was, "I burned the papers we had written before our marriage. I propose to let my wife have the biggest part of my money."

in his estate should, upon his death, descend to her heirs and personal representatives. It was to be presumed from the disparity of ages that the husband would die first, and, it being for his interest to retain the larger control of his property allowed by the contract, a declaration by him that it had been annulled would be admissible after his death as evidence that such was the fact, being a declaration against interest.

§ 330 (333). **General rules on the subject.**—There is no particular limitation as to the form of the declaration. It may be in public or private *writings or books*.⁵ Although the statement has often been made that the declaration must be written, and although in most of the cases the declaration has been in that form, yet by the clear weight of authority it may consist of mere *verbal statements*, if the other conditions are complied with.⁶ These are matters which affect the weight rather than the admissibility of the evidence. The legal incidents of the declaration are the same, whether it is oral or in writing.⁷ By the weight

⁵ Clapp v. Engledow, 72 Tex. 252, 10 S. W. 462 (inventory); Bingham v. Hiland, 53 Hun (N. Y.), 631, 6 N. Y. Supp. 75 (bank reports); Hart v. Kendall, 82 Ala. 144, 3 South. 41 (accounts); Field v. Boynton, 33 Ga. 239 (receipts); Southern Bank of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613 (depositions). In Framingham Mfg. Co. v. Barnard, 2 Pick. (Mass.) 532, letters were refused admission, but under Revised Laws of Massachusetts of 1902, chapter 175, section 66, all such declarations are receivable if made in good faith and on personal knowledge.

⁶ Humes v. O'Bryan, 74 Ala. 64; Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92; Schell v. Weaver, 225 Ill. 159, 8 Ann. Cas. 339, 80 N. E. 95; Mahaska County v. Ingalls, 16 Iowa, 81; Prather v. Johnson, 3 Har.

& J. (Md.) 487; Hosford v. Hosford (Hosford v. Rowe), 41 Minn. 245, 42 N. W. 218; Rand v. Dodge, 17 N. H. 343; White v. Chouteau, 1 E. D. Smith (N. Y.), 493; Huzard v. Trego, 35 Pa. 9; Coleman v. Frazier, 4 Rich. (S. C.) 146, 53 Am. Dec. 727; Smith v. Hanson, 34 Utah, 171, 18 L. R. A., N. S., 520, 96 Pac. 1087; Holladay v. Littlepage, 2 Munf. (Va.) 316; Bowen v. Chase, 98 U. S. 254, 25 L. Ed. 47; Barker v. Ray, 2 Russ. 63, 38 Eng. Reprint, 259.

⁷ Edie v. Kingsford, 14 Com. B. 763, 2 C. L. R. 832; Rex v. Birmingham, 31 L. J. (M. C.) 63, 1 B. & S. 763; Stapylton v. Clough, 2 El. & B. 933, 118 Eng. Reprint, 1016; Fursdon v. Clogg, 10 Mees. & W. 572; Coleman v. Frazier, 4 Rich. (S. C.) 146, 53 Am. Dec. 727; White v. Chouteau,

of authority an entry charging liability on the part of the declarant is admissible, although such entry is the only evidence of the charge of which it shows the *subsequent liquidation*.⁸ The English rule, as laid down by Stephen and which follows our own, is that a declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part. Thus, where the question is whether A received rent for certain land, a deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favor of the steward.⁹ And when the question was whether certain repairs were done at A's expense, a bill for doing them, receipted by a deceased carpenter, was deemed to be relevant, there being no other evidence either that the repairs were done or that the money was paid.¹⁰ In order to be admissible, the declaration must have been

10 Barb. (N. Y.) 202; *Mahaska County v. Ingalls*, 16 Iowa, 81 (full discussion of the authorities in the opinion by Judge Dillon).

⁸ See note, 2 Smith's Lead. Cas. 371; Steph. Ev., art. 28; Tayl. Ev., 10th ed., §§ 675, 676.

⁹ *Williams v. Graves*, 8 Car. & P. 592.

¹⁰ *Rex v. Lower Heyford*, 2 Smith's Lead. Cas., 7th ed., 333, 1 Barn. & Ald. 75, 109 Eng. Reprint, 715, approved in *Taylor v. Witham*, L. R. 3 Ch. D. 605, in which Sir George Jessel, M. R., disapproved *Doe v. Vowles*, 1 Moody & R. 261. His opinion is so clear and emphatic that it is reproduced. "It is, no doubt, an established rule in the courts of this country that an entry

against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of its being against his interest? I adopt the view of Mr. Baron Parke in the case of *Reg. v. Inhabitants of Lower Heyford*, that it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value."

made while the interest continued.¹¹ The fact to be proved need not be expressly stated. Several cases are illustrations of the principle that the main fact to be proved may be *inferred* from the facts stated. Thus, an entry of payment for drawing a paper was admitted to prove that the paper was really executed subsequent to the time it bore date;¹² and entries of payment for rentals, made by agents, have been received as evidence establishing the *right to property* in behalf of the principal.¹³ So if there are living witnesses who might testify to the facts contained in the declaration, this does not exclude the statement, but only affects the weight to be given it.¹⁴

§ 331 (334). **Dying declarations.**¹⁵—Another instance in which declarations in the nature of hearsay are received as evidence, although not made under oath or tested by cross-examination, is where the statements are of the character known as dying declarations. In the sense here used, these are declarations made by the victim in cases of homicide, where the death of the deceased is the subject of the charge and the circumstances and cause of the death are the subject of the dying declarations.¹⁶ Although declara-

¹¹ *Crease v. Barrett*, 1 Crompt., M. & R. 925, 5 Tyr. 458. This has been often illustrated in the case of indorsements on notes when they might rebut the statute of limitations: *Young v. Perkins*, 29 Minn. 173, 12 N. W. 515; *Small v. Rose*, 97 Me. 286, 54 Atl. 726.

¹² *Doe v. Robson*, 15 East, 32, 104 Eng. Reprint, 756.

¹³ *Barry v. Bebbington*, 4 Term Rep. 514, 100 Eng. Reprint, 1149.

¹⁴ *Middleton v. Melton*, 10 Barn. & C. 317, 109 Eng. Reprint, 467.

¹⁵ This and the following four sections are reprinted from the second edition both to preserve the order of the sections and for their value for purposes of reference. The scope of this work being the com-

mentary on the law of evidence in civil cases, those matters affecting the criminal law alone could not be treated in the space at disposal.

¹⁶ *People v. Olmstead*, 30 Mich. 431; *Mattox v. United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. Rep. 50; *Starkey v. People*, 17 Ill. 17; *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264. See notes to *State v. Molisse*, 58 Am. Rep. 184-194, and *Field v. State*, 34 Am. Rep. 479-482. See, also, *Bouvier's Law Dictionary*, title "Declarations," and see, also, the valuable collection of cases in 28 Eng. Reprint (Moak's ed.), 592-595; *Kelly v. United States*, 27 Fed. 621. On general subject, see long notes, to *Worthington v. State*, 56 L. R. A.

tions of this character are clearly hearsay, yet there are considerations which have properly led the courts to make some discrimination in their favor. The declarations are made under the sense of impending death and when there is comparatively *little temptation* on the part of the declarant *to falsify*. Moreover, the declarant *may be the only witness* beside the accused that has any knowledge of the facts, and if this be so, the murderer may escape if such declarations are rejected.¹⁷ But since these declarations are in the nature of pure hearsay and are open to the objections which may be urged against that class of testimony, the *limitations* subject to which they are received must be carefully observed. It is not within the scope of this work to treat of the rules of evidence in criminal actions, except in so far as it is necessary to illustrate the rules in other cases; therefore this exception to the general rule excluding hearsay will not be discussed in detail.

§ 332 (335). Limited to cases of homicide and when made in expectation of impending death.—Although there was formerly some doubt as to the proposition, it is now well settled that the declarations are admissible only in cases of *homicide*.¹⁸ Thus, they have been rejected in an

353-457; and *State v. Meyer*, 86 Am. St. Rep. 637-668. As to evidence of threats by the accused, see note to *Wilson v. State*, 17 L. R. A. 654-663.

¹⁷ *Woodcock's Case*, Leach, 4th ed., 500; *Thayer*, Cas. Ev. 354. For a discussion of the grounds of admissibility of such declarations, see note to *State v. Meyer*, 86 Am. St. Rep. 638, 639.

¹⁸ *Rex v. Mead*, 2 Barn. & C. 605, 107 Eng. Reprint, 509; *Reynolds v. State*, 68 Ala. 502; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Leiber v. Commonwealth*, 9 Bush (Ky.), 11; *Hill v. State*, 41 Ga. 484; *Wilson v. Borem*, 15 Johns. (N. Y.) 286; *State v. Bohan*, 15 Kan. 407; *Barnett v.*

People, 54 Ill. 325; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *State v. McCanon*, 51 Mo. 160; *Wright v. State*, 41 Tex. 246; *People v. Davis*, 56 N. Y. 95; *Railing v. Commonwealth*, 110 Pa. 100, 1 Atl. 314; *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213; *Testard v. State*, 26 Tex. App. 260, 9 S. W. 888; *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Thayer v. Lombard*, 165 Mass. 174, 52 Am. St. Rep. 507, 42 N. E. 563. See notes to *Worthington v. State*, 56 L. R. A. 360-365, and *State v. Meyer*, 86 Am. Rep. 665-668; 1 Greenl. Ev., § 156.

indictment for administering drugs with intent to procure an abortion, although death resulted from the act,¹⁹ as well as in a trial for perjury²⁰ or robbery,²¹ and in civil actions generally, although such actions are for the injury causing the death.²² It is another condition that it must appear, either from the statements of the declarant or from all the circumstances of the case, that he was in *actual danger of death*, and that he had *no hope of recovery at the time* the declarations were made.²³ Even a slight hope of re-

¹⁹ *Rex v. Mead*, 2 Barn. & C. 605, 107 Eng. Reprint, 509; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596. *Peoples v. Commonwealth*, 87 Ky. 487, 9 S. W. 509, 810, is a contrary ruling. They are admissible, however, in an action for manslaughter caused by an attempted abortion: *State v. Dickinson*, 41 Wis. 299; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297. If in reality the offense is homicide and the subject of inquiry the manner of the death of deceased, the declarations will be received; *Seifert v. State*, 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100; *State v. Meyer*, 65 N. J. L. 237, 86 Am. St. Rep. 634 (and note, 666, 667), 47 Atl. 486; *State v. Dickinson*, 41 Wis. 299. As to dying declarations in prosecution for homicide by commission of, or attempt to commit, abortion, see note to *State v. Power*, 63 L. R. A. 916.

²⁰ *Rex v. Mead*, 2 Barn. & C. 605, 107 Eng. Reprint, 509.

²¹ *Rex v. Lloyd*, 4 Car. & P. 233.

²² *Wilson v. Boerem*, 15 Johns. (N. Y.) 286; *Daily v. New York etc. Ry. Co.*, 32 Conn. 356, 87 Am. Dec. 176; *Waldele v. New York C. Ry. Co.*, 19 Hun (N. Y.), 69; *Marshall v. Chicago etc. Ry. Co.*, 48 Ill. 475, 95 Am. Dec. 561; *Johnson v. State*, 50 Ala. 456. See note to *State v. Meyer*, 86 Am. St. Rep. 667, 668.

²³ *Reg. v. Morgan*, 14 Cox C. C. 337; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *Moeck v. People*, 100 Ill. 242, 39 Am. Rep. 38; *State v. Elliott*, 45 Iowa, 486; *Doolin v. Commonwealth*, 16 Ky. Law Rep. 189, 27 S. W. 1; *Commonwealth v. Roberts*, 108 Mass. 296; *Commonwealth v. Haney*, 127 Mass. 455; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *Lipscomb v. State*, 75 Miss. 559, 23 South. 210, 230; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Brother-ton v. People*, 75 N. Y. 159; *State v. Blackburn*, 80 N. C. 474; *Allison v. Commonwealth*, 99 Pa. 17; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *Shell v. State*, 88 Ala. 14, 7 South. 40; *Archibald v. State*, 122 Ind. 122, 23 N. E. 758; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49; *Hall v. Commonwealth*, 89 Va. 171, 15 S. E. 517; *State v. Nelson*, 101 Mo. 464, 14 S. W. 712; *State v. Bradley*, 34 S. C. 136, 13 S. E. 315; *State v. Murdy*, 81 Iowa, 603, 47 N. W. 867; *Crump v. Commonwealth*, 13 Ky. Law Rep. 450, 20 S. W. 390; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. See note to *State v. Meyer*, 86 Am. St. Rep. 654-660; *People v. Buettner*, 13 Ann. Cas. 238, and *Rex v. Perry*, 17 Ann. Cas. 287.

covery entertained by the declarant at the time excludes the declarations.²⁴ But a prior hope of recovery, which had been abandoned,²⁵ or a subsequent hope of recovery, does not necessarily render the declarations incompetent.²⁶ It is a preliminary question for the court to determine whether the declarations were made without hope of recovery. But, of course, if admitted, the question of credibility is for the jury as in other cases.²⁷ The preliminary evidence for the court may be given in the presence of the jury.²⁸ The essential condition is that the declarations should be made with the expectation of speedy death. If this condition is satisfied, the testimony is not excluded, although it appear that the *death did not ensue for a considerable time*. In most reported cases, however, where such evidence has been received, the death has followed within a few hours or days.²⁹ And it has been held that

²⁴ *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30; *Commonwealth v. Roberts*, 108 Mass. 296; *Rex v. Crockett*, 4 Car. & P. 544, 19 E. C. L. 641. But see *McQueen v. State*, 103 Ala. 12, 15 South. 824, and *State v. Evans*, 124 Mo. 397, 28 S. W. 8, where deceased at the time of making the declaration also sent for a doctor. See note to *State v. Meyer*, 86 Am. St. Rep. 660, 661. As to belief and hopes of others, see note to *State v. Meyer*, 86 Am. St. Rep. 661-663.

²⁵ *Mockabee v. Commonwealth*, 78 Ky. 380; *Small v. Commonwealth*, 91 Pa. 304; *State v. McEvoy*, 9 S. C. 208.

²⁶ *State v. Kilgore*, 70 Mo. 546; *Swisher v. Commonwealth*, 26 Gratt. (Va.) 963, 21 Am. Rep. 330; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174.

²⁷ *Commonwealth v. Roberts*, 108 Mass. 296; *Kehoe v. Commonwealth*, 85 Pa. 127; *Owens v. State*, 59 Miss. 547; *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297; *Roten v. State*, 31

Fla. 514, 12 South. 910; *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229; 1 Greenl. Ev., § 160. See note on "Admissibility of Dying Declarations as Question of Law or Fact," to *Willoughby v. Territory*, 8 Ann. Cas. 539.

²⁸ *People v. Smith*, 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; *State v. Murdy*, 81 Iowa, 603, 47 N. W. 867; *Sullivan v. Commonwealth*, 93 Pa. 284. See, also, *Starkey v. People*, 17 Ill. 17.

²⁹ *Rex v. Bernadotti*, 11 Cox C. C. 316 (three weeks); *State v. Noc-ton*, 121 Mo. 537, 26 S. W. 551; *Baxter v. State*, 15 Lea (Tenn.), 657 (sixteen days); *Jones v. State*, 71 Ind. 66 (fourteen days); *Commonwealth v. Cooper*, 5 Allen (Mass.), 495, 81 Am. Dec. 762 (seventeen days); *Million v. Commonwealth*, 16 Ky. Law Rep. 17, 25 S. W. 1059; *Miller v. State*, 27 Tex. App. 63, 10 S. W. 445; *State v. Wensel*, 98 Mo. 137, 11 S. W. 614; *State v. Jones*, 89 Iowa, 182, 56 N. W. 427; *Hussey v.*

one in fear of death may reaffirm statements made before fear of death became imminent, and such declarations then become admissible.³⁰ Although it must be shown that the declaration was made under the expectation of impending death, this fact *need not appear from the declaration* itself, but may be inferred from other statements of the deceased or from all the surrounding circumstances.³¹ The testimony is not excluded because of the fact that *other testimony* may be available.³²

§ 333 (336). Declarant must have been competent to testify.—If the declarant could not have been a competent witness while living, his dying declarations will not be re-

State, 87 Ala. 121, 6 South. 420; State v. Banister, 35 S. C. 290, 14 S. E. 678 (declarations made two months before death); Boulden v. State, 102 Ala. 78, 15 South. 341. As to how long before death dying declarations may be made, see note to Gipe v. State, 1 L. R. A., N. S., 419.

³⁰ Snell v. State, 29 Tex. App. 236, 25 Am. St. Rep. 723, and note, 15 S. W. 722; People v. Crews, 102 Cal. 174, 36 Pac. 367; Johnson v. State, 102 Ala. 1, 16 South. 99; Wilson v. Commonwealth, 22 Ky. Law Rep. 1251, 60 S. W. 400; Smith v. Commonwealth, 113 Ky. 19, 67 S. W. 32; State v. Evans, 124 Mo. 397, 28 S. W. 8; State v. Garth, 164 Mo. 553, 65 S. W. 275. But see Harper v. State, 79 Miss. 575, 56 L. R. A. 372, 31 South. 195. As to effect of reaffirmation under sense of impending death to render statement previously made admissible as a dying declaration, see note to State v. Peacock, 27 L. R. A., N. S., 702.

³¹ Ward v. State, 78 Ala. 441; Kehoe v. Commonwealth, 85 Pa. 127; People v. Smith, 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; Don-

nelly v. State, 26 N. J. L. 601; Swisher v. Commonwealth, 26 Gratt. (Va.) 963, 21 Am. Rep. 330; Owens v. State, 59 Miss. 547; Smith v. State, 9 Humph. (Tenn.) 9; State v. Cantieny, 34 Minn. 1; State v. Elliott, 45 Iowa, 486; State v. Johnson, 76 Mo. 121; Jones v. State, 71 Ind. 66; Starkey v. People, 17 Ill. 17; State v. Evans, 124 Mo. 397, 28 S. W. 8; People v. Glenn, 10 Cal. 32; Young v. State, 114 Ga. 849, 40 S. E. 1000; Newberry v. State, 68 Ark. 355, 58 S. W. 351; Lester v. State, 37 Fla. 382, 20 South. 232; McHargess v. Commonwealth, 15 Ky. Law Rep. 323, 23 S. W. 349; Commonwealth v. Haney, 127 Mass. 455; State v. Cronin, 64 Conn. 293, 29 Atl. 536. See note to State v. Meyer, 86 Am. St. Rep. 658-660. As to how sense of impending death evidenced, see note to Territory of New Mexico v. Eagle, 30 L. R. A., N. S., 391.

³² Commonwealth v. Roddy, 184 Pa. 274, 39 Atl. 211; Reynolds v. State, 68 Ala. 502; Fuqua v. Commonwealth, 24 Ky. Law Rep. 2204, 73 S. W. 782; Donnelly v. State, 26 N. J. L. 601, 627.

ceived; for example, in those states where *infamy* is a disqualification, the dying declarations of those convicted of burglary, larceny, robbery and the like will be rejected.³³ But the dying declarations of a *wife or husband* are admissible against each other on the principle that the testimony of one is admissible against the other when the complaint is of violence by the accused against the person of the other.³⁴ On the same principle the dying declarations of an *insane person*³⁵ or of a *child* of too tender age to be a competent witness,³⁶ or of one incapable of understanding his statements by reason of partial unconsciousness,³⁷ are incompetent. As bearing upon the credibility and weight of the statements, the *bad character* of the declarant may be shown.³⁸ So it may be shown that he had *no belief in future punishment*;³⁹ or that he had made *contradictory*

³³ *The King v. Drummond*, Leach, 4th ed., 337; *Thayer*, Cases on Ev. 353; *Walker v. State*, 39 Ark. 221; *State v. Williams*, 67 N. C. 12; *Greenl. Ev.*, § 519. See notes to *State v. Meyer*, 86 Am. St. Rep. 640-642; and *Harper v. State*, 56 L. R. A. 432. It is not necessary to show in the first instance that the declarant was in full possession of his faculties: *State v. Reed*, 137 Mo. 125, 38 S. W. 574.

³⁴ *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276; *State v. Belcher*, 13 S. C. 459; *People v. Green*, 1 Denio (N. Y.), 614. See note to *State v. Meyer*, 86 Am. St. Rep. 641. As to admissibility of dying declarations of wife against husband, see note to *Worthington v. State*, 56 L. R. A. 360.

³⁵ *Bolin v. State*, 9 Lea (Tenn.), 516. See note to *State v. Meyer*, 86 Am. St. Rep. 640, 641.

³⁶ *Rex v. Pike*, 3 Car. & P. 598; *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650. As to admissibility of dying declarations of infant, see

note to *Worthington v. State*, 56 L. R. A. 360, above referred to.

³⁷ *Binfield v. State*, 15 Neb. 484, 19 N. W. 607; *Mitchell v. State*, 71 Ga. 128; *McHugh v. State*, 31 Ala. 317. But see *Commonwealth v. Silcox*, 161 Pa. 484, 29 Atl. 105.

³⁸ *State v. Thomas*, 1 Jones (46 N. C.), 274; *State v. Blackburn*, 80 N. C. 474; *Nesbit v. State*, 43 Ga. 238; *People v. Knapp*, 1 Edm. Sel. Cas. (N. Y.) 177.

³⁹ *Hill v. State*, 64 Miss. 431, 1 South. 494; *State v. Elliott*, 45 Iowa, 486; *People v. Chin Mook Sow*, 51 Cal. 597; *People v. Sanford*, 43 Cal. 29; *State v. Ah Lee*, 8 Or. 214; *Goodall v. State*, 1 Or. 333, 80 Am. Dec. 396; *Nesbit v. State*, 43 Ga. 238; *Walker v. State*, 39 Ark. 221; *Donnelly v. State*, 26 N. J. L. 463. See note to *State v. Meyer*, 86 Am. St. Rep. 641, 642. See note on "Want of Religious Belief on Part of Declarant as Affecting Admissibility or Weight of Dying Declarations," to *Gambrell v. State*, 16 Ann. Cas. 148.

or inconsistent *statements*;⁴⁰ or that the declarant was in a reckless or irreverent state of mind or actuated by malicious motives.⁴¹ But when proof is offered to impeach the declarant, it is of course competent for the prosecution to *rebut* such evidence.⁴²

§ 334 (337). Declarations must be confined to the homicide.—Under the principle already stated that the declarations must point distinctly to the cause of death and the circumstances producing and attending it, declarations as to previous threats,⁴³ or as to a prior state of feeling,⁴⁴ or as to relations between the parties or former quarrels,⁴⁵ or that he called the attention of witnesses to the fact that he was unarmed,⁴⁶ cannot be admitted. But the name of the offender and of the declarant may be proved by such declarations.⁴⁷ The declarant must have had knowledge of the transaction,⁴⁸ and mere *statements of opinion* which

⁴⁰ *Battle v. State*, 74 Ga. 101; *People v. Lawrence*, 21 Cal. 368; *Hurd v. People*, 25 Mich. 405; *Felder v. State*, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Carver v. United States*, 164 U. S. 694, 41 L. Ed. 602, 17 Sup. Ct. Rep. 228. See notes on "Impeachment of Dying Declarations by Proof of Contradictory Statements" to *State v. Mayo*, 7 Ann. Cas. 885, and *Allen v. Commonwealth*, 20 Ann. Cas. 887.

⁴¹ *Tracy v. People*, 97 Ill. 101.

⁴² See cases cited in note 38, *supra*.

⁴³ *Jones v. State*, 71 Ind. 66; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *Merrill v. State*, 58 Miss. 65; *State v. Wood*, 53 Vt. 560; *State v. Moody*, 18 Wash. 165, 51 Pac. 356. See note to *Worthington v. State*, 56 L. R. A. 369. As to evidence of antecedent threats on trial for homicide, see note to *State v. Tolla*, in 3 L. R. A., N. S., 523. See note on "Admissibility as Dying Declaration

of Statement Respecting Transaction Occurring Prior to Homicide," to *People v. Alexander*, 21 Ann. Cas. 152.

⁴⁴ *Ben v. State*, 37 Ala. 103; *Jones v. State*, 71 Ind. 66; *Reynolds v. State*, 68 Ala. 502.

⁴⁵ *State v. Jefferson*, 125 N. C. 712, 34 S. E. 648; *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970.

⁴⁶ *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

⁴⁷ *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; *Sylvester v. State*, 71 Ala. 17; *State v. Johnson*, 76 Mo. 121; *Lister v. State*, 1 Tex. App. 739.

⁴⁸ *Jones v. State*, 52 Ark. 345, 12 S. W. 704; *Jones v. State*, 79 Miss. 309, 30 South. 759; *State v. Reed*, 137 Mo. 125, 38 S. W. 574. See note to *State v. Meyer*, 86 Am. St. Rep. 647-649. See further cases cited in 2 Wigmore, Ev., p. 1814.

would not be received if the declarant were a witness are inadmissible.⁴⁹ But it has been held that a statement that the accused had no provocation or cause for the commission of the offense, that is, that it was intentional, is a statement of fact and not a mere opinion.⁵⁰ It is obvious that the declarations of a person may be received when they are made under such circumstances as to form part of the *res gestae*, although no foundation is laid for their admission as dying declarations.⁵¹

§ 335 (338). Form of the declaration—General rules.—It is not necessary that the declarations should be made in any particular form. While they are generally oral, they may be in writing or by means of signs.⁵² When the declarations are *reduced to writing* and signed by the declarant, it is generally held that the writing is the *best evidence* and must be produced.⁵³ But a different rule

⁴⁹ *People v. Wasson*, 65 Cal. 538, 4 Pac. 555; *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *Shenkenberger v. State*, 154 Ind. 630, 57 N. E. 519; *Brotherton v. People*, 75 N. Y. 159; *Reynolds v. State*, 68 Ala. 502; *Walker v. State*, 39 Ark. 221; *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287; *Ratteree v. State*, 53 Ga. 570; *Savage v. State*, 18 Fla. 909; *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970; *People v. Olmstead*, 30 Mich. 431; *Moeck v. People*, 100 Ill. 242, 39 Am. Rep. 38; *Collins v. Commonwealth*, 12 Bush (Ky.), 271. But see *Wroe v. State*, 20 Ohio St. 460; *State v. Gile*, 8 Wash. 12, 35 Pac. 417. See note to *State v. Meyer*, 86 Am. St. Rep. 649, 650.

⁵⁰ *Wroe v. State*, 20 Ohio St. 460; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; *Payne v. State*, 61 Miss. 161; *State v. Nettlebush*, 20 Iowa, 257; *People v. Abbott*, 2 Cal. Unrep. 383, 4 Pac. 769; *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264.

⁵¹ *People v. Brown*, 59 Cal. 345; *Stagner v. State*, 9 Tex. App. 440; *State v. Porter*, 34 Iowa, 131; *State v. Wagner*, 61 Me. 178; *Burns v. State*, 61 Ga. 192; *Commonwealth v. Hackett*, 2 Allen (Mass.), 136; *Wilkinson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990. See note to *State v. Meyer*, 86 Am. St. Rep. 665.

⁵² *Jones v. State*, 71 Ind. 66; *Commonwealth v. Casey*, 11 Cush. (Mass.) 417, 59 Am. Dec. 150; *Wagoner v. Territory*, 5 Ariz. 175, 51 Pac. 145; *Mockabee v. Commonwealth*, 78 Ky. 380; *Reg. v. Morgan*, 14 Cox C. C. 337, 28 Eng. Rep. (Moak's ed.) 583. See notes to *Harper v. State*, 56 L. R. A. 427, and *State v. Meyer*, 86 Am. St. Rep. 642-647. See note on "Fact That Dying Declaration is Made by Acts or Signs Instead of Words as Affecting Its Admissibility," to *People v. Madas*, Ann. Cas. 1912B, 231.

⁵³ *State v. Sullivan*, 51 Iowa, 142, 50 N. W. 572; *State v. Tweedy*, 11

obtains when the statement is not read to or signed by the declarant.⁵⁴ The *signature* is not necessary if the writing is read to and understood by the declarant.⁵⁵ The fact that a written statement has been made does not exclude *prior* or *subsequent* oral declarations, if the written statement cannot be produced.⁵⁶ If the declarations are otherwise competent, they should not be rejected on the ground that they have been drawn out by *leading questions*,⁵⁷ or because they do not give all of the facts making up the transaction to which they refer.⁵⁸ It suffices if the *substance* of the declaration is proved and if only part is stated the adversary may prove the rest,⁵⁹ and *either party*

Iowa, 350; *People v. Glenn*, 10 Cal. 32; *Collier v. State*, 20 Ark. 36; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *King v. State*, 91 Tenn. 617, 20 S. W. 169. See note to *State v. Meyer*, 86 Am. St. Rep. 642-644. See, also, *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Krebs v. State*, 8 Tex. App. 1; *Commonwealth v. Haney*, 127 Mass. 455.

⁵⁴ *State v. Fraunburg*, 40 Iowa, 555; *Allison v. Commonwealth*, 99 Pa. 17; *Anderson v. State*, 79 Ala. 5.

⁵⁵ *Freeman v. State*, 112 Ga. 48, 37 S. E. 172; *State v. Carrington*, 15 Utah, 480, 50 Pac. 526. See note to *State v. Meyer*, 86 Am. St. Rep. 643. As to refreshing memory, *Fuqua v. Commonwealth*, 24 Ky. Law Rep. 2204, 73 S. W. 782; *Foley v. State*, 11 Wyo. 464, 72 Pac. 627.

⁵⁶ *Rex v. Reason and Trauter*, 1 Str. 499, 93 Eng. Reprint, 659; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *Hendrickson v. Commonwealth*, 24 Ky. Law Rep. 2173, 73 S. W. 764. See note to *State v. Meyer*, 86 Am. St. Rep. 642.

⁵⁷ *Commonwealth v. Casey*, 11 Cush. (Mass.) 417, 59 Am. Dec. 150; *Com-*

monwealth v. Haney, 127 Mass. 455; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *Vass v. Commonwealth*, 3 Leigh (Va.), 786, 24 Am. Dec. 695; *North v. People*, 139 Ill. 81, 28 N. E. 966; *Ingram v. State*, 67 Ala. 67; *Jones v. State*, 71 Ind. 66; *People v. Sanchez*, 24 Cal. 17; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *Rex v. Fagent*, 7 Car. & P. 238; *White v. State*, 30 Tex. App. 652, 18 S. W. 462; *Worthington v. Commonwealth*, 92 Md. 222, 84 Am. St. Rep. 506, 56 L. R. A. 352, 48 Atl. 355. See note to *State v. Meyer*, 86 Am. St. Rep. 644-646.

⁵⁸ *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *State v. Giroux*, 26 La. Ann. 582. See note to *State v. Meyer*, 86 Am. St. Rep. 646. But see *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229, where it was held that a part was inadmissible, unless the omitted parts were irrelevant. See, also, *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264.

⁵⁹ *Mattox v. United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. Rep. 50.

may use the declarations.⁶⁰ Of course the ordinary rule prevails that the judge decides upon the admissibility and the jury upon the weight of the evidence.⁶¹ It was well settled that before the adoption of the state constitutions in this country dying declarations were admissible in cases of homicide; hence such declarations are not now excluded by those clauses which secure to the accused in criminal prosecutions the right "to meet the witnesses face to face."⁶²

§ 336 (339). Evidence of witnesses given in former action or on former trial.—In the preceding sections the discussion has been, for the most part, upon those exceptions to the rules excluding hearsay, where such hearsay consisted of the unsworn declarations of the person whose statement was to be offered as testimony. The most serious objections to the admission of hearsay evidence in general are that no opportunity has been given for the cross-examination of the declarant, and that his statements were made without the sanction of an oath. In those cases where these objections are removed, there is good reason for the relaxation of the strict rule forbidding hearsay testimony. It has long been settled as one of the exceptions to the general rule excluding hearsay that the testimony of a witness given in a former action or at a former stage of the same action is competent in a subsequent action or in a subsequent proceeding in the same action, where it is shown that the *witness is dead* or that a valid legal reason exists for his *nonproduction*, that the *parties and questions in issue are substantially the same*, and that such former tes-

⁶⁰ *People v. Southern*, 120 Cal. 645, 53 Pac. 214; *Mattox v. United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. Rep. 50.

⁶¹ *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560; *People v. Smith*, 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; *State v. Sexton*, 147 Mo. 89, 48 S. W. 452; *State v.*

Phillips, 118 Iowa, 660, 92 N. W. 876.

⁶² *State v. Dickinson*, 41 Wis. 299; *Commonwealth v. Carey*, 12 Cush. (Mass.) 246; *People v. Green*, 1 Denio (N. Y.), 614; *State v. Vansant*, 80 Mo. 67; *State v. Tilghman*, 11 Ired. (33 N. C.) 513; *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15; *Robbins v. State*, 8 Ohio St. 131.

timony can be *substantially reproduced* upon the second hearing.⁶³ It is necessary, therefore, to consider the question having regard to these prerequisites.

§ 337 (340). Exact identity of the parties not necessary. In the preceding section we find the words, "former action or at a former stage of the same action," and before proceeding with the discussion, it is well to say, that the rule

⁶³ Clealand v. Huey, 18 Ala. 343; Lane v. Brainerd, 30 Conn. 565; Letcher v. Norton, 5 Ill. 575; Schindler v. Milwaukee etc. Ry. Co., 87 Mich. 400, 49 N. W. 670; Ephraims v. Murdock, 7 Blackf. (Ind.) 10; Packard v. McCoy, 1 Iowa, 530; Conway v. Erwin, 1 La. Ann. 391; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; Berg v. McLafferty (Pa.), 12 Atl. 460; Watson v. Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49; Calvert v. Coxe, 1 Gill (Md.), 95; Breeden v. Feurt, 70 Mo. 624; Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Harper v. Burrow, 6 Ired. (N. C.) 30; Jackson v. Lawson, 15 Johns. (N. Y.) 539; Osborn v. Bell, 5 Denio (N. Y.), 370, 49 Am. Dec. 275; Parker v. Legett, 12 Rich. (S. C.) 198; Mathewson v. Sargeant, 36 Vt. 142; Radford v. Georgia & A. Ry. Co., 113 Ga. 327, 39 S. E. 108; Watson v. St. Paul City Ry. Co., 76 Minn. 358, 79 N. W. 308; McGeoch v. Carlson, 96 Wis. 138, 71 N. W. 116. See full note to Atchison etc. R. R. Co. v. Osborn, 91 Am. St. Rep. 192-208. But the rule forbidding the introduction of evidence from a former trial does not apply when it is introduced for the purpose of impeaching witnesses: Lohr v. Philipsburg, 165 Pa. 109, 30 Atl. 822. In Madden v. Duluth etc. R. R. Co., 112 Minn. 303, 21 Ann. Cas. 805, 127 N. W. 1052, it was held that under the rule of evidence which enables the

use of testimony of a witness given on a former trial (as defined in Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639), there is no distinction between expert and other witnesses. In Toledo Traction Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28, the subject of the introduction in the federal courts of evidence taken at a former trial is elaborately discussed by Severens, J. An attempt was made to exclude the evidence by reason of Revised Statutes, section 861 (U. S. Comp. Stats. 1901, p. 661). The learned judge held that federal courts are not called upon, either by that section or the succeeding ones dealing with depositions, to exclude testimony admissible by the common law before and at the time the federal statute was enacted. As to admissibility on trial for murder of testimony of accused at coroner's inquest, see notes to Tuttle v. People, 70 L. R. A. 33, and Maki v. State, 33 L. R. A., N. S., 465. As to admissibility in criminal trial of testimony given upon preliminary examination by witnesses not available at time of trial, see note to State v. Hefferman, 25 L. R. A., N. S., 868. See, also, the Canadian cases: Town of Walkerton v. Erdman, 23 S. C. R. 352; The King v. Snelgrove, 39 N. S. R. 400.

is not limited to new trials of actions in the ordinary sense of the term. It is not necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of an action. It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination.⁶⁴ In view of the reasons for this relaxation of the rule, it is not necessary that there should be exact or precise nominal identity of parties in the two proceedings. Where the right to cross-examine the deceased witness existed, it is enough if in the second proceeding there is *privity of interest*. "The rule is that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate or privies in law."⁶⁵ Thus in an action concerning land, the testimony of plaintiff's grantor, since deceased, which was given against defendant's grantor may be admitted in a subsequent proceeding on the same issue.⁶⁶ The same rule applies when the present action is by a *survivor* of the partners who brought the former action;⁶⁷ or by successors in interest

⁶⁴ Orr v. Hadley, 36 N. H. 575; and see § 339, *post*.

⁶⁵ Alabama Consol. Coal etc. Co. v. Heald, 171 Ala. 263, 55 South. 181; Long v. Davis, 18 Ala. 801; Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305; Lane v. Brainerd, 30 Conn. 565; Heatley v. Long, 135 Ga. 153, 68 S. E. 783; Atlanta etc. R. R. Co. v. Venable, 67 Ga. 697; Hutchings v. Corgan, 59 Ill. 70; State v. New Orleans Waterworks Co., 107 La. 1, 31 South. 395; Cumberland Coal etc. Co. v. Jeffries, 27 Md. 526; Strickland v. Hudson, 55 Miss. 235; Anaconda Copper Min. Co. v. Heinze, 27 Mont. 161, 69 Pac. 909, 22 Morr. Min. Rep. 346; O'Meara v. McDermott, 40 Mont. 38, 104 Pac. 1049; Watson v. St. Paul

City Ry. Co., 76 Minn. 358, 79 N. W. 308; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; Shook v. Fox, 126 App. Div. 565, 110 N. Y. Supp. 951; Jackson v. Lawson, 15 Johns. (N. Y.) 539; Bryan v. Malloy, 90 N. C. 508; Wright v. Cumpsty, 41 Pa. 102; Ottinger v. Ottinger, 17 Serg. & R. (Pa.) 142; Martin v. Ragsdale, 71 S. C. 67, 50 S. E. 671; Shelton v. Barbour, 2 Wash. (Va.) 64; Metropolitan St. R. Co. v. Gumby, 99 Fed. 192, 39 C. C. A. 455. See note to 91 Am. St. Rep. 199, cases cited below.

⁶⁶ Yale v. Comstock, 112 Mass. 267.

⁶⁷ Wilbur v. Selden, 6 Cow. (N. Y.) 162. See note to Grafton Bank v. Moore, 38 Am. Dec. 481.

or assignees;⁶⁸ or where the former action was against one of two *administrators* and the pending action is against both, since they are privies in law and one represents the other;⁶⁹ or where the former action was by the *agent* of parties in the present suit, the other parties and the issues being the same;⁷⁰ or where the subsequent action is against the executor or administrator of the party to the previous action. In all such cases the evidence is available for the same reason.⁷¹

§ 338 (341). Parties should be substantially the same or in privity.—On the same principle it has been held that where an action was brought against a railroad company for personal injury, the testimony of the plaintiff may be used by her child in an action against the company after the injury had resulted in the death of the former plaintiff.⁷² And where a test case on the validity of a patent had been tried, and subsequently three defendants were sued for infringing such patent, two of whom had contributed to the defense in the test case, the court held that the participation in the defense of the test suit made the two defendants referred to privy to that suit, and that the testimony of a witness given therein, and since deceased, might properly be read against them.⁷³ The testimony will not necessarily be rejected, although there were *other parties* to the record in the former proceedings, when the *issues* are substantially *the same* and the parties affected by the second suit had the opportunity to cross-examine the

⁶⁸ Doe v. Derby, 1 Ad. & E. 783, 791, and note, 110 Eng. Reprint, 1406; Wright v. Tatham, 1 Ad. & E. 3, 110 Eng. Reprint, 1108.

⁶⁹ Boudereau v. Montgomery, 4 Wash. C. C. 186, Fed. Cas. No. 1694.

⁷⁰ Ritchie v. Lyne, 1 Call (Va.), 489.

⁷¹ Indianapolis etc. R. Co. v. Stout, 53 Ind. 143; Clealand v. Huey, 18 Ala. 343; Chicago etc. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Lewis v. Roulo, 93 Mich. 475, 53

N. W. 622; Strickland v. Hudson, 55 Miss. 235; Evans v. Reed, 78 Pa. 415; Houston etc. Ry. Co. v. Perkins, 2 Tex. App. Civ. Cas., § 520; McDonald v. Allen, 8 Baxt. (Tenn.) 446; Hutchings v. Corgan, 59 Ill. 70.

⁷² Atlanta etc. R. R. Co. v. Venable, 67 Ga. 697; Indianapolis etc. R. Co. v. Stout, 53 Ind. 143.

⁷³ Rumford Chemical Works v. Hygienic Chemical Co., 159 Fed. 436, 86 C. C. A. 416.

witnesses.⁷⁴ But the parties must be substantially the same, and it is for the party offering the testimony to establish this.⁷⁵ When the subject matter of both actions was the same, the fact that in the second one the defendants were sued both in their individual and representative capacities, and only in their representative capacity in the first one, did not render such testimony inadmissible. The parties were the same.⁷⁶ The testimony of a deceased witness in an action by one tenant in common is not admissible in an action by another tenant in common, although the same land is in question.⁷⁷ The parties are not the same in this sense, where one proceeding is against an administrator, and the second is against the sureties on his bond.⁷⁸

⁷⁴ Philadelphia, W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. Ed. 157; Doe v. Tatham, 1 Ad. & E. 3, 110 Eng. Reprint, 1108; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570. Such testimony, however, was refused where the issues were changed by an amendment to the complaint: Schindler v. Milwaukee etc. Ry. Co., 87 Mich. 400, 49 N. W. 670. Not so if issue remain same after amendment: Watson v. St. Paul City Ry. Co., 76 Minn. 358, 79 N. W. 308.

⁷⁵ *McTighe v. Herman*, 42 Ark. 285; *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *Tritch v. Perry*, 48 Colo. 339, 108 Pac. 981; *Hughes v. Clark*, 67 Ga. 19; *Earl v. Hurd*, 5 Blackf. (Ind.) 248; *Rucker v. Hamilton*, 3 Dana (Ky.), 36; *Mercier v. Rossi*, 128 La. 853, 55 South. 552; *Mason v. Kellogg*, 38 Mich. 132; *Leggat v. Carroll*, 30 Mont. 384, 76 Pac. 805; *Orr v. Hadley*, 36 N. H. 575; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; *Latta v. Catawba etc. Co.*, 146 N. C. 285, 59 S. E. 1028; *Summons v. State*, 5 Ohio St. 325; *Patty v. Salem Flouring Co.*, 53 Or. 350, 96 Pac. 1106, 98

Pac. 521, 100 Pac. 935; *Wright v. Cumpsty*, 41 Pa. 102; *Killingsworth v. Bradford*, 2 Overt. (Tenn.) 204; *Gulf etc. R. Co. v. Peacock* (Tex. Civ. App.), 128 S. W. 463; *United States v. Reading Co.*, 183 Fed. 427; *Tappan v. Beardsley*, 10 Wall. 427, 19 L. Ed. 947.

⁷⁶ *Pratt, Hurst & Co. v. Tailer*, 125 App. Div. 1, 119 N. Y. Supp. 803; *Boyd v. United States Mfg. etc. Co.*, 187 N. Y. 262, 116 Am. St. Rep. 599, 10 Ann. Cas. 146, 9 L. R. A., N. S., 399, 79 N. E. 999; *Deering v. Schreyer*, 88 App. Div. 457, 85 N. Y. Supp. 275; *Smith v. Heyser*, 115 Ala. 455, 22 South. 149.

⁷⁷ *Norris v. Monen*, 3 Watt (Pa.), 465. So where the relationship of father and son existed, there being no privity of estate: *Morgan v. Nicholl*, L. R. 2 C. P. 117. Same in two suits, one by father for loss of services and the other as guardian *ad litem* of son for personal injury: *Hooper v. Southern Ry. Co.*, 112 Ga. 96, 37 S. E. 165.

⁷⁸ *Fellers v. Davis*, 22 S. C. 425. The rule is otherwise if the surety defends for the principal: *Woodworth v. Gorsline*, 30 Colo. 186, 58 L. R. A. 417, 69 Pac. 705.

On the same principle an agreed statement of facts between parties in the former suit is not admissible in the second suit, unless the parties are the same or privies.⁷⁹ It is no objection to the testimony, where the parties are the same, that the testimony offered by one is that of a witness who, on the former trial, was the witness of the other party.⁸⁰ But as between executor and devisee,⁸¹ and heir and administrator,⁸² it has been held that there is no privity to warrant the introduction of such testimony.

§ 339 (342). Form of proceedings may be different.— If the parties and the issues are the same in each case, it is not necessary to the admission of the testimony that the form of the second proceeding should be the same as that of the first. Nor that the former trial should be a trial immediately preceding that in which the testimony is offered. The rule covers *any* former trial, where evidence was given by a party since deceased, which it is subsequently desired to use.⁸³ For example, the defendants in one action may be the plaintiffs in the other.⁸⁴ The admission of the testimony of the deceased witness is not confined to appeals or new trials in the ordinary courts of law. Thus, where *commissioners* are a duly constituted tribunal to determine disputes relative to land or other subjects, the testimony of a witness, since deceased, given before them, is competent in a later proceeding in court.⁸⁵ On the same prin-

⁷⁹ *Frye v. Gragg*, 35 Me. 29.

⁸⁰ *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099. See note on "Identity of Parties and Issues as Condition to Admissibility of Testimony Given in Former Proceeding by Witness Who has Become Disqualified or Inaccessible," to *McInturff v. Insurance Co.*, 21 Ann. Cas. 179.

⁸¹ *Burnham v. Burnham*, 46 App. Div. 513, 62 N. Y. Supp. 120.

⁸² *Jacob Home Inst. v. Davis*, 87 Md. 591, 41 Atl. 166.

⁸³ *Koehler v. Scheider*, 16 Daly (N. Y.), 235, 10 N. Y. Supp. 101.

⁸⁴ *Yale v. Comstock*, 112 Mass. 267.

⁸⁵ *Jackson v. Bailey*, 2 Johns. (N. Y.) 17; *Cox v. Pearce* (N. Y.), 7 Johns. 298; *Forney v. Hallagher*, 11 Serg. & R. (Pa.) 203; *Ottinger v. Ottinger*, 17 Serg. & R. (Pa.) 142; *Ray v. Bush*, 1 Root (Conn.), 81; *Lewis v. Roulo*, 93 Mich. 475, 53 N. W. 622 (appeal from justice court). In a recent case (*United States v. Reading Co.*, 183 Fed. 427), an objection to the admission of testimony taken before the Interstate Commerce Commission was sustained, but the court found it was testimony taken before

ciple if the former proceeding was before *arbitrators* having jurisdiction, such testimony is admissible on a trial in court.⁸⁶ Likewise such testimony given in a *preliminary examination* on a criminal charge may be admitted at the trial.⁸⁷ But if the testimony is given before a tribunal which cannot enforce the attendance of witnesses or administer oaths, a different rule applies.⁸⁸ Nor is the testimony of a witness given at a *coroner's inquest* admissible under this exception, in a subsequent action, as the inquest is not a judicial proceeding between the same parties.⁸⁹ For the same reason testimony given before an investigating committee is not admissible;⁹⁰ but it has been held that such testimony is admissible even though the court had no jurisdiction of the subject matter.⁹¹ We note, however, this forms the subject of a conflict, and think that the

a body not judicial but administrative, in a proceeding between different parties, and with reference to nonidentical issues. In addition, it was not authenticated or proven by any witness present at the time the testimony was taken.

⁸⁶ Calvert v. Friebus, 48 Md. 44; Bailey v. Woods, 17 N. H. 365; Walbridge v. Knipper, 96 Pa. 48. But see Jessup v. Cook, 6 N. J. L. 434.

⁸⁷ Davis v. State, 17 Ala. 354; State v. Hooker, 17 Vt. 658; United States v. Penn, 13 Bank. Reg. 464, Fed. Cas. No. 16,025; State v. Stewart, 34 La. Ann. 1037; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; People v. Leavens, 12 Cal. App. 178, 106 Pac. 1103. As to admissibility in criminal trial of testimony given upon preliminary examination by witnesses not available at time of trial, see note to State v. Heffernan, 25 L. R. A., N. S., 868.

⁸⁸ Montgomery v. Snodgrass, 2 Yeates (Pa.), 230; Packer v. Gonzalus, 1 Serg. & R. (Pa.) 526; Foster v. Shaw, 7 Serg. & R. (Pa.) 156.

⁸⁹ Pittsburg Ry. Co. v. McGrath, 115 Ill. 172, 3 N. E. 479; Cook v. New York C. Ry. Co., 5 Lans. (N. Y.) 401; State v. Campbell, 1 Rich. (S. C.) 124; State v. Cecil County Commrs., 54 Md. 426; Farkas v. State, 60 Miss. 847; McLain v. Commonwealth, 99 Pa. 86; Whitehurst v. Commonwealth, 79 Va. 556. See, also, Brown v. State, 71 Ind. 470; Mack v. State, 48 Wis. 271, 4 N. W. 449. As to admissibility, on trial for murder, of testimony of accused at coroner's inquest, see note to Tuttle v. People, 70 L. R. A. 33, and Maki v. State, 33 L. R. A., N. S., 465. In Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422, there is a *dictum* that testimony of a witness at a coroner's inquest might be received if the witness were dead, but it is against the weight of authority.

⁹⁰ Dunck v. Milwaukee County, 103 Wis. 371, 79 N. W. 413.

⁹¹ Jerome v. Bohm, 21 Colo. 322, 40 Pac. 570.

law as expressed in a New York case,⁹² that in such cases the former testimony cannot be used, is correct. The ground upon which the exception stands is that, in an authorized action or proceeding, testimony being given under the solemnity of an oath, where the witness was or might have been cross-examined, the probabilities of the truth having been told are so great as to justify the resort to that testimony when the witness has died or become insane since the former trial. As stated by Greenleaf, the evidence is admitted where it was given under oath in a judicial proceeding in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do. It is immaterial to the admission of the evidence whether the party actually cross-examined, or did not cross-examine, if he were bound so to do.⁹³ The exception must have general application. It cannot depend upon whether the party has examined or cross-examined the witness, if the court had no jurisdiction to entertain the action or proceeding in which the testimony was given. Nor is the testimony of the deceased witness admissible, if under the existing statutes such testimony would be incompetent if he were living.⁹⁴ But where a statute prohibits a party to a transaction from testifying thereto when the other party is dead, and there has been a trial during the life of both at which they testified, and it is sought to prove the testimony of one of them since deceased, at a subsequent trial, then the living party is entitled to testify notwithstanding the statute. It would be most unjust to permit the testimony of one of the parties to a transaction to go to the jury and exclude that of the other, and such a result is not within the contemplation of the law. The principle is that the living party shall not be heard to give his version of a transaction about which death has sealed the lips of the other; but when the testimony of the deceased party is made available in the con-

⁹² *Deering v. Schreyer*, 88 App. Div. 457, 85 N. Y. Supp. 275. See, also, *State v. Johnson*, 12 Nev. 121.

⁹³ *Bradley v. Mirick*, 91 N. Y. 293.

⁹⁴ *Eaton v. Alger*, 47 N. Y. 345; *Hoover v. Jennings*, 11 Ohio St. 624.

troversy, it would shock justice to deny the right of the living party to be heard as to the matters covered by that testimony.⁹⁵

§ 340 (343). The opportunity of cross-examination on the former trial.—The law on this subject is tersely stated in a recent Arkansas case:⁹⁶ 1. That where the adverse witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found, what such witness testified on a former occasion on the same issue and between the same parties, may be given in evidence, provided the accused was present having the right of cross-examination. 2. It is not necessary that the testimony given by such witness shall be reduced to writing and signed by the witness, before evidence of such testimony is admissible. 3. The testimony of the absent witness can be proved by anyone who heard him testify and can remember the testimony. 4. Nor is it necessary, in order to render this testimony competent, that the defendant should have been represented by counsel at the examining trial. It finds strong support in other jurisdictions.⁹⁷ But where the party was not only unrepresented by counsel, but not notified of his right to cross-examine, the former testimony was held inadmissible.⁹⁸ Although as we have shown, it is one of the controlling reasons for the admission of testimony of this character that in the former proceeding there

⁹⁵ *Strickland v. Hudson*, 55 Miss. 235. See, also, *Hutchings v. Corgan*, 59 Ill. 70. The purpose of this qualification of the rule as to executors and administrators was to prevent the surviving party from having the benefit of his own testimony, when, by the death of his adversary, his representative was deprived of his executor's version of the transaction or statement: *McDonald v. Allen*, 8 Baxt. (Tenn.) 446.

⁹⁶ *Poe v. State*, 95 Ark. 172, 129 S. W. 292, citing other Arkansas decisions.

⁹⁷ *Floyd v. State*, 82 Ala. 16, 2 South. 683; *Oliver v. Railway Co.*, 17 Ky. Law Rep. 840, 32 S. W. 759; *State v. Harvey*, 28 La. Ann. 105; *Walterhouse v. Walterhouse*, 130 Mich. 89, 89 N. W. 585; *State v. Hill*, 2 Hill (S. C.), 607, 27 Am. Dec. 406; *Stone v. Stitt* (Tex. Civ. App.), 132 S. W. 862 (where an *ex parte* deposition of a bankrupt before the referee was held inadmissible); *Pooler v. State*, 97 Wis. 627, 73 N. W. 336.

⁹⁸ *Commonwealth v. Lenausky*, 206 Pa. 277, 55 Atl. 977.

has been the right of cross-examination, yet it is not to be inferred that the actual cross-examination of the witness in the former trial is a prerequisite. This was well illustrated in a New York case where, after joining issue, the defendant through neglect made default. It was held by the court of appeals that on a second trial the testimony of a deceased witness should have been received, as the defendant had, by his failure to appear and cross-examine when it was in his power, waived that privilege.⁹⁹ The view that the real test of the admissibility of the evidence is whether the party to be affected by it had the opportunity or power of cross-examining the witness has been carried to its extreme limit in a few cases where in the first proceeding the action was a criminal suit, in the name of the state, and in the second, a civil action growing out of the same facts. Thus, in Wisconsin, where, under the statutes, the complainant in assault and battery has the management and control of the prosecution before the magistrate, it was held that the testimony of a witness, since deceased, given in such an action, might be proved in a subsequent civil action for damages, when the witness in the former proceeding had been cross-examined by the plaintiff's counsel.¹⁰⁰ Most of the cases cited illustrate the rule that there must have been the opportunity for cross-examination.¹ To this rule of opportunity for cross-examination, however, there is an exception. Where the direct examination of the witness has been excluded on the former trial on the application of the party who, on the subsequent trial, objects to its admission on the ground of no opportunity to cross-examine, he cannot be heard on

⁹⁹ *Bradley v. Mirick*, 91 N. Y. 293. See note to *Atchison etc. R. R. Co. v. Osborn*, 91 Am. St. Rep. 200, 201. See, also, *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257.

¹⁰⁰ *Charlesworth v. Tinker*, 18 Wis. 633; *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059. See, also, *Scott v. Wilson*, *Cooke* (3 Tenn.), 315 (malicious prosecution); *Gavan v.*

Ellsworth, 45 Ga. 283. The mere presence of counsel is not sufficient, unless it clearly appears there is opportunity for cross-examination: *Jackson v. Crilley*, 16 Colo. 103, 26 Pac. 331.

¹ *Oliver v. Railway Co.*, 17 Ky. Law Rep. 840, 32 S. W. 759; *Walterhouse v. Walterhouse*, 130 Mich. 89, 89 N. W. 585.

such ground notwithstanding the evidence was improperly rejected. He must be held to have taken the risk of the ruling made at his instance. He did have the opportunity to cross-examine, but waived it to give room for his motion to strike.²

§ 341 (344). Death of the former witness—Relaxation of the rule.—Under the English common law the courts seldom, if ever, admitted the testimony of a witness given on a former trial, except in case of his death.³ This strictness has, however, since been modified in England by statute; and the present rule, so far as it bears on this subject, is thus stated by Stephen: "Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding or in a later stage of the same proceeding, when the witness is dead, or is mad, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or in civil, but not, it seems, in criminal, cases, is out of jurisdiction of the court, or perhaps in civil, but not in criminal, cases, when he cannot be found."⁴ In other words, the rule that the witness must personally testify is so far relaxed, that the party on whose behalf his testimony is required may use the former testimony of the witness, if he can satisfy the court as to why the witness himself is not present. This is founded on the plainest principles of common sense. If there were no means of utilizing such testimony, then it would, in case of the death of the witness, become "interred with his bones," and probably an action which should survive would be crippled for want of it. All courts have made it clear that on proper explanation of the nonpresence of a material witness who has given former testimony, such testimony, the judicial necessity for it hav-

² Union Central L. Ins. Co. v. Burnett, 136 Ill. App. 187, 203.

³ 1 Phil. Ev. 337; Best, Ev., 10th ed., § 496. See, also, Le Baron v. Crombie, 14 Mass. 234. As to the sufficiency of the proof of the death

of the witness, see note to Driggers v. United States, 17 Ann. Cas. 76.

⁴ Steph. Ev., art. 32; Town of Walkerton v. Erdman, 23 Can. Sup. 352.

ing been satisfactorily established, if given in accordance with the conditions with which the law safeguards its admission, may be reproduced to the best advantage.⁵ Although, as will be seen, there has been considerable conflict in the United States as to how far the ancient rule has been relaxed, there can be but little doubt that in this country the rule has been so far modified as to admit such testimony in at least four cases: first, *where the witness is dead*; second, *where he is insane or mentally incompetent*; third, *where he is beyond the seas*; fourth, *where he has been kept away by the contrivance of the opposite party*.⁶

⁵ Bell v. State, 156 Ala. 76, 47 South. 242; Barre v. State, 99 Ark. 629, 139 S. W. 641; Rico Reduction etc. Co. v. Musgrave, 14 Colo. 79, 23 Pac. 458; Punal v. State, 56 Fla. 86, 47 South. 864; Riggins v. Brown, 12 Ga. 271; Loughry v. Mail, 34 Ill. App. 523; State v. Stewart, 85 Kan. 404, 116 Pac. 489; Citizens' Sav. Bank v. Boswell, 127 Ky. 21, 104 S. W. 1014; Yale v. Comstock, 112 Mass. 267; O'Brien v. St. Louis Transit Co., 212 Mo. 59, 15 Ann. Cas. 86, 110 S. W. 705; Vandewege v. Peter, 83 Neb. 140, 119 N. W. 226; Young v. Dearborn, 22 N. H. 372; Walter v. Joline, 136 App. Div. 426, 120 N. Y. Supp. 1025; Martin v. Cope, 28 N. Y. 180; Smith v. Moore, 149 N. C. 185, 62 S. E. 892; Hawkins v. United States, 3 Okl. Cr. 651, 108 Pac. 561; Mathews v. Colburn, 1 Strob. (S. C.) 258; Missouri etc. R. Co. v. Nesbit, 43 Tex. Civ. App. 630, 97 S. W. 825; Sullivan v. State, 6 Tex. App. 319, 32 Am. Rep. 580; Carrico v. West Virginia etc. R. Co., 39 W. Va. 86, 24 L. R. A. 50, 19 S. E. 571; Dover v. Greenwood, 177 Fed. 946. It necessarily appears that it is always a question for the court, but in a late Texas case, the power to send an issue to the jury is recognized. In Ozark v. State, 51 Tex. Cr. Rep. 106,

100 S. W. 927, the court said: "Upon another trial, if said witness is out of the state, or if the evidence shows, by positive or circumstantial evidence, that he has left or was induced to leave the state by appellant, or is absenting himself from this trial at the instance of appellant, and either of the predicates above suggested are laid, the testimony of the said Slovacek (the witness who testified at the examining trial) could be introduced. Of course, if there is an issue or doubt raised as to the accuracy of the predicate laid by the evidence, then the court should submit the predicate as a question of fact to the jury, for the jury to pass upon, before considering the testimony of the witness Fred Slovacek, provided same is introduced."

⁶ Drayton v. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Howard v. Patrick, 38 Mich. 795; Stout v. Cook, 47 Ill. 530; Rothrock v. Gallaher, 91 Pa. 108; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; Radclyffe v. Barton, 161 Mass. 327, 37 N. E. 373; Whitaker v. Marsh, 62 N. H. 477; St. Louis Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571. See note to Atchison etc. R. Co. v. Osborn, 91 Am. St. Rep. 193-198. See § 342, *post*.

The rule has frequently been stated much more broadly. Thus, Greenleaf, in speaking of testimony of this character, says: "It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane or sick and unable to testify or has been summoned, but appears to have been kept away by the adverse party."⁷ Dealing with the subject of this section, if the death of the witness is established, the law is unquestioned that his former testimony, if within the rules referred to, is always admissible.⁸

§ 341a (344). Same—Physical, mental or legal incapacity of the former witness.—In harmony with the views expressed in the preceding section, such testimony has been admitted when the witness was unable to testify by reason

⁷ 1 Greenl. Ev., § 163; *Rex v. Eriswell*, 3 Term Rep. 707, 100 Eng. Reprint, 815; *Howard v. Patrick*, 38 Mich. 795.

⁸ *Coulson v. Scott*, 167 Ala. 606, 52 South. 436; *Jeffries v. Castleman*, 75 Ala. 262; *St. Louis etc. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Fredricks v. Judah*, 2 Cal. Unrep. 651, 11 Pac. 133; *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 439, 67 Atl. 497; *Rico Reduction etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Union Cent. L. Ins. Co. v. Burnett*, 136 Ill. App. 187; *Chicago etc. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Studabaker v. Faylor*, 170 Ind. 498, 127 Am. St. Rep. 397, 83 N. E. 747; *Rooker v. Parsley*, 72 Ind. 497; *Packard v. McCoy*, 1 Iowa, 530; *Cave v. Cave*, 13 Bush (Ky.), 452; *Yocum v. Cincinnati etc. R. Co.*, 143 Ky. 700, 137 S. W. 217; *Conway v. Erwin*, 1 La. Ann. 391; *Watson v. Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206; *McGivern v. Steele*, 197 Mass. 164, 83 N. E. 405; *Costigan v. Lunt*, 127 Mass. 354; *Jones v. Pendleton*, 160

Mich. 338, 125 N. W. 349; *Detroit Baseball Club v. Preston Nat. Bank*, 113 Mich. 470, 71 N. W. 833; *Finnes v. Selover etc. Co.*, 114 Minn. 339, 131 N. W. 371; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174; *Orr v. Hadley*, 36 N. H. 575; *Berney v. Mitchell*, 34 N. J. L. 337; *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175; *Pratt v. Tailer*, 125 App. Div. 1, 119 N. Y. Supp. 803; *Morehouse v. Morehouse*, 41 Hun (N. Y.), 146; *Harper v. Burrow*, 28 N. C. 30; *Persons v. Smith*, 12 N. D. 403, 97 N. W. 551; *Hoover v. Jennings*, 11 Ohio St. 624; *Pratt v. Patterson*, 81 Pa. 114; *Carr v. American Locomotive Co.*, 29 R. I. 276, 70 Atl. 196; *Yancey v. Stone*, 9 Rich. Eq. (S. C.) 429; *McCall v. Alexander*, 84 S. C. 187, 65 S. E. 1021; *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446; *Wagoner v. Sneed* (Tex. Civ. App.), 138 S. W. 219; *Earl v. Tupper*, 45 Vt. 275; *Nome Beach Lighterage etc. Co. v. Standard Marine Ins. Co.*, 156 Fed. 484; *Fry v. Wood*, 1 Atk. 445, 26 Eng. Reprint, 284.

of sickness, mental incapacity, or advanced age. The courts were slow and cautious in relaxing the rule in cases of sickness. In a Maine case,⁹ where the witness was suffering from typhoid fever and his previous testimony was admitted, the court, while conceding that the trial court could have exercised its discretion in postponing the case, yet when the testimony, said Symonds, J., was all in a deposition taken upon the same issue and between the same parties, "where both had fully exercised the right to examine the witness, and where no surprise, or sudden change in the aspect of the case, to render the right of further cross-examination valuable to the defendants, was alleged, if the court, in view of all the circumstances, determined that the ends of justice would be better served in the particular case, by receiving the deposition than by interrupting the trial, we are not prepared to say, after a careful examination of the authorities cited in the able brief for the defendants, and by the authors to whom we have referred, that such a decision was beyond the limits of good practice, or a violation of any settled rule of evidence."¹⁰ And now, the clear weight of authority is in favor of admitting the testimony,¹¹ provided the proper foundation is

⁹ Chase v. Springvale Mills Co., 75 Me. 156; and in Berney v. Mitchell, 34 N. J. L. 337, there is a well-considered discussion, citing English and American cases, by Dalrimple, J. He says: "It must be recollected that the rule by which the evidence of a deceased witness given on a former trial is admitted is an exception to the rule rejecting all hearsay evidence. . . . In my opinion neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, except in case of the death or insanity of the witness, or when it appeared at the time of the trial, by reason of physical inability of a permanent character, he is unable to be examined, and that, by the exercise of due diligence, his deposi-

tion could not have been taken." "We quote this language to show how cautiously the most respectable courts in this country have proceeded in extending the exception to the general rule": Smith v. Moore, 149 N. C. 185, 62 S. E. 892.

¹⁰ In Virginia, however, in a precisely similar case—typhoid fever—the testimony was refused admission, but the party did not make the application until the trial was in progress: McCrorey v. Garrett, 109 Va. 645, 24 L. R. A., N. S., 139, 64 S. E. 978.

¹¹ Edwards v. Edwards, 93 Iowa, 127, 61 N. W. 413; State v. Wheat, 111 La. 860, 35 South. 955; Miller v. Russell, 7 Mart., N. S. (La.), 266; People v. Droste, 160 Mich. 66, 125

laid. The condition of the witness, the nature of the ailment, its past and probable future duration, and what efforts could have been made to take a deposition must be clearly established. A certificate from the attendant physician is not enough. The court has to make a finding of the fact which is conclusive and is entitled to have all the circumstances placed before it. In such case, too, the court may take into consideration the question of notice to the opposite party, so that if the illness is temporary, an election to consent to a continuance, or the introduction of the former testimony, might be made.¹² But if the sickness of the witness is not so severe as to disable him from doing some work, and from being up and about the house, his evidence taken on the former trial is not admissible.¹³ Or if counsel enter upon the trial of a case knowing that an important witness is ill and may not be able to attend, it seems that he is not entitled, in the midst of the trial, to present the fact of the illness of such witness, and then testify to what the latter said upon the former trial of the case. In such case, counsel should ask for a continuance of the trial.¹⁴ If from extreme old age, and both physical and mental infirmity, a witness has become incompetent to testify to facts once within his knowledge and memory, and it appears likely that he will remain in such condition, or grow worse, there is no abuse of discretion in admitting in evidence his testimony introduced on a former trial of the same case when he was not so afflicted with such infirmities.¹⁵ Although the *sickness* of a witness is generally

N. W. 87; Siefert v. Siefert, 123 Mich. 664, 82 N. W. 511; Howard v. Patrick, 38 Mich. 795; State v. Staples, 47 N. H. 113, 90 Am. Dec. 565; Berney v. Mitchell, *supra*; Kirchner v. Laughlin, 5 N. M. 365, 23 Pac. 175; Morehouse v. Morehouse, 41 Hun (N. Y.), 146; Perrin v. Wells, 155 Pa. 299, 26 Atl. 543.

¹² Smith v. Moore, *supra*, which contains an excellent epitome of the law on the subject.

¹³ Siefert v. Siefert, 123 Mich. 664, 82 N. W. 511.

¹⁴ Chicago etc. R. Co. v. Mayer, 91 Ill. App. 372.

¹⁵ Central R. etc. Co. v. Murray, 97 Ga. 326, 22 S. E. 972; Smithpeters v. Griffin, 10 B. Mon. (Ky.) 259; Kirchner v. Laughlin, *supra*; Rothrock v. Gallaher, 91 Pa. 108; Emig v. Diehl, 76 Pa. 359.

only ground for the postponement of the trial, the sickness may be of such a character as to amount to a permanent disability to testify; and in such case it would be within the reason of the rule to admit the testimony given on the former trial, and this has been recognized as an exception by English statutes.¹⁶ The testimony of a witness on a former trial, who has since become mentally incapacitated to testify, is competent in a subsequent trial of the same action. Such witness is deemed mentally dead.¹⁷ And it makes no difference that the witness who, since testifying, has become insane, is a party to the suit.¹⁸ The failure of the witness to recollect particular facts, if short of mental incapacity, will not admit proof of his testimony at a former trial.¹⁹ And the mere fact that the witness has forgotten the facts to which he formerly testified is never sufficient to render evidence of his former testimony admissible.²⁰ It has been held that the conviction of the witness of an infamous crime renders his evidence given on the first trial of a civil suit inadmissible on the second trial,²¹ but in an excellent footnote appended to the case last referred to, it is pointed out that the decision is not supported by any authority, and in addition is inconsistent with general principles. The man so convicted of infamous crime is dead for all purposes of evidence, and his

¹⁶ 11 & 12 Viet., c. 42, § 17; *Rex v. Hogg*, 6 Car. & P. 176; *Rex v. Wilshaw*, Car. & M. 145; *Rex v. Cockburn*, 7 Cox C. C. 265; *Fry v. Wood*, 1 Atk. 445, 26 Eng. Reprint, 284; *Chase v. Springvale Mills Co.*, 75 Me. 156; *Berney v. Mitchell*, 34 N. J. L. 337; *Howard v. Patrick*, 38 Mich. 795; *Thornton v. Britton*, 144 Pa. 126, 22 Atl. 1048. But it must be shown that the witness is unable to attend the trial: *Edwards v. Edwards*, 93 Iowa, 127, 61 N. W. 413.

¹⁷ *Stout v. Cook*, 47 Ill. 530; *Howard v. Patrick*, 38 Mich. 795; *Whitaker v. Marsh*, 62 N. H. 477; *Berney v. Mitchell*, 34 N. J. L. 337; *Kirchner*

v. Laughlin, 5 N. M. 365, 23 Pac. 175; *McCall v. Alexander*, 84 S. C. 187, 65 S. E. 1021; *Drayton v. Wells*, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; *Louisville etc. R. Co. v. Atkins*, 2 Lea (Tenn.), 248.

¹⁸ *Wafer v. Hemken*, 9 Rob. (La.) 203.

¹⁹ *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55.

²⁰ *Robinson v. Gilman*, 43 N. H. 295. As to sufficiency of showing as to the circumstances justifying admissions, see note to *State v. Hefferman*, in 25 L. R. A., N. S., 875.

²¹ *Le Baron v. Crombie*, 14 Mass. 234.

former testimony is entitled to admission as in cases of mental incompetency.

§ 342 (345). Same — Absence from state — Absence through contrivance of opposite party — Other disability. — The fact that a witness is beyond the jurisdiction of the state, or of the court, is generally a sufficient excuse for not producing him. Hence, if it is shown that a witness is absent from the state, or a nonresident, or out of the jurisdiction of the court, or if his place of residence is unknown, testimony given by him upon a former trial, and correctly preserved, is admissible in evidence on a subsequent trial of the same cause. It makes no difference whether his testimony was given in the form of a deposition, or orally, if it has been preserved in the manner pointed out by law.²²

²² Birmingham Nat. Bank v. Bradley (Ala.), 30 South. 546; Long v. Davis, 18 Ala. 801; McTighe v. Herman, 42 Ark. 285; Dolan v. State, 40 Ark. 454; Watson v. Sutro, 103 Cal. 169, 37 Pac. 201; Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; People v. Devine, 46 Cal. 45; Rico Reduction etc. Co. v. Musgrave, 14 Colo. 79, 23 Pac. 458; Owen v. Palmour, 111 Ga. 885, 36 S. E. 969; Plano Mfg. Co. v. Parmenter, 56 Ill. App. 258; Shearer v. Harber, 36 Ind. 536; Atchison etc. R. Co. v. Osborn, 64 Kan. 187, 91 Am. St. Rep. 189, 67 Pac. 547; Reynolds v. Powers, 96 Ky. 481, 29 S. W. 299; Reynolds v. Rowley, 2 La. Ann. 890; Schindler v. Milwaukee etc. R. Co., 87 Mich. 400, 39 N. W. 670; Hudson v. Roos, 76 Mich. 173, 42 N. W. 1099; King v. McCarthy, 54 Minn. 190, 55 N. W. 960; Wilder v. City of St. Paul, 12 Minn. 192; Augusta Wine Co. v. Weippert, 14 Mo. App. 483; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; Omaha St. R. Co. v. Elkins, 39 Neb. 480, 58 N. W. 164; City of Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432,

52 N. W. 833; Kirchner v. Laughlin, 5 N. M. 365, 23 Pac. 175; Ballman v. Heron, 169 Pa. 510, 32 Atl. 594; Rothrock v. Gallaher, 91 Pa. 108; Magill v. Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713, and note; Drayton v. Wells, 1 Nott & M. (S. C.) 409, 9 Am. Dec. 718; McGovern v. Hays, 75 Vt. 104, 53 Atl. 326. There is a singular dearth of authority from New York, from which state the earlier decisions include Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Merrill v. Ithaca etc. R. R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; and Weeks v. Lowerre, 8 Barb. (N. Y.) 530; from which cases it may be gathered that the former testimony could not be given in evidence when the witness was living. In Mutual Life Ins. Co. v. Anthony, 50 Hun, 101, 4 N. Y. Supp. 501 the court, citing these cases, said "the rule in this state seems to be well settled that such evidence is not admissible." The rule is more strict against such testimony in criminal cases: People v. Newman, 5 Hill (N.

Testimony of a witness given at a former trial is admissible when his presence at the second trial of the same case cannot be procured.²³ If it is impossible to secure the presence of a witness who has testified at the first trial of the case, it is proper to admit evidence of an unsuccessful effort to find him, in order to lay the foundation for admitting his testimony given on the former trial.²⁴ Evidence of an absent witness given at a former trial is not admissible if his deposition has been taken and is produced at the second trial.²⁵ And some cases hold that if the whereabouts of an absent witness is known, and his deposition could have been taken, testimony given by him on a former trial is inadmissible.²⁶ A witness outside the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given on a former trial.²⁷ Parol evidence of the testimony of an absent witness on a former trial of the same case is not admissible where the parties have relied upon his mere promise to attend, and have made no effort to compel his attendance, although he was within the jurisdiction of the court.²⁸ It may be stated as a general proposition that the evidence given by a witness at a former trial of the case is not admissible on the second trial when such witness, though absent, might have been produced on the trial. Temporary absence, when there has been no effort to subpoena the witness, is clearly insufficient.²⁹ In Iowa, how-

Y.), 295; *Collins v. Commonwealth*, 12 Bush (Ky.), 271; *Broggy v. Commonwealth*, 10 Gratt. (Va.) 722; *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565; *United States v. McComb*, 5 McLean (U. S.), 289.

²³ *Clossman v. Barbancey*, 7 Rob. (La.) 438; *Powell v. Manson*, 22 Gratt. (Va.) 177.

²⁴ *Ballman v. Heron*, 169 Pa. 510, 32 Atl. 594.

²⁵ *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55.

²⁶ *Gastrell v. Phillips*, 64 Miss. 473, 1 South. 729; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174.

²⁷ *Meyer v. Roth*, 51 Cal. 582; *Butcher v. Vaca Valley R. Co.*, 56 Cal. 598. The contrary doctrine is, however, maintained in *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558.

²⁸ *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302.

²⁹ *Harris v. State*, 73 Ala. 495; *Savannah etc. R. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 9

ever, the rule has been so greatly relaxed, that if the witness be not present in court, the report of his former testimony on a former trial of the same issue can be used.³⁰ The testimony of a party or witness given at a former trial cannot be read in evidence when he is in the presence of the court.³¹ Although a witness resides without the state, yet where one party to an action of ejectment has taken his testimony by interrogatories, which have been duly crossed by the opposite party, and the evidence so taken is introduced on the trial of the case, the party who crossed the interrogatories cannot thereupon introduce evidence of such witness, taken by interrogatories in a case of forcible entry and detainer between the same parties, as affirmative evidence of the facts stated by the witness in such former testimony, on the ground that the witness is inaccessible.³²

§ 342a (345). Same, continued.—As we have already seen, there are numerous cases which favor the relaxation of the strict rule against hearsay so far as to admit proof of the former testimony of witnesses permanently absent

S. E. 471; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; *Powell v. Waters*, 17 Johns. (N. Y.) 176; *Mott v. Ramsay*, 92 N. C. 152.

³⁰ *Van Norman v. Modern Brotherhood of America*, 143 Iowa, 536, 121 N. W. 1080; *Fitch v. Mason City etc. Traction Co.*, 124 Iowa, 665, 100 N. W. 618.

³¹ *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87; *Byrd v. Hartman*, 70 Mo. App. 57; *Sargeant v. Marshall*, 38 Ill. App. 642; *Trimmel v. Marvel*, 11 La. Ann. 404; *Leeser v. Boekhoff*, 38 Mo. App. 445; *Michigan Sav. Bank v. Butler*, 98 Mich. 381, 57 N. W. 253; *Hunter v. Lanus*, 82 Tex. 677, 18 S. W. 201; *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637. Nor if he is temporarily absent from the place of trial, but within the jurisdiction of the court:

Wabash R. C. v. Miller, 27 Ind. App. 180, 60 N. E. 1127.

³² *Tillman v. Bomar*, 134 Ga. 660, 68 S. E. 504; *Atlanta etc. R. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 26 L. R. A. 553, 20 S. E. 550; *Smith v. Holbrook*, 99 Ga. 256, 25 S. E. 627. If it be contended that such former testimony was admissible to impeach the witness, by showing conflicting evidence given by him, much of the testimony contained in the answers to the former interrogatories was not in conflict with his testimony in the case on trial, if any of it were so; and the former interrogatories and answers being offered as a whole, if any part of such testimony might have been admissible, the refusal to admit it as a whole furnishes no cause for a reversal: *Tillman v. Bomar, supra*.

from the state. In some of these cases it is urged that the modern method of taking down testimony by an official stenographer obviates the principal objection to the use of the evidence taken on the former trial. On the other hand, there is perhaps an equal array of authority holding that, where statutes allow the taking of depositions out of the state, the proper procedure is to take the deposition of the witness, if he can be found, and that mere absence from the state is not one of the grounds for admitting testimony taken on the former trial.³³ It is urged that the facilities now afforded for taking depositions render any such relaxation of the general rules of evidence unnecessary. But the tendency of the later decisions as well as of legislation seems to be in favor of the admission of the former testimony, if the witness is permanently outside the state, and in some states the former testimony is received, if it is shown that the witness is not likely to return or is absent indefinitely.³⁴ As to this subject the statutes of the jurisdiction should be consulted, as in some cases they provide that absence from the state or even the county may suffice. If, as has been already stated, the witness is *beyond the seas or insane*, or otherwise rendered incompetent to testify, this is a sufficient excuse. If, after due diligence, the *residence* of the witness *cannot be ascertained*, this would, on the same principle, be a reason for dispensing with the rule.³⁵ As in other like cases, the burden of satisfying the

³³ *Berney v. Mitchell*, 34 N. J. L. 337; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174; *Wilbur v. Selden*, 6 Cow. (N. Y.) 162; *Drayton v. Wells*, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; *Kellogg v. Secord*, 42 Mich. 318, 3 N. W. 868; *Cassady v. Trustees*, 105 Ill. 560; *Stein v. Swenson*, 46 Minn. 360, 49 N. W. 55; *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175; *Savannah Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 9 S. E. 471; *Gastrell v. Phillips*, 64 Miss. 473, 1

South. 729; *Rosenfield v. Case*, 87 Mich. 295, 49 N. W. 630. Insufficient diligence shown: *Slusser v. City of Burlington*, 47 Iowa, 300; *Thompson v. State*, 106 Ala. 67, 17 South. 512.

³⁴ *Burton v. State*, 107 Ala. 68, 18 South. 240; *Jacobi v. State*, 133 Ala. 1, 32 South. 158; *Jacobi v. Alabama*, 187 U. S. 133, 47 L. Ed. 106, 23 Sup. Ct. Rep. 48; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558 (outside of county).

³⁵ *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580; *Slusser v. City of Burlington*, 47 Iowa, 300; *Shackel-*

court of the validity of the excuse for nonproduction of the witness, and the discretion of the court will not be reviewed except it has been abused,³⁶ lies upon the party seeking to introduce the former testimony, and where the excuse is other than death, the court has a wide discretion to exercise under the various circumstances to which the absence may be ascribed, and will not admit such testimony without clear proof from someone who can speak positively, not alone of the absence of the witness, but in many cases as to why his deposition could not be taken.³⁷ Evidence of a witness who has since absconded, and cannot by diligent search be found, and whose address is unknown, is admissible at a subsequent trial of the same cause.³⁸ Testimony of a witness given on a former trial may be given on a trial when he is kept away from the second trial by the opposite party.³⁹ If a deputy sheriff required as a witness

ford v. State, 33 Ark. 539; Gunn v. Wades, 65 Ga. 537. The court is not bound by strict rules of evidence in determining the question of residence: Vaughan v. State, 58 Ark. 353, 24 S. W. 885; Spaulding v. Chicago etc. Ry. Co., 98 Iowa, 205, 67 N. W. 227; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030. But it devolves upon the proponent to show that due diligence to procure the witness had been used; Young v. Sage, 42 Neb. 37, 60 N. W. 313; Thompson v. State, 106 Ala. 67, 17 South. 512. In the federal courts it is held that the Revised Statutes provide a complete system for the practice of the courts of the United States in the procurement and admission of the testimony of witnesses, and that it was error to admit evidence of the testimony of witnesses given at a former trial of the case: Salt Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637; Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117, 5 Sup. Ct. Rep. 724; Hanks Dental Assn. v. Tooth Crown Co., 194 U. S.

303, 48 L. Ed. 989, 24 Sup. Ct. Rep. 700; Diamond Coal & Coke Co. v. Allen, 137 Fed. 705, 71 C. C. A. 107.

³⁶ Vaughan v. State, 58 Ark. 353, 24 S. W. 885.

³⁷ The following will be found useful and illustrative cases: Lucas v. State, 96 Ala. 51, 11 South. 216; Southern R. Co. v. Bonner, 141 Ala. 517, 37 South. 702; People v. Johnson, 13 Cal. App. 776, 110 Pac. 965; Robinson v. State, 128 Ga. 254, 57 S. E. 315; Augusta etc. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706; Baldwin v. St. Louis etc. R. Co., 68 Iowa, 37, 25 N. W. 918; Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510; Dover v. Greenwood, 177 Fed. 946.

³⁸ Gunn v. Wades, 65 Ga. 537; Augusta Wine Co. v. Weippert, 14 Mo. App. 483.

³⁹ Kirchner v. Laughlin, 5 N. M. 365, 23 Pac. 175; Drayton v. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Yancey v. Stone, 9 Rich. Eq. (S. C.) 429.

is absent on official duty, his testimony given on a former trial may be read in evidence.⁴⁰

§ 342b (345). **Same, in criminal cases.**—In *criminal cases* a stricter rule obtains on this subject than in civil actions. It has been held in a few instances that such testimony cannot be given in criminal cases, even although the witness is dead.⁴¹ But the rule is well settled that, if the defendant in a criminal case procures the absence of a witness, the testimony of such witness given on a former trial is competent, on the principle that a party cannot thus take advantage of his own wrong. Such evidence is not repugnant to the constitutional provision that the defendant shall be confronted by the witnesses against him.⁴² So, also, by the weight of authority, such testimony is admissible in criminal cases when it is shown that the witness is dead.⁴³

§ 343 (346). **Mode of proving former testimony—Refreshing memory.**—It is not necessary that the *exact words* of the deceased witness be given. It is sufficient if the *substance* of the testimony can be stated. If the exact words were required, this would in effect abrogate the rule allow-

⁴⁰ Noble v. Martin, 7 Mart., N. S. (La.), 282.

⁴¹ Finn v. Commonwealth, 5 Rand. (Va.) 701; Commonwealth v. McKenna, 158 Mass. 207, 33 N. E. 389; Cline v. State, 36 Tex. Cr. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850, and note 886 et seq.

⁴² Rex v. Scaife, 2 Denio C. C. 281, 17 Q. B. 238, 5 Cox, 243, 17 Eng. Reprint, 1271; Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; State v. Houser, 26 Mo. 431; Sage v. State, 127 Ind. 15, 26 N. E. 667. In Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672 (however, it was held incompetent).

⁴³ People v. Sligh, 48 Mich. 54; LeBaron v. Crombie, 14 Mass. 234; Wilbur v. Selden 6 Cow. (N. Y.) 162;

State v. Staples, 47 N. H. 113, 90 Am. Dec. 565; Sullivan v. State, 6 Tex. App. 319, 32 Am. Rep. 580; Collins v. Commonwealth, 12 Bush (Ky.), 271; State v. Fitzgerald, 63 Iowa, 268, 19 N. W. 202; State v. Able, 65 Mo. 357; Brown v. Commonwealth, 73 Pa. 321, 13 Am. Rep. 740; United States v. Macomb, Fed. Cas. No. 15,702, 5 McLean (U. S.), 286, full discussion by Drummond, J. In the following criminal cases such evidence has been admitted still more liberally: Hurley v. State, 29 Ark. 17; Sullivan v. State, 6 Tex. App. 319, 32 Am. Rep. 580; People v. Devine, 46 Cal. 45; Shackelford v. State, 33 Ark. 539. See note to State v. Hefernan, 25 L. R. A., N. S., 868.

ing secondary evidence in such cases.⁴⁴ But it is not competent to prove the *legal effect* of the testimony.⁴⁵ But the substance of his *whole* testimony must be proved,⁴⁶ and if any parts of it are irrelevant, the court may reject them, but the witness cannot determine the relevancy of the portions which he omits.⁴⁷ Under this rule a juror, witness, stenographer, attorney or any other person who heard the testimony on the former trial and is able to state its substance from memory may be called.⁴⁸ Under the general

⁴⁴ Clealand v. Huey, 18 Ala. 343; Thompson v. State, 106 Ala. 67, 17 South. 512; Mitchell v. State, 71 Ga. 128; Luetgert v. Volker, 153 Ill. 385, 39 N. E. 113; Ephraims v. Murdock, 7 Blackf. (Ind.) 10; Horne v. Williams, 23 Ind. 37; State v. Fitzgerald, 63 Iowa, 268, 19 N. W. 202; Small v. Chicago etc. R. Co., 55 Iowa, 582, 8 N. W. 437; State v. O'Brien, 81 Iowa, 88, 46 N. E. 752; Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730; Bush v. Commonwealth, 80 Ky. 244, 3 Ky. Law Rep. 740; Lime Rock Bank v. Hewett, 52 Me. 531; Garrott v. Johnson, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272; Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Stein v. Swenson, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55; Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; Davis v. Kline, 96 Mo. 401, 2 L. R. A. 78, 9 S. W. 724; Vandewege v. Peter, 83 Neb. 140, 119 N. W. 226; Omaha St. R. Co. v. Elkins, 39 Neb. 480, 58 N. W. 164; Young v. Dearborn, 22 N. H. 372; Sloan v. Somers, 20 N. J. L. 66; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831; Buie v. Carver, 73 N. C. 264; Wagers v. Dickey, 17 Ohio, 439, 49 Am. Dec. 467; Summons v. State, 5 Ohio St. 325; Hepler v. Mt. Carmel Sav. Bank, 97 Pa. 420, 39 Am. Rep. 813; Planters' Bank v. Massey, 2 Heisk. (Tenn.) 360; Thurmond v.

Trammell, 28 Tex. 371, 91 Am. Dec. 321; Whitecher v. Morey, 39 Vt. 459; Caton v. Lenox, 5 Rand. (Va.) 31; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; United States v. McComb, Fed. Cas. No. 15,702, 5 McLean (U. S.), 286. In Massachusetts it must be given substantially in all material particulars; Costigan v. Lunt, 127 Mass. 354, and cases cited.

⁴⁵ Bowie v. O'Neale, 5 Har. & J. (Md.) 226.

⁴⁶ Woods v. Keyes, 14 Allen (Mass.), 236, 92 Am. Dec. 765; Ward v. Dow, 44 N. H. 45; Odell v. Solomon, 23 Jones & S. (N. Y.) 410; Philadelphia etc. R. R. Co. v. Spearen, 47 Pa. 300, 86 Am. Dec. 544; Buie v. Carver, 73 N. C. 264 (partially deaf witness, who only heard part of the testimony, rejected).

⁴⁷ Magee v. Doe, 22 Ala. 699.

⁴⁸ Jeffries v. Castleman, 75 Ala. 262; Poe v. State, 95 Ark. 172, 129 S. W. 292; Kansas etc. Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79, 74 S. W. 521; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; People v. Murphy, 45 Cal. 137; Riggins v. Brown, 12 Ga. 271; Miller v. People, 216 Ill. 309, 74 N. E. 743; Hutchings v. Corgan, 59 Ill. 70; State v. Dean, 148 Iowa, 566, 126 N. W. 692; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752; Moore v. Moore, 39 Iowa, 461; State v. Harmon, 70 Kan. 476, 78 Pac. 805;

principles of evidence the *notes of testimony* taken by stenographers, judges, justices of the peace, attorneys and other officers or persons would seem to be inadmissible as evidence, on the ground that such notes are hearsay.⁴⁹ But such notes, when shown to be correct, are often used *to refresh the memory of the witness*; and in some instances they have been received as evidence of the testimony given at former trials.⁵⁰ For this purpose witnesses may refresh their memory by reading notes of the testimony taken by them;⁵¹ and the minutes of testimony taken by the judge,⁵² stenographers and other authorized officers of the

Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; Black v. Woodrow, 39 Md. 194; Commonwealth v. McCarty, 152 Mass. 577, 26 N. E. 140; Costigan v. Lunt, 127 Mass. 354; Yale v. Comstock, 112 Mass. 267; Davis v. Kline, 96 Mo. 401, 2 L. R. A. 78, 9 S. W. 724; State v. Johnson, 12 Nev. 121; Olmsted v. Olmsted, 190 N. Y. 458, 123 Am. St. Rep. 585, 83 N. E. 569; State v. Woolridge, 45 Or. 389, 78 Pac. 333; Hepler v. Mt. Carmel Sav. Bank, 97 Pa. 420, 39 Am. Rep. 813; Cornell v. Green, 10 Serg. & R. (Pa.) 14; Carr v. Locomotive Co., 29 R. I. 276, 70 Atl. 196; Kendrick v. State, 10 Humph. (Tenn.) 479; Wade v. State, 7 Baxt. (Tenn.) 80; Earl v. Tupper, 45 Vt. 275; Johnson v. Powers, 40 Vt. 611; Fertig v. State, 100 Wis. 301, 75 N. W. 960; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; Pyke v. Crouch, 1 Ld. Raym. 730, 91 Eng. Reprint, 1387; Doncaster v. Day, 3 Taunt. 262, 128 Eng. Reprint, 104. And it seems that if counsel agree on the testimony, the identification by oath is unnecessary: Jackson v. Jackson, 47 Ga. 99; Earl v. Tupper, 45 Vt. 275; Nutt v. Thompson, 69 N. C. 548; Coughlin v. Haeussler, 50 Mo. 126; Rhine v. Robinson, 27 Pa. 30; Clark v. Vorce, 15 Wend.

(N. Y.) 193, 30 Am. Dec. 53; Jones v. Ward, 3 Jones (48 N. C.), 24, 64 Am. Dec. 590; Davis v. Kline, 96 Mo. 401, 2 L. R. A. 78, 9 S. W. 724.

⁴⁹ Schafer v. Schafer, 93 Ind. 586; Smith v. State, 42 Neb. 356, 60 N. W. 585; Huff v. Bennett, 4 Sand. (N. Y.) 120; Miles v. O'Hara, 4 Binn. (Pa.) 108; Drayton v. Wells, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Eiberfeldt v. Waite, 79 Wis. 284, 48 N. W. 525; Reg. v. Child, 5 Cox C. C. 197.

⁵⁰ Yale v. Comstock, 112 Mass. 267; Lucker v. Liske, 111 Mich. 683, 70 N. W. 421; Labar v. Crane, 56 Mich. 585, 23 N. W. 323; Ashe v. De Rossett, 5 Jones (50 N. C.), 299, 72 Am. Dec. 552 (notes of an attorney); Philadelphia etc. Ry. Co. v. Spearen, 47 Pa. 300, 86 Am. Dec. 544; Huff v. Bennett, 4 Sand. (N. Y.) 120; People v. Sligh, 48 Mich. 54, 11 N. W. 782.

⁵¹ Costigan v. Lunt, 127 Mass. 354; Rounds v. State, 57 Wis. 45, 14 N. W. 865 (stenographer's notes taken at preliminary hearing); Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731.

⁵² Reg. v. Gazard, 8 Car. & P. 595; Whitcher v. Morey, 39 Vt. 459; Yale v. Comstock, 112 Mass. 267; Chase v. Debolt, 7 Ill. 371. Some cases assert the broad proposition that notes, taken by the judge, are not admissible to

court,⁵³ or by attorneys,⁵⁴ may be received for such purpose, when their accuracy is proved; and it will be seen from some of the cases just cited that, when the accuracy of such notes was proved, they have been received, not merely to refresh the memory, but as evidence.⁵⁵ Although the official report

prove such testimony: *Citizens' State Bank v. Adams*, 91 Ind. 280; *Schafer v. Schafer*, 93 Ind. 586; *Yancey v. Stone*, 9 Rich. Eq. (S. C.) 429; even when certified by the judge to be a true copy of such testimony: *Miles v. O'Hara*, 4 Binn. (Pa.) 108; *Elberfeld v. Waite*, 79 Wis. 284, 48 N. W. 525. The true rule we take to be is, that the minutes or notes of the judge of the testimony of a witness since deceased, given on a former trial, are not of themselves evidence, but if the judge making them can testify that they are correct, or that he has no doubt of their being so, they are admissible. If he cannot testify that they are full and accurate, they cannot of themselves be regarded as evidence: *Huff v. Bennett*, 4 Sand. 120, 6 N. Y. 337. This is only in keeping with the established rule that minutes of the testimony of a deceased witness taken at a former trial by one who states that he tried to take down all that the witness said, not the substance alone, are admissible, although the witness will not swear that he took down every word: *Clark v. Vorce*, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118; *Martin v. Cope*, 3 Abb. App. Dec. (N. Y.) 182; *Cornell v. Green*, 10 Serg. & R. (Pa.) 14.

⁵³ *Stewart v. First Nat. Bank*, 43 Mich. 257, 5 N. W. 302; *Rhine v. Robinson*, 27 Pa. 30; *Yale v. Comstock*, 112 Mass. 267; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Quinn v. Halbert*, 57 Vt. 178; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731;

Rounds v. State, 57 Wis. 45, 14 N. W. 865; *People v. Chung Ah Chue*, 57 Cal. 567.

⁵⁴ The notes of an attorney are subject to the same rule as those of the judges: *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Waters v. Waters*, 35 Md. 531; *Clark v. Vorce*, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53; *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831; *Ashe v. De Rossett*, 5 Jones (N. C.), 299, 72 Am. Dec. 552; *Jones v. Ward*, 3 Jones (48 N. C.), 24, 64 Am. Dec. 590; *Lightner v. Wike*, 4 Serg. & R. (Pa.) 203; *Chess v. Chess*, 17 Serg. & R. (Pa.) 409; *Moore v. Pearson*, 6 Watts & S. (Pa.) 51; *Rhine v. Robinson*, 27 Pa. 30; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Earl v. Tupper*, 45 Vt. 275; *Johnson v. Powers*, 40 Vt. 611; *Whitcher v. Morey*, 39 Vt. 459.

⁵⁵ *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Poe v. State*, 95 Ark. 172, 129 S. W. 292; *People v. Lem You*, 97 Cal. 224, 32 Pac. 11; *People v. Murphy*, 45 Cal. 137; *Anderson v. Reid*, 10 App. Cas. (D. C.) 426; *Luetgert v. Volker*, 153 Ill. 385, 39 N. E. 113; *Fisher v. Fisher*, 131 Ind. 462, 29 N. E. 31; *Moore v. Moore*, 39 Iowa, 461; *Wilson v. Commonwealth*, 21 Ky. Law Rep. 1333, 54 S. W. 946; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Costigan v. Lunt*, 127 Mass. 354; *Jaquith v. Morrill*, 204 Mass. 181, 90 N. E. 556; *Stahl v. Duluth*, 71 Minn. 341, 72 N. W. 143; *Amor v. Stoeckele*, 76 Minn. 180, 78 N. W. 1046; *State v. Byers*, 16 Mont. 565, 41 Pac. 708;

by the stenographer in longhand, properly certified, would be admissible evidence of the testimony of the deceased maker of a note given upon a former trial, such report does not exclude oral evidence from memory alone by persons who heard his testimony.⁵⁶ It has been held that a *bill of exceptions* is not admissible to prove the testimony of a deceased witness. These decisions rest on the view that the bill of exceptions imports verity for the purpose of an appeal, and for no other purpose.⁵⁷ But the authorities are divided on this proposition, and the view is held by high authority that, in the nature of things, there can be no other evidence of equal or superior credit or reliability when properly authenticated. These decisions rest upon the ground that bills of exceptions are carefully prepared from the stenographer's notes of the testimony and that they have been subject to the careful inspection of lawyers and judges, thus preventing any mistakes.⁵⁸ It has been held,

State v. Able, 65 Mo. 357; Hair v. State, 16 Neb. 601, 21 N. W. 464; Sloan v. Somers, 20 N. J. L. 66; Grimm v. Hamel, 2 Hilt. (N. Y.) 434; Halsey v. Sinsebaugh, 15 N. Y. 485; Carpenter v. Tucker, 98 N. C. 316, 8 S. E. 831; Jones v. Ward, 48 N. C. 24, 64 Am. Dec. 590; Miles v. O'Hara, 4 Binn. (Pa.) 108; Rothrock v. Gallaher, 91 Pa. 108; State v. Rawls, 2 Nott & McC. (S. C.) 331; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S. W. 487; Whitcher v. Morey, 39 Vt. 459; Kellogg v. Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; Rounds v. State, 57 Wis. 45, 14 N. W. 865; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101.

⁵⁶ Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

⁵⁷ Kankakee Ry. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Roth v. Smith, 54 Ill. 431; Stern v. People, 102 Ill. 540; Odell v. Solomon, 55 N. Y. Super. Ct. 410; Simmons v. Spratt, 22 Fla. 370; Kirk v. Mowry, 24 Ohio St.

581; Fisher v. Fisher, 131 Ind. 462, 29 N. E. 31; Sargeant v. Marshall, 38 Ill. App. 642.

⁵⁸ Case v. Blood, 71 Iowa, 632, 33 N. W. 144; Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605, case on appeal; Cantrell v. Hewlett, 2 Bush (Ky.), 311; Bruce Lumber Co. v. Hoos, 67 Mo. App. 264; Wilson v. Noonan, 35 Wis. 321. Other cases qualify the rule by adding that in order to make the testimony admissible, it must be first shown that the testimony of the witness as contained in the bill is correct as taken at the former trial, and that he is either dead, unable to attend the trial, or without the jurisdiction of the court: Torrey v. Burney, 113 Ala. 496, 21 South. 348; Plano Mfg. Co. v. Parmenter, 56 Ill. App. 258; Woollen v. Wire, 110 Ind. 251, 11 N. E. 236; Fisher v. Fisher, 131 Ind. 462, 29 N. E. 31; Davis v. Kline, 96 Mo. 401, 2 L. R. A. 78, 9 S. W. 724. Other cases maintain the strict doctrine that a

however, that an affidavit⁵⁹ is not admissible to prove the testimony of a deceased witness. Under the prevailing practice by which testimony is taken by *stenographers* appointed by the court, the most convenient mode of proving the former testimony is to read such notes, properly authenticated. *Statutes* quite generally exist making the *report of the stenographer* admissible; and in the absence of such statutes, it may be used to refresh his memory.⁶⁰ If the testimony given on the former trial is otherwise admissible, it is no objection that new evidence has been introduced on the second trial on which there was no cross-examination at the other trial.⁶¹ Whenever the evidence of the witness on the former trial is admissible, the evidence as stated by an *interpreter* may be proved in the same way.⁶² It is almost unnecessary to say that the rules applying to former testimony have no application where such testimony is introduced as an admission or statement as against the party making it.⁶³ There is a definite decision now upon the question of objections not raised to

bill of exceptions is not admissible to show what the testimony of a witness since deceased or out of the jurisdiction of the court was at the former trial. Such evidence must be shown by the testimony of sworn living witnesses, wherever the latter doctrine prevails: *Simmons v. Spratt*, 26 Fla. 449, 9 L. R. A. 343, 8 South. 123; *Illinois Cent. R. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Elgin v. Welch*, 23 Ill. App. 185; *Montgomery v. Handy*, 63 Miss. 43; *Kirk v. Mowry*, 24 Ohio St. 581; *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357.

⁵⁹ *Hudson v. Applegate*, 87 Iowa. 605, 54 N. W. 462. As to an agreed statement of facts, see *Dwyer v. Ripetoe*, 72 Tex. 520, 10 S. W. 668; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621; *Lathrop v. Adkissin*, 87 Ga. 339, 13 S. E. 517.

⁶⁰ See cases above cited. See note to *Atchison etc. R. Co. v. Osborn*, 91

Am. St. Rep. 206-208, and to *Padgitt v. Moll*, 81 Am. St. Rep. 358.

⁶¹ *First Nat. Bank of Easton v. Wirebach*, 106 Pa. 37.

⁶² *Schearer v. Harber*, 36 Ind. 536. See note to *Commonwealth v. Vose*, 17 L. R. A. 813; also § 263, *ante*.

⁶³ *Kutzmeyer v. Ennis*, 27 N. J. L. 371; *Schearer v. Harber*, 36 Ind. 536; *Johnson v. Powers*, 40 Vt. 611. In *Philadelphia etc. R. Co. v. Howard*, 13 How. (U. S.) 307, 14 L. Ed. 157, the plaintiff offered to read the deposition of a deceased witness taken and used by the defendants in a case between the same parties in another court, to prove that a document therein referred to bore the seal of the corporation, placed there by the deponent, an officer of the defendant corporation. The defendant objected, but the court admitted the evidence, upon the ground, amongst others, that it proved that in that case the

the testimony at the first trial. In a Texas case,⁶⁴ we find that at a former trial a witness for defendant testified, and died before the second trial. No objection was at that time made to her answers to questions, as recorded by the stenographer, for the reason that the answer was not responsive to the question. At the second trial, defendant offered to read the testimony of the witness given at the former trial, when plaintiffs objected to a portion of it, because not responsive to the question, which objection was sustained by the court. "The court erred in that ruling. Having permitted the evidence to go to the jury without objection when the witness was on the stand, the plaintiffs should not be allowed the objection after the witness had died. If made at the first trial, the question could have been framed to meet the objection."⁶⁵

defendant had asserted this instrument to be the deed of the corporation and relied on it as such.

⁶⁴ *Sherman Gas etc. Co. v. Belden* (Tex.), 123 S. W. 119.

⁶⁵ In *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515, there is apparently a contrary ruling. In South Carolina, however, the rule as to incompetent testimony becoming competent for want of objection is the same as elsewhere; but in the case last referred to the testimony was that of witnesses at a coroner's inquest,

and, in the language of the court, "Such testimony is not admissible on a trial between persons who were not parties to the inquest and had no legal connection therewith." In such case it was a question of the identity of parties; in the Texas case, of the nature of the testimony, to which no objection having been primarily made, no objection could be subsequently raised. To this effect, also, is *Randle v. Birmingham etc. Power Co.*, 158 Ala. 532, 48 South. 114.

CHAPTER 11.

RES GESTAE.

- § 344. *Res Gestae*—Meaning of the Term—Illustrations.
- § 345. Mere Narrations not Admissible.
- § 346. Cases in Which the Rule is Relaxed.
- § 347. Time Through Which *Res Gestae* may Extend.
- § 348. The Statements or Acts must be Part of a Transaction.
- § 349. Declarations as to Bodily Feelings.
- § 349a. Same, Continued.
- § 350. Declarations Showing Motive or Intent.
- § 351. Declarations by Possessor of Personal Property.
- § 352. Declarations by One in Possession of Land—When Admitted in Disparagement of Title.
- § 353. Same—Possession must be Shown.
- § 354. Declarations Proper to Show Character of Possession—Not to Destroy Record Title.
- § 355. Declarations as to Boundary Lines.
- § 356. Declarations of Agents.
- § 356a. Same—Further Illustrations.
- § 356b. Prerequisites to Admission of Such Declarations.
- § 357. Declarations by Agents of Corporations.
- § 358. General Rule and Summary of the Chapter.

§ 344 (347). *Res gestae*—Meaning of the term—Illustrations.—“Part of the *res gestae*” is one of the most familiar terms in legal use, and yet calls for definition and close study, in that *res gestae* is a law unto itself, consisting of many of the ordinary rules of evidence, but primarily of relevancy; apparently setting at naught many of the exceptions, but in reality presenting a complete system of self-regulation to meet the necessities and demands of complete proof. It devolves upon us to consider what is this law of “the thing done.” It is an axiom that one of the most important functions of the law of evidence is to prevent the confusion of the court and jury, and the burdening of the record with a mass of hearsay and irrelevant testimony, which can only tend to obscure the real issues, and to give rise to others of only apparent and not real importance, besides giving to the trial of a cause a cumbrous movement and an uncertain direction highly detrimental to

the ends of justice. But there is a class of evidence which forms an exception to the general rules of hearsay and relevancy, termed the *res gestae*, which is admitted, although it is in fact hearsay or apparently irrelevant, because without it a clear understanding of the nature of the litigated act cannot be had, and to obtain this should, of course, be the prime object of the rules of evidence, —by admitting as well as by excluding evidence. Greenleaf says that “the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence has its inseparable attributes, and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.”¹ Wharton defines *res gestae* as “those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of anyone concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is, that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a rela-

¹ 1 Greenl. Ev., § 108.

tion not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." The idea of the *res gestae* presupposes a main fact or principal transaction, and the *res gestae* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.² In Stephen's Digest we find the rule crystallized in these words: "Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it."³ When declarations or

² *Hermes v. Chicago etc. R. Co.*, 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584, and cases therein cited.

³ Reynolds's Stephen's Digest, art. 8, in which are also the illustrations given by the learned judge. On the question whether A committed an act of bankruptcy by departing the realm with intent to defraud his creditors, letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts. On the question whether A was sane, the fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct. The authority for the last proposition is *Wright v. Doe d. Tatham*, 7 Ad. & E. 324, 325, 112 Eng. Reprint, 488, in which the doctrine of *res gestae* was much discussed before Lord Denman, and Bosanquet, J., put the question, "How do you translate *res gestae*? *Gestae*, by whom?" Baron Parke stated the

rule to be that where any facts are proper evidence upon an issue (i. e., when they are in issue, or relevant to the issue), all oral or written declarations which can explain such facts may be received in evidence. Stephen says his article 8 was framed to answer Baron Parke's query: "The acts by whomsoever done are *res gestae* if relevant to the matter in issue. But the question is, What are relevant?" An excellent illustration is furnished in the recent case of *Champlin v. Pawcatuck Valley St. Ry. Co.*, 33 R. I. 572, 82 Atl. 481. It was an action for personal injuries against a street railroad company. Evidence was admitted by the trial judge of what a bystander said to the motorman while the injured man was being picked up, and the motorman's reply thereto. Objection was taken to the statement of the bystander. The court in overruling it said that the statement of the bystander was necessary to understand the motorman's reply. The appellate court dismissed the exception with,

acts accompany the fact in controversy and tend to illustrate or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the *res gestae*.⁴ Thus, conversations contemporaneous with the facts in controversy and explaining such facts are admissible.⁵ It is

"We cannot see how the court could have ruled differently, as the statement of the motorman was entirely unintelligible by itself": See, also, Louisville etc. R. Co. v. Moore, 150 Ky. 692, 150 S. W. 849.

⁴ Broyles v. Central of Georgia R. Co., 166 Ala. 616, 139 Am. St. Rep. 50, 52 South. 81; Hamburg Bank v. George, 92 Ark. 472, 123 S. W. 654; Rogers v. Manhattan etc. Co., 138 Cal. 285, 71 Pac. 348; Thompson v. Commercial Union Assur. Co., 20 Colo. App. 331, 78 Pac. 1073; Hall v. Connecticut River Steamboat Co., 13 Conn. 319; Barrow v. State, 80 Ga. 191, 5 S. E. 64; Hertz v. Chicago etc. R. R. Co., 154 Ill. App. 80; Place v. Baugher, 159 Ind. 232, 64 N. E. 852; State v. Gainor, 84 Iowa, 209, 50 N. W. 947; Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. 608; Thornton v. Layle, 111 S. W. 279, 33 Ky. Law Rep. 382; State v. Blount, 124 La. 202, 50 South. 12; Waters v. Riffin, 19 Md. 536; Davidson v. Kolb, 95 Mich. 469, 55 N. W. 373; Newcomb v. State, 37 Miss. 383; State v. Baker, 209 Mo. 444, 108 S. W. 6; Wallace v. Boston etc. R. R. Co., 72 N. H. 504, 57 Atl. 913; Nugent v. Breuchard, 91 Hun, 12, 36 N. Y. Supp. 102; Fraley v. Fraley, 150 N. C. 501, 64 S. E. 381; Crooks v. Bunn, 136 Pa. 368, 20 Atl. 529; Blakely v. Frazier, 20 S. C. 144; Cornwell v. State, Mart. & Y. (Tenn.) 147; Bronson v. State, 59 Tex. Cr. 17, 127 S. W. 175; Leach v. Oregon Short Line R. Co., 29 Utah, 285, 110 Am. St. Rep. 708, 81

Pac. 90; Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757; Nicholas v. Commonwealth, 91 Va. 741, 21 S. E. 364; State v. Falsetta, 43 Wash. 159, 10 Ann. Cas. 177, 86 Pac. 168; Cor-der v. Talbott, 14 W. Va. 277; Prenz-tiss v. Strand, 116 Wis. 647, 93 N. W. 816; Kerr v. Modern Woodmen etc., 117 Fed. 593, 54 C. C. A. 655.

⁵ Stewart v. Brown, 48 Mich. 383, 12 N. W. 499; International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, and note, 17 S. W. 1039; Mack v. State, 48 Wis. 271, 4 N. W. 449; State v. Mason, 112 Mo. 374, 34 Am. St. Rep. 390, 20 S. W. 629; Bragg v. Massie, 38 Ala. 89, 79 Am. Dec. 82; Brockett v. New Jersey Co., 18 Fed. 156; Earle v. Earle, 11 Allen (Mass.), 1; Weir v. Borough of Plymouth, 148 Pa. 566, 24 Atl. 94; Chick v. Sisson, 95 Mich. 412, 54 N. W. 895; Spencer v. New York & N. E. Ry. Co., 62 Conn. 242, 25 Atl. 350. For illustrations of facts that have been held to be part of the *res gestae*, see notes to Baker v. Kelly, 93 Am. Dec. 279; Leahy v. Cass Ave. etc. Ry. Co., 10 Am. St. Rep. 306; Moses v. State, 16 Am. St. Rep. 22; Kincheliffe v. Koontz, 16 Am. St. Rep. 407; International etc. Ry. Co. v. Anderson, 27 Am. St. Rep. 907; Ehrlinger v. Douglas, 29 Am. St. Rep. 865; and elaborate notes to People v. Vernon, 95 Am. Dec. 51-76, and Ohio etc. R. Co. v. Stein, 19 L. R. A. 733-752. See, also, article in 43 L. T. 272.

not a condition of the admission of such evidence that no other can be obtained. The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize or explain it. It should appear that they were made without premeditation or artifice, and without a view to the consequences; that they are the *spontaneous utterances*, the natural result of the act they characterize or elucidate. Of course, the act must be relevant to the issue, but when relevant, the declarations are not rejected merely because there may be other competent testimony. It is hardly necessary to add that when the declarations form *part of a contract* or the performance of a contract, they are relevant and will be received. In the celebrated case in which Lord George Gordon was on trial for treason, the cries of the mob which accompanied the defendant during the acts complained of were received for the purpose of showing that his intentions were unlawful and treasonable.⁶ On the same principle, the complaints and statements of an injured party made at the time of the occurrence both as to bodily suffering and the circumstances of the occurrence are frequently received.⁷ Another illustration is the fact that the

⁶ Rex v. Gordon, 21 How. St. Tr. 514.

⁷ Averson v. Kinnaird, 6 East, 188, 102 Eng. Reprint, 1258; Ent-whistle v. Feighner, 60 Mo. 214; Harriman v. Stowe, 57 Mo. 93; Elkins v. McKean, 79 Pa. 493; Little Rock Ry. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Waldele v. New York C. etc. R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Hall v. Accident Assn., 86 Wis. 518, 57 N. W. 366; Louisville Ry. Co., v. Buck, 116 Ind. 566, 9 Am. St. Rep. 883, 2 L. R. A. 520, 19 N. E. 453; Leahey v. Cass Ave. Ry. Co., 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58. See, also, § 349

post. The rule renders admissible the declarations and conduct of *third persons* at the very time of an accident or injury which they witness: Galena etc. R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Mobile etc. R. Co. v. Ashcraft, 48 Ala. 15; Indianapolis etc. Ry. Co. v. Anthony, 43 Ind. 183; Missouri Pac. Ry. Co. v. Collier, 62 Tex. 318; State v. Walker, 78 Mo. 380; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; Kleiber v. People's Ry. Co., 107 Mo. 240, 14 L. R. A. 613, 7 S. W. 946. See, also, Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio St. 25, 29 N.

prosecutrix in an indictment for rape has made complaint immediately after the wrong. This is, however, scarcely

E. 1052; statements as to the conditions of an execution sale: *Arnold v. Gorr*, 1 Rawle (Pa.), 223; statements of an officer and of other persons interested made at the time of *levying on property*: *Pierson v. Hoag*, 47 Barb. (N. Y.) 243; *Grandy v. McPherson*, 7 Jones (N. C.), 347; *Arnold v. Gorr*, 1 Rawle (Pa.), 223; *Johnston v. Hamburger*, 13 Wis. 175; declarations accompanying the *payment of money*, to show the purpose or application of the payment: *Bank of Woodstock v. Clark*, 25 Vt. 308; *Hood v. French*, 37 Fla. 117, 19 South. 165; *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35; declarations accompanying a *gift*: *Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482; *Lord v. New York Life Ins. Co.*, 95 Tex. 216, 93 Am. St. Rep. 827, 56 L. R. A. 596, 66 S. W. 290; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. Rep. 860, 19 N. E. 190; declarations affecting the *revocation of a will*: *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *statements of a grantor* at the time of making a conveyance: *Gamble v. Johnson*, 9 Mo. 605; *Potter v. McDowell*, 31 Mo. 62; *Badger v. Story*, 16 N. H. 168; *Cheswell v. Eastham*, 16 N. H. 296; *Kent v. Harcourt*, 33 Barb. (N. Y.) 491; declarations of a person at the time of making an *entry upon land*, explaining the character and purpose of such entry: *Robison v. Swett*, 3 Greenl. (Me.) 316; 3 Black. Com. 174; statements made by a bondsman when he signed a bond: *State v. Gregory*, 132 Ind. 387, 31 N. E. 952; and statements of the parties to a *sale of personal property* made at the time of sale, when such statements bear upon the

question of good faith or other fact in issue: *Dale v. Gower*, 24 Me. 563; *Haight v. Hayt*, 19 N. Y. 464; *Banfield v. Parker*, 36 N. H. 353; acts and declarations of the wife showing maltreatment on the part of the husband: *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; declarations by the *bailee* contemporaneous with the loss to show the nature of the loss: *Doorman v. Jenkins*, 2 Ad. & E. 256, 111 Eng. Reprint, 99; *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Beardslee v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596; *Frink v. Coe*, 4 G. Greene (Iowa), 555, 61 Am. Dec. 141; where the consideration of a mortgage is in issue, all that was said and done by the parties in the course of their negotiations and as part of the agreement is admissible: *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106. Among the modern cases, the following will be found to contain illustrations of contemporaneous declarations both of the parties and others: *Swanson v. Chicago City R. Co.*, 242 Ill. 388, 90 N. E. 210; *Madden Son & Co. v. Wilcox*, 174 Ind. 657, 91 N. E. 933; *Dubois v. Luthmers*, 147 Iowa, 315, 126 N. W. 147; *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745; *United Power Co. v. Matheny*, 81 Ohio St. 204, 90 N. E. 154; *Shelton v. Southern Ry.*, 86 S. C. 98, 67 S. E. 899; *Britton v. Washington etc. Co.*, 59 Wash. 440, 110 Pac. 20; *Walters v. Spokane etc. R. Co.*, 58 Wash. 293, 42 L. R. A., N. S., 917, 108 Pac. 593; *Stone v. Campbell's Creek R. Co.*, 66 W. Va. 417, 66 S. E. 521. See interesting sketch of the history of the phrase *res gestae* by Prof.

to be classed as a spontaneous declaration, as the complaint is received even after a considerable interval, if it is made on her first opportunity to denounce the offender.⁸

§ 345 (348). **Mere narrations not admissible.**—The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestae*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision. “But the principle, whether expressed in an abbreviated Latin phrase or otherwise, is an important one in any system of evidence whose object is the ascertainment of facts. Its development has been promoted, in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible.”⁹ It will readily be gathered from the preceding section that whether a statement or act is or is not a part of the *res gestae* depends wholly upon the facts of each case; and it is therefore difficult, if not impossible, to frame any more satisfactory definition of the term “*res gestae*.” But there are certain well-recognized tests or rules which may be applied in determining whether a given statement or act is to be rejected as hearsay, or admitted as part of the *res gestae*. One of these rules is that declarations are not ad-

Thayer, 14 Am. Law Review, 817. As to the admissibility of expressions or statements of present pain made during sickness or subsequent to injury, see note to Mississippi Cent. R. R. Co. v. Turnage, 24 L. R. A., N. S., 253, and to Beal Doyle Dry Goods Co. v. Carr, 14 Ann. Cas. 51.

⁸ McMurrin v. Rigby, 80 Iowa,

322, 45 N. W. 877; People v. Brown, 53 Mich. 531, 19 N. W. 172. In People v. Hicks, 98 Mich. 86, 56 N. W. 1102, this is declared rather corroboration than part of the *res gestae*. See note to Ohio etc. R. Co. v. Stein, 19 L. R. A. 744.

⁹ Murray v. Boston & M. R. R., 72 N. H. 32, 101 Am. St. Rep. 660, 61 L. R. A. 495, 54 Atl. 289.

missible if they amount to no more than a *mere narrative of a past occurrence*. When the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, it is competent and admissible as part of the *res gestae*; but when it is merely a history, or part of a history, of a completed past affair, it is incompetent and inadmissible.¹⁰ Thus, where the holder of a check went into a bank and when he came out said he had demanded payment, the declaration was held inadmissible.¹¹ So where one who was fatally injured by a railway train made statements half an hour after the occurrence, the statements were held no part of the *res gestae*;¹² and in an action against a township for injuries caused by a defective bridge, statements made by the plaintiff as to the cause and circumstances of the injury were held inadmissible.¹³ The rule has often been declared that the declarations must be *contemporaneous* with the facts which they illustrate; and many cases might be cited as examples of such rulings. Thus, in a case which has excited much discussion and which has been regarded as an extreme case, it was held that a statement made by a person immediately after the act, while running out of the room in which her throat had been cut, was incompetent;¹⁴ and in many other cases it has been held that declarations, immediately or a few minutes after the event sought to be explained, could not be received.¹⁵ In these and many similar cases which might be cited it was held that the declarations were not

¹⁰ Chicago etc. R. Co. v. Becker, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; Lander v. People, 104 Ill. 248; Mayes v. State, 64 Miss. 329, 60 Am. Rep. 58, 1 South. 733; Waldele v. New York etc. R. R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

¹¹ Lund v. Tyngsborough, 9 Cush. (Mass.) 36.

¹² Waldele v. New York C. & H. R. Ry. Co., 95 N. Y. 274, 47 Am. Rep. 41; Savannah Ry. Co. v. Holland, 82 Ga. 257, 14 Am. St. Rep.

158, 10 S. E. 200; Steinhofel v. Railway Co., 92 Wis. 123, 65 N. W. 852.

¹³ Merkle v. Bennington, 58 Mich. 156, 55 Am. Rep. 166, 24 N. W. 776; Schillinger v. Town of Verona, 88 Wis. 317, 60 N. W. 272.

¹⁴ Rex v. Bedingfield, 14 Cox C. C. 341, 14 Am. Law Rep. 817.

¹⁵ White v. Henderson-Boyd Lum-ber Co., 165 Ala. 218, 51 South. 764; Rosenbaum v. State, 33 Ala. 354; Northwestern Redwood Co. v. Dick- en, 13 Cal. App. 689, 110 Pac.

so nearly contemporaneous with the transaction in issue as to characterize or explain it; that they were mere narratives of transactions wholly completed. These declarations depended for their truth wholly upon the accuracy and reliability of the declarant and the witness, and were not corroborated by any event or fact, then transpiring, by means of which their truth could be tested. Among the more modern cases, it will be found that conversations after accidents are frequently tendered as part of the *res gestae*, and in the cases cited hereto will be found excellent illustrations of their rejection on the ground of narrative.¹⁶

- 591; *Morse v. Consolidated R. Co.*, 81 Conn. 395, 71 Atl. 553; *McBride v. Georgia Ry. & Electric Co.*, 125 Ga. 515, 54 S. E. 674; *Roach v. Western & A. Ry. Co.*, 93 Ga. 785, 21 S. E. 67; *Williams v. English*, 64 Ga. 546; *Sullivan v. Guth*, 148 Ill. App. 538; *Lander v. People*, 104 Ill. 248; *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648; *Wadsworth v. Harrison*, 14 Iowa, 272; *State v. Deuble*, 74 Iowa, 509, 38 N. W. 383; *Campbell v. Brown*, 81 Kan. 480, 26 L. R. A., N. S., 1142, 106 Pac. 37; *Louisville R. Co. v. Johnson*, 131 Ky. 277, 20 L. R. A., N. S., 133, 115 S. W. 207; *Bionto v. Illinois etc. R. Co.*, 125 La. 147, 27 L. R. A., N. S., 1030, 51 South. 98; *Bangor v. Brunswick*, 27 Me. 351; *Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48; *Leistritz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294; *Stone v. Segur*, 11 Allen (Mass.), 568; *Rowell v. City of Lowell*, 11 Gray (Mass.), 420; *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745; *Gordon v. Grand Rapids & I. Ry. Co.*, 103 Mich. 379, 61 N. W. 549; *Barker v. Lewis Pub. Co.*, 152 Mo. App. 706, 131 S. W. 924; *Ruschenberg v. So. Electric Co.*, 161 Mo. 70, 61 S. W. 626; *Pledger v. Chicago etc. R. Co.*, 69 Neb. 456, 95 N. W. 1057; *Hirsch v. New York etc. R. Co.*, 50 Misc. Rep. 568, 99 N. Y. Supp. 431; *Waldele v. New York C. & H. R. Ry. Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Luby v. Hudson Riv. R. Co.*, 17 N. Y. 131; *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Roche v. Brooklyn Ry. Co.*, 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630; *Bumgardner v. Southern R. Co.*, 132 N. C. 438, 43 S. E. 948; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *Smith v. Territory*, 11 Okl. 669, 69 Pac. 805; *Sullivan v. Oregon Ry. & Nav. Co.*, 12 Or. 392, 53 Am. Rep. 364, 7 Pac. 508; *Keefer v. Pacific M. L. Ins. Co.*, 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366; *Chapman v. Pendleton*, 26 R. I. 573, 59 Atl. 928; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Cromeenes v. San Pedro etc. R. Co.*, 37 Utah, 475, Ann. Cas. 1912C, 307, 109 Pac. 10; *Wells v. Boston etc. R. Co.*, 82 Vt. 108, 137 Am. St. Rep. 987, 71 Atl. 1103; *Smith v. Betty*, 11 Gratt. (Va.) 752; *Sorenson v. Dundas*, 42 Wis. 642; *Kyner v. Portland Gold Min. Co.*, 184 Fed. 43, 106 C. C. A. 245; *Garnier v. Stamford*, 7 Ont. L. R. 50.
- ¹⁶ *Sloss-Sheffield etc. Co. v. Bibb*, 164 Ala. 62, 51 South. 345; *Belskis v. Dering Coal Co.*, 246 Ill. 62, 20

The mere fact that the statement is in narrative form will not exclude it, if it was actually part of the *res gestae*.¹⁷ And it gains nothing in strength from the fact that it is written. If an oral statement is not admissible as part of the *res gestae*, the mere fact that it is in writing will not render it competent.¹⁸ It goes without saying that the converse of this proposition is equally true—that if it is admissible in that character, it makes no difference whether it is oral or in writing. It is, of course, true that in many cases it may be difficult to find the line dividing narrative from contemporaneous utterance, and in such cases, as has well been said, if the narrative bears the slightest trace of concoction or any suspicion of device or afterthought, it will be rejected.¹⁹

§ 346 (349). **Cases in which the rule is relaxed.**—The trend of judicial decision is undoubtedly in the direction of relaxing the rule of absolute and identical contemporaneousness. Mr. Justice Swayne, in the United States supreme court, emphasizes the substitution of “nearly contemporaneous.” “The *res gestae* are the statements of the

Ann. Cas. 388, 92 N. E. 575; *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162; *Cyborowski v. Kinsman Transit Co.*, 179 Fed. 440, 102 C. C. A. 586; *Feldman v. Detroit etc. R. Co.*, 162 Mich. 486, 127 N. W. 687; *Kimic v. San Jose etc. R. Co.*, 156 Cal. 379, 104 Pac. 986; *Kenney v. South Shore etc. Fuel Co.*, 134 App. Div. 859, 119 N. Y. Supp. 363; *Houston Electric Co. v. Jones* (Tex. Civ. App.), 129 S. W. 863; *Coalgate Co. v. Hurst*, 25 Okl. 588, 107 Pac. 657; *Bionto v. Illinois etc. R. Co.*, 125 La. 147, 27 L. R. A., N. S., 1030, 51 South. 98; *Dunlap v. Chicago etc. R. Co.*, 145 Mo. App. 215, 129 S. W. 262; *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 110 Pac. 591; *Traylor v. Hollis*, 45 Ind. App. 680, 91 N. E. 567.

¹⁷ *Murray v. Boston & M. R. R.*, 72 N. H. 32, 101 Am. St. Rep. 660, 61 L. R. A. 495, 54 Atl. 298. The following illustrative statement is contained in this case: “It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be for that reason of such probative force as to be admissible as evidence upon a material issue.”

¹⁸ *Wilson v. Sherlock*, 36 Me. 295.

¹⁹ *Hall v. State*, 48 Ga. 607; *Savannah etc. R. Co. v. Holland*, 82 Ga. 257, 14 Am. St. Rep. 158, 10 S. E. 200, in which latter case the subject is well discussed by Bleckley, C. J. See, also, *Chappel v. John*, 45 Colo. 45, 132 Am. St. Rep. 134, 16 Ann. Cas. 854, 99 Pac. 44.

cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority.”²⁰ Parallel with this new line of thought, there is another class of cases which hold that declarations may in some cases be received, although made *after the act* in question, provided they were uttered after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it, and when it is plain that the act is the *inducing* cause of the declaration.²¹ For example, in a Massachusetts case, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, “I am stabbed!” and that he at once went to him and reached him within twenty seconds after that, and that he then heard him say, “I am stabbed! I am gone—Dan Hackett has stabbed me!” Although the court conceded that testimony as to declarations of this character should

²⁰ Travelers’ Ins. Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. Ed. 437, and note.

²¹ Commonwealth v. Hackett, 2 Allen (Mass.), 136; Hanover R. Co. v. Coyle, 55 Pa. 396; Otis v. Thom, 23 Ala. 469, 58 Am. Dec. 303; Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838; Kirby v. Commonwealth, 77 Va. 681, 46 Am. Rep. 747; Missouri Pac. Ry. v. Baier, 37 Neb. 235, 55 N. W. 913; Trenton P. R. Co. v. Cooper, 60 N. J. L. 219, 64 Am. St. Rep. 592, 38 L. R. A. 637,

37 Atl. 730; State v. Epstein, 25 R. I. 131, 55 Atl. 204; Bliss v. State, 117 Wis. 596, 94 N. W. 325; Johnson v. State, 8 Wyo. 494, 58 Pac. 761; Hall v. American M. Acc. Assn., 86 Wis. 518, 57 N. W. 366; Poole v. East Tenn. & V. G. Ry. Co., 92 Ga. 337, 17 S. E. 267; Travelers’ Protective Assn. v. West, 102 Fed. 226, 42 C. C. A. 284. See note to Hawker v. Baltimore etc. R. R. Co., 36 Am. Rep. 829, and to Field v. State, 34 Am. Rep. 479.

be restricted within narrow limits, it was held that the declarations, although made after the homicidal act, were in fact a *part of the transaction*.²² While the English case already mentioned²³ illustrates the strictness of the one class of decisions which hold that the declarations must be contemporaneous with the act, a well-known decision of the supreme court of the United States may be cited as one which carries the more liberal rule to the extreme limit. In the case referred to, the action was on a life insurance policy, and for the purpose of proving that the death was caused by falling downstairs at night, the statement of deceased to members of his family soon after the alleged accident, and after he had returned to his room were held admissible.²⁴ The cases already cited sufficiently illustrate the fact that there is often no little difficulty in determining whether the declarations are so far contemporaneous with the main fact or transactions as to be admissible, and that it is impracticable to fix, by any general rule, any exact instant of time so as to preclude debate and conflict of opinion in regard to this particular point.²⁵ So long, however as the element of fabrication is absent, and no suspicious taint of preconceived action or suggestion of design is present, the fact that there is a slight interval between the declaration and the act, and that they are not entirely synchronous will not affect its admis-

²² *Commonwealth v. Hackett*, 2 Allen (Mass.), 136. See elaborate note as to declarations made by wounded persons to *State v. Molisse*, 58 Am. Rep. 184.

²³ *Rex v. Bedingfield*, 14 Cox C. C. 341. See, also, note to *State v. Molisse*, 58 Am. Rep. 184. See, also, the Canadian cases: *Reg. v. Drain*, 8 Man. L. R. 535; *The Queen v. Troop*, 30 N. S. R. 339; *Basterach v. Atkinson*, 2 All. 439.

²⁴ *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. Ed. 437.

²⁵ *People v. Vernon*, 35 Cal. 49,

95 Am. Dec. 49; *Union Casualty etc. Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Green v. State*, 154 Ind. 655, 57 N. E. 637; *Conklin v. Consolidated R. Co.*, 196 Mass. 302, 13 Ann. Cas. 857, 82 N. E. 23; *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745; *Stevens v. Walpole*, 76 Mo. App. 213; *McElveen v. King*, 88 S. C. 346, 70 S. E. 801; *Stagner v. State*, 9 Tex. App. 440; *Kirby v. Commonwealth*, 77 Va. 681, 46 Am. Rep. 747.

sibility as part of the *res gestae*.²⁶ So far the consideration of the subject might lead to the understanding that there was a limitation in *res gestae* to the acts or declarations of the principals. That is not so. The "things done" in that respect means just what the phrase says, and therefore things done or said spontaneously by bystanders are relevant.²⁷ For example, in a Georgia

²⁶ *Nelson v. State*, 130 Ala. 83, 30 South. 728; *Soto v. Territory*, 12 Ariz. 36, 94 Pac. 1104; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051; *Glover v. State*, 89 Ga. 391, 15 S. E. 496; *Louisville etc. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714; *Hutcheis v. Cedar Rapids etc. R. Co.*, 128 Iowa, 279, 103 N. W. 779; *Louisville etc. R. Co. v. Onan*, 33 Ky. Law Rep. 462, 110 S. W. 380; *State v. Foley*, 113 La. 52, 104 Am. St. Rep. 493, 36 South. 885; *State v. Wagner*, 61 Me. 178; *Commonwealth v. McPike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745; *Mobile etc. R. Co. v. Stinson*, 74 Miss. 453, 21 South. 14, 522; *State v. Lockett*, 168 Mo. 480, 68 S. W. 563; *Lexington v. Fleherty*, 74 Neb. 626, 104 N. W. 1056; *Kupfersmith v. Law etc. Ins. Co.*, 80 N. J. L. 432, 78 Atl. 223; *Casey v. New York Cent. etc. R. R. Co.*, 78 N. Y. 518; *Firemen's Ins. Co. v. Seaboard etc. R. Co.*, 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; *Smith v. Territory*, 11 Okl. 669, 69 Pac. 805; *State v. Garrard*, 5 Or. 216; *Commonwealth v. Van Horn*, 188 Pa. 143, 41 Atl. 469; *Shelton v. Southern R. Co.*, 86 S. C. 98, 67 S. E. 899; *Malone v. Texas etc. R. Co.*, 49 Tex. Civ. App. 398, 109 S. W. 430; *Hawkes v. Chester*, 70 Vt. 271,

40 Atl. 727; *Andrews v. Commonwealth*, 100 Va. 801, 40 S. E. 935; *Britton v. Washington Water Power Co.*, 59 Wash. 440, 140 Am. St. Rep. 858, 110 Pac. 20, where the declaration of a boy, as soon as he recovered consciousness, eight days after an injury, was admitted; *Sample v. Consol. Light R. Co.*, 50 W. Va. 472, 57 L. R. A. 186, 40 S. E. 597, 694; *Charley v. Potthoff*, 118 Wis. 258, 95 N. W. 124; *Mutual etc. Ins. Co. v. Newton*, 22 Wall. (U. S.) 32, 22 L. Ed. 793; *Aveson v. Kinnaird*, 6 East, 188, 8 Rev. Rep. 455, 102 Eng. Reprint, 1258.

²⁷ *Appleton v. State*, 61 Ark. 590, 33 S. W. 1066; *State v. Desroches*, 48 La. Ann. 428, 19 South. 250; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *Coll v. Easton Transit Co.*, 180 Pa. 618, 37 Atl. 89; *Butler v. Railway Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738, 26 L. R. A. 46, 38 N. E. 454; *Ganaway v. Dramatic Assn.*, 17 Utah, 37, 53 Pac. 830. Other important and interesting cases are: *Cromeenes v. San Pedro etc. R. Co.*, 37 Utah, 475, Ann. Cas. 1912C, 307, 109 Pac. 10; *Weller & Co. v. Camp*, 169 Ala. 275, 28 L. R. A., N. S., 1106, 52 South. 929; *Texas etc. R. Co. v. Marshall*, 57 Tex. Civ. App. 538, 122 S. W. 946. There is a Louisiana case (*State v. Bellard*, 50 La. Ann. 594, 69 Am. St. Rep. 461, 23 South. 504), where it was held that when a difficulty occurs, resulting in a shooting, killing, or

case,²⁸ error was assigned upon the refusal of the court to rule out the testimony of a witness that "immediately after the pistol fired, Sol. Owens asked 'Who in the hell was that shot me?' and Will Strahan spoke and says it was Enos Knight shot." The exclamation was, said the court, apparently, admissible as a part of the *res gestae* of the homicide. So in a civil action for injuries resulting from a railway collision. Upon the trial it was an important issue in the case whether one of the trains stopped or did not stop before entering upon the crossing, and there was much evidence both ways upon this question. A witness, who lived near the crossing and in sight thereof, testified that it did not stop, and that when he saw it approaching the crossing without stopping, and before the collision, he remarked to his wife that it had entered upon the crossing without stopping, and that there would be a collision there some day. The court, without discussing the question, held that the statement to the witness' wife was part of the *res gestae*, and admissible.²⁹ It is scarcely necessary to add

other alleged offense, the exclamations of bystanders made at the time are not admissible in evidence, as part of the *res gestae*, though it is claimed that they "characterized" the act, showing that it was not done by the accused, but by others. This is against the entire weight of authority, and is in other respects a faulty opinion, in that it cites *State v. Desroches*, *supra*, as authority for the inadmissibility, whereas the syllabus by the court in that case says: "In case of alleged burglary, the impulsive utterances of a member of the family, in the presence of the accused, and while he is in the act of committing the crime charged, as part of the *res gestae*, is evidence."

²⁸ *Knight v. State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928.

²⁹ *Missouri etc. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167. In

Dixon v. Northern Pac. R. Co., 37 Wash. 310, 107 Am. St. Rep. 810, 2 Ann. Cas. 620, 68 L. R. A. 895, 79 Pac. 943, there are two excellent illustrations, one of the admission of evidence as *res gestae*, and the other of the rejection of the evidence of a stranger, not to be found at the time of the trial, and with no showing of circumstances which should prompt him to speak the truth. In *Shadowski v. Pittsburgh R. Co.*, 226 Pa. 537, 75 Atl. 730, the statement of a bystander was rejected, but it was a voluntary profane exclamatory remark made by himself prior to the happening of the accident and made to no one in particular, and not even in the presence of any of the parties concerned. In addition, he gave evidence of what he saw and what happened, and his soliloquy was properly excluded.

that the quality of the statements does not affect their admissibility. It makes no difference whether they are self-serving;³⁰ whether they are statements which would otherwise be privileged, such as between husband and wife;³¹ whether they would otherwise be expressions of opinion;³² or whether, if the cause were a criminal one, they would have to have been accompanied by the formalities which the criminal laws demand. In a Missouri action for damages for the death of the plaintiff's husband, in consequence of a switch being left open on the defendant's track, testimony was tendered of a statement by the decedent, immediately after the accident, and when he became conscious. Wagner, J., in delivering the opinion of the court, said: "As a dying declaration it was clearly inadmissible, for the modern decisions clearly establish the doctrine that the rule permitting dying declarations to be given in evidence applies exclusively to criminal prosecutions for felonious homicides, and has no reference to civil cases. But every declaration of a deceased person is not to be rejected upon this principle. Where a declaration is made by a deceased person contemporaneously, or nearly so, with a main event, by whose consequence it is alleged he died, as to the cause of that event, though generally the declarations must be contemporaneous with the event, yet

³⁰ Where the proof of death in an action on a policy of insurance consisted of circumstantial evidence, indicating the suicide of the deceased in disappearing from a steamer at night, leaving his coat and hat and valise and a letter to the captain in his stateroom, expressing his intention to go over the side of the steamer, and so get rid of the trials and troubles of life and avoid a funeral, such letter is admissible in evidence as part of the *res gestae*, and is not objectionable on the ground that it is self-serving: *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348.

³¹ In *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446, it was held that the testimony of a witness who testified in a homicide case that he heard the prisoner's wife say, in presence of the prisoner, "he has killed my boy; he struck him right over my shoulder. See the blood of my boy on my sleeve. Take him away; I never want to see him," was admissible.

³² *Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294; *State v. Mace*, 118 N. C. 1244, 24 S. E. 798.

where there are any connecting circumstances, they may, even when made some time afterward, form a part of the whole *res gestae*.”³³

§ 347 (350). Time through which *res gestae* may extend. It is necessary to note here that the attention has hitherto been directed rather to the occurrence of a single principal event, but it is well settled that the main transaction is not necessarily confined to a particular point of time. The act or transaction may be completed in a moment, or, if there are connecting circumstances, it may extend through a period of days or weeks, or even months. As illustrated by Wharton, “if in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. When again there is a social feud in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestae* as the blows given in homicides for which particular prosecutions may be brought.”³⁴ On this principle the *declarations of bankrupts* on going from and returning home have been received for the purpose of showing the motive and cause of absence, although a considerable time had elapsed;³⁵ and the declarations of persons made at the time

³³ *Brownell v. Pacific R. Co.*, 47 Mo. 239.

³⁴ 1 Whart. Ev., § 258; *Lake Shore & M. S. Ry. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052; *Small v. Williams*, 87 Ga. 681, 13 S. E. 589; *Linck v. Vorhauer*, 104 Mo. App. 368, 79 S. W. 478 (two years).

³⁵ *Bateman v. Bailey*, 5 Term Rep. 512, 101 Eng. Reprint, 288; *Rouch v. Great Western Ry. Co.*, 1 Q. B. 61, 113 Eng. Reprint, 1049; *Mutual*

Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 90; *Ridley v. Gyde*, 9 Bing. 349, 131 Eng. Reprint, 646; *Rawson v. Haigh*, 2 Bing. 99, 130 Eng. Reprint, 242; *Smith v. Cramer*, 1 Bing. N. C. 585, 131 Eng. Reprint, 1242; *Vacher v. Cocks*, 1 Moody & M. 353, 1 Barn. & Ad. 145, 109 Eng. Reprint, 741; *Thomas v. Connell*, 4 Mees. & W. 267, 1 H. & H. 189.

of going and returning have been received as evidence of this intention, when the issue related to the *domicile* of the person,³⁶ or when it was claimed that a debtor has absconded.³⁷ The courts have held declarations of a servant, at the time of leaving his master's service, to be competent evidence, in actions between third persons, of his reasons for doing so.³⁸ And the supreme court of Ohio has held that, for the purpose of proving that a person was at a railroad station intending to take passage on a train, previous declarations made by him at the time of leaving his hotel were admissible.³⁹ In such cases the declarations, whether verbal or consisting of letters, have been received on the ground that they were a *continuous act* which showed the intention of the person whose motives were in question.⁴⁰ The rule applicable to such declarations of intention is well stated in a United States supreme court decision.⁴¹ "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those ex-

³⁶ *Bateman v. Bailey*, 5 Term Rep. 512, 101 Eng. Reprint, 288; *Rawson v. Haigh*, 2 Bing. 99, 130 Eng. Reprint, 242; *Newman v. Stretch*, 1 Moody & M. 388; *Ridley v. Gyde*, 9 Bing. 349, 131 Eng. Reprint, 646; *Smith v. Cramer*, 1 Bing. N. C. 585, 131 Eng. Reprint, 1242; *The Venus*, 8 Cranch (U. S.), 278, 3 L. Ed. 553; *Gorham v. Canton*, 5 Greenl. (Me.) 266, 17 Am. Dec. 231; *Richmond v. Thomaston*, 38 Me. 232; *Cornville v. Brighton*, 39 Me. 333; *Thorndike v. Boston*, 1 Met. (Mass.) 242; *Kilburn v. Bennett*, 3 Met. (Mass.) 199; *Salem v. Lynn*, 13 Met. (Mass.) 544; *Carroll v. State*, 3 Humph. (Tenn.) 315; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *Bigelow v. Bear*, 64 Kan. 887, 68 Pac. 73; *Chambers v. Prince*, 75 Fed. 176.

³⁷ *Brady v. Parker*, 67 Ga. 636. See note on "Respective Weight of

Person's Acts and Declarations on Question of Domicile," to Holt v. Hendee, 21 Ann. Cas. 206.

³⁸ *Hadley v. Carter*, 8 N. H. 40; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724, 24 N. E. 208.

³⁹ *Lake Shore & M. S. R. v. Herick*, 49 Ohio St. 25, 29 N. E. 1052. See, also, *Jackson v. Boneham*, 15 Johns. (N. Y.) 226; *Gorham v. Canton*, 5 Me. 266, 17 Am. Dec. 231; *Kilburn v. Bennett*, 3 Met. (Mass.) 199; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36.

⁴⁰ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 909, and cases cited; *Rawson v. Haigh*, 2 Bing. 99, 130 Eng. Reprint, 242; *New Milford v. Sherman*, 21 Conn. 101; *Marsh v. Davis*, 24 Vt. 363.

⁴¹ *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. Ed. 437.

pressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury."⁴²

§ 348 (351). **The statements or acts must be part of a transaction.**—From whatever point of view a given circumstance is regarded in connection with its admissibility as one of the *res gestae*, it is absolutely essential that the claim shall be founded on its being one of the immediate family of facts which relevantly constitute the real subject matter. Does it belong to it, or has it only a distant relation and relevancy? If it is no part, then the admission, if at all, must be based on ground other than *res gestae*. Although, as we have seen, different tribunals do not agree as to the degree of strictness or liberality with which they apply the rule that the declaration should be contemporaneous with the transaction in issue, there is no doubt but that the declaration must be a *part of such transaction*, and that it must illustrate or explain it. "The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are con-

⁴² See, also, cases in which Mutual Life Ins. Co. v. Hillmon, *supra*, was approved: Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348, holding in action on life policy, where insured boarded steamer and was never seen again, letters left in stateroom indicating intention to commit suicide admissible; Mathews v. Great Northern Ry., 81 Minn.

363, 83 Am. St. Rep. 383, 84 N. W. 101, holding in personal injury case declarations of person as to purpose in doing acts made at or about time of act admissible; The San Rafael, 141 Fed. 270, 27 C. C. A. 388, declarations of intention to take certain trip on boat admissible to prove declarant was on boat and was killed in collision.

sidered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of coexisting motives."⁴³ In other words, they must be the spontaneous outcome from the nucleus of the given transaction, and spontaneity is of equal moment with contemporaneity. Hence, if there is reason to suppose that the declarations are not the natural and spontaneous utterance of the declarant, but that they are *premeditated* or designed for a purpose, they are inadmissible; and if sufficient time has elapsed to give an *opportunity for deliberation* or the fabrication of evidence, the declarations cannot be deemed a part of the *res gestae*.⁴⁴ Declarations are not admissible as part of the *res gestae* when they merely explain acts which would not be admissible in evidence without such declarations.⁴⁵ Thus, a *letter* written immediately after the transaction is no part of the *res gestae*.⁴⁶ But letters or declarations made *imme-*

⁴³ *Tilson v. Terwilliger*, 56 N. Y. 732; *Meek v. Perry*, 36 Miss. 190; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49, and extended note; *Mitchum v. State*, 11 Ga. 615; *Handy v. Johnson*, 5 Md. 450; *Rutland v. Hathorn*, 36 Ga. 380; *Leach v. Oregon Short Line R. Co.*, 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 90. As to how near the main transaction declarations must be made in order to constitute part of the *res gestae*, see note to *Ohio etc. R. Co. v. Stein*, 19 L. R. A. 733. See, also, the recent cases: *Staples v. Steed* (Ala. App.), 60 South. 499; *St. Louis R. Co. v. Waters* (Ark.), 152 S. W. 137; *Curtis v. Armagast* (Iowa), 138 N. W. 873; *Lewiston etc. Deposit Co. v. Shackford* (Mass.), 100 N. E. 828; *Johnson v. Clark Motor Co.* (Mich.), 139 N. W. 30; *Emerson v. Butte El. R. Co.*, 46 Mont. 454, 129 Pac. 319; *Phelps v. Bergers* (Neb.), 139 N. W. 632; *Scully v. Scully*, 139 N. Y. Supp.

622; *Goetz v. Merchants' Bank* (N. D.), 138 N. W. 10; *Canham v. Rhode Island Co.* (R. I.), 85 Atl. 1050; *First Nat. Bank v. Harvey* (S. D.), 137 N. W. 365; *National State Bank v. Ricketts* (Tex. Civ. App.), 152 S. W. 646; *Harrison v. United States*, 200 Fed. 662.

⁴⁴ *Galveston City v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *People v. Davis*, 56 N. Y. 95; *Cleveland etc. R. Co. v. Mara*, 26 Ohio St. 185. See note, *People v. Vernon*, 95 Am. Dec. 64.

⁴⁵ *Gresham Hotel Co. v. Manning*, Ir. Rep. 1 C. L. 125.

⁴⁶ *Small v. Gilman*, 48 Me. 506. See the following recent cases: *Bessierre v. Alabama etc. R. Co.* (Ala.), 60 South. 82; *Washburn v. State Bank*, 86 Kan. 468, 121 Pac. 515; *Louisville etc. R. Co. v. Moore* (Ky.), 150 S. W. 849; *Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161; *Bernard v. Grand Rapids Paper Box Co.* (Mich.), 136 N. W. 374; *Hed-*

diately preparatory to the litigated act may be received if they tend to give character to and illustrate the act in question. Thus, upon the question whether a person left a certain place with a certain other person, letters in which he stated his intention to leave it with that person, which were written and mailed by him to his family at that place shortly before the time when other evidence tends to show that he left the place, are competent evidence of such intention.⁴⁷ And inasmuch as such declarations must be part of the transaction, it makes little difference whether they precede,⁴⁸ coincide⁴⁹ or follow the main transaction.⁵⁰

lund v. Minneapolis etc. R. Co. (Minn.), 139 N. W. 603; Canham v. Rhode Island Co. (R. I.), 85 Atl. 1050; Texas Cent. R. Co. v. Dumas (Tex. Civ. App.), 149 S. W. 543; Taylor v. Spokane etc. R. Co. (Wash.), 130 Pac. 506; Cohodes v. Menominee etc. Co., 149 Wis. 308, 135 N. W. 879.

⁴⁷ Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 909; Hinchcliffe v. Koontz, 121 Ind. 422, 16 Am. St. Rep. 403, 23 N. E. 271; Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052; McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305. Declarations of a servant made at the time of leaving service as to his reasons for doing so are admissible in actions between third persons: Hadley v. Carter, 8 N. H. 40; Elmer v. Fessenden, 151 Mass. 359, 5 L. R. A. 724, 24 N. E. 208. See the following recent cases: Healy v. Chicago City R. Co., 160 Ill. App. 7; Owensboro City R. Co. v. Rowland (Ky.), 153 S. W. 206; Cecil Paper Co. v. Nesbitt, 117 Md. 59, 83 Atl. 254; Marlatt v. Erie R. Co., 139 N. Y. Supp. 771; Harris v. Delaware etc. R. Co., 82 N. J. L. 456, 82 Atl. 881.

⁴⁸ On a trial for murder, it was shown that the deceased stated to

the witnesses that he had just seen the defendant going down a slough, about one hundred yards distant, with a shotgun. Three or four minutes later the sound of a gun was heard, and going to the slough the witnesses found the deceased mortally wounded with buckshot, and he then stated to them that the defendant shot him. It was held that both declarations were competent as *res gestæ*: Washington v. State, 19 Tex. App. 521, 53 Am. Rep. 387. In Flynn v. State, 43 Ark. 289, there is a ruling which is sometimes mistaken for a conflict. The circumstances in the Arkansas case were peculiar, in that the person who was being shot at, and who was running away, did not appear at the trial, and the witness testified to a conversation with him, he, the witness, not being a bystander. See, also, last section.

⁴⁹ See cases already cited.

⁵⁰ Conklin v. Consolidated Ry. Co., 196 Mass. 302, 13 Ann. Cas. 857, 82 N. E. 23. We perceive no logical difference in the application of this principle between declarations made before and those made after the event in question: Mobile etc. R. Co. v. Ashcraft, 48 Ala. 15; San Antonio etc. Ry. v. Robinson, 73 Tex. 277, 11 S. W. 327; Louisville

§ 349 (352). **Declarations as to bodily feelings.**—The proper exclusion of narrative leaves only for consideration those voluntary declarations which are received, closely scrutinized, and rigidly tested for spontaneity. First utterances are of first importance, and we have already shown that the interval of time between the main transaction and the first statement or declaration is unimportant.⁵¹ Whenever it becomes material to show a person's condition of health, or motives, or state of mind, such person's declarations may often be received in evidence for such purpose, provided the requisites already pointed out are complied with; and it appears that such statements are spontaneous and undesigned, and that they illustrate the facts which are the subject of inquiry.⁵² In some of the decisions the utterances are limited to groans and exclamations, and other involuntary exclamations of pain.⁵³ But in others, assertions and complaints as to present feeling are received more liberally.⁵⁴ But on the

etc. *R. v. Stewart*, 56 Fed. 808, 6 C. C. A. 147. See, also, *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 125 N. W. 745, and cases already cited.

⁵¹ See, also, *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750.

⁵² *State v. Hutchinson*, 95 Iowa, 566, 64 N. W. 610; *Hatch v. Fuller*, 131 Mass. 574; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832; *Gosa v. Railway Co.*, 67 S. C. 347, 45 S. E. 810. See, also, § 347, *ante*.

⁵³ *Green v. Pacific L. Co.*, 130 Cal. 435, 62 Pac. 747; *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800. See note on "Admissibility in Evidence of Exclamations and Expressions of Pain in Actions Involving Bodily Injuries," to *Federal Betterment Co. v. Reeves*, 15 Ann. Cas. 799. See, also, the following recent cases: *Alabama etc. R. Co. v. Heald* (Ala.), 59 South. 461; *Washington etc. El. Co. v. Wright*,

38 App. D. C. 268; *Southern R. Co. v. Parham*, 10 Ga. App. 531, 73 S. E. 763; *Guilfoil Con. Co. v. Clark* (Ind. App.), 99 N. E. 777; *Vernon v. Iowa etc. Assn. (Iowa)*, 138 N. W. 696; *Kington Coal Co. v. Aaron*, 147 Ky. 480, 144 S. W. 371; *Pruner v. Detroit United R. (Mich.)*, 139 N. W. 48; *Jewell v. Excelsior Powder Mfg. Co. (Mo. App.)*, 149 S. W. 1045; *Greener v. General Electric Co.*, 153 App. Div. 439, 138 N. Y. Supp. 273; *Moulton v. St. Johns Lumber Co.*, 61 Or. 62, 120 Pac. 1057; *Cohodes v. Menominee etc. Co.*, 149 Wis. 308, 135 N. W. 879; *Knox v. Robbins* (Tex. Civ. App.), 151 S. W. 1134.

⁵⁴ *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *Oliver v. Railway Co.*, 65 S. C. 1, 43 S. E. 307; *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271, 39 L. Ed. 977, 15 Sup. Ct. Rep. 840; *Bagley v. Mason*, 69 Vt. 175, 37 Atl.

grounds already stated, such declarations are *confined* to the *present condition* of the declarant. Such evidence is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narrative or statement is to be carefully excluded; and testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally furnish evidence of a present existing pain or malady.⁵⁵ The rule admitting the declarations of a party expressive of pain and bodily feeling in his own behalf was adopted with reluctance and has been generally *cautiously applied*. The danger that the admission of such declarations may lead to the fabrication of evidence is sufficient reason for receiving them only with caution and scrutiny. In a New York case it was held that, although natural expressions of pain, such as moans, sighs, or screams, might be admissible, the mere statement of a party made long after the injury that he suffered pain ought not to be admitted, as in any degree corroborative of his testimony as to the extent of his pain.⁵⁶ Each case must, however, be judged by its own attendant circumstances. All that the text-writer may do is to point the impossibility of framing a general rule, and the courts are coming to recognize this. Where any ground for suspicion exists, and it invariably betrays itself in an atmosphere of scheming or machination, the courts are prompt to reject the testimony.⁵⁷ The nature of the declaration

287. As to admissibility of expressions or statements of present pain made during sickness or subsequent to injury, see note to Mississippi Cent. R. R. Co. v. Turnage, 24 L. R. A., N. S., 253.

⁵⁵ Bacon v. Charlton, 7 Cush. (Mass.) 581; Roosa v. Boston Loan Co., 132 Mass. 439; Central Ry. Co. v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Keley v. Detroit Ry. Co., 80 Mich. 237, 20 Am. St. Rep. 514, 45 N. W. 90; Firkins v. Chicago G. W. Ry. Co., 61 Minn. 31, 63 N. W. 172; Roach v. Western & A. Ry. Co., 93

Ga. 785, 21 S. E. 67. Statements of the plaintiff, made long after the accident, that he suffered pain and could not perform certain work are inadmissible: Winter v. Central Iowa Ry. Co., 74 Iowa, 448, 38 N. W. 154.

⁵⁶ Roche v. Brooklyn Ry. Co., 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630.

⁵⁷ People v. Dewey, 2 Idaho, 79, 83, 6 Pac. 103; Atchison etc. R. Co. v. Logan, 65 Kan. 748, 70 Pac. 878; Jackson v. Commonwealth, 18 Ky. Law Rep. 670, 37 S. W. 847; Fitzgerald v. Commonwealth, 9 Ky. Law

invariably furnishes some guide as to its premeditation or otherwise. This is advantageously discussed in one of the cases approving what is familiarly known as the Mosley case.⁵⁸ A man, having fallen by night into an excavation, was asked how he came to be there, and said he fell in. He was next asked, "Was there no light?" and replied there was none. Having died from his injuries, an action was brought by his administratrix and testimony given, over objection, of his statement as part of the *res gestae*. The court carefully discriminated between the first and second statements on the ground that as to the second one, the declarant was going back of the immediate cause that led to the fall. "When an injured man, shortly after his injury, while still suffering intensely, is found at the bottom of a deep hole, and is asked, 'How did you come to fall in here?' and answers, 'No lamp put there,' it is difficult to discriminate the case from the Mosley case. The question assumes a fall as the immediate cause of the injury, and the mind of the injured man is perhaps for the first time since the injury directed to the cause of the fall. His answer may have been unpremeditated, spontaneous, involuntary. It enables comprehension of the principal fact—the injury—and is in some sense rather intimately related thereto. . . . The declaration that there was no light was made in answer to a suggestively leading question. It was a part of a conversation on the subject of the presence or absence of a light . . . it is clear that Pringle's (the plaintiff's intestate who had sustained a fatal injury) declarations as to the absence of the light was an apt and reasoned reply to a question. He was clearly not in such pain as to be incapable of reasoning, reflecting, and, if he thought fit, making a possibly untrue and self-serving declaration. In no sense can we consider Pringle's declaration that there was no light as an involuntary, exclamatory, spon-

Rep. 664, 6 S. W. 152; Kraner v. State, 61 Miss. 158; Estell v. State, 51 N. J. L. 182, 17 Atl. 118; Brown

v. State (Tex. Civ. App.), 44 S. W. 174.

⁵⁸ Travelers' Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. Ed. 437.

taneous 'verbal act.' He immediately followed this statement with the explanation that there had been a light when he went to the meeting, but that there was no light when he came back. The objectionable part of Pringle's declaration has not the sanction of an extreme probability of truth, coming from an unpremeditated and spontaneous exclamation made at the time of or immediately after the injury, nor is it so intimately connected with the principal fact as to be a verbal act, essentially a part thereof. To admit the declaration as to the light is to extend the doctrine of the Mosley case beyond the limit warranted by that case and it is to lose sight of what we think is the true reason for the rule of evidence in question."⁵⁹ But it does not follow that merely because the declaration is in answer to a question that this makes it inadmissible;⁶⁰ although the length of the declaration, its change from exclamation to narrative,⁶¹ the manner of making it,⁶² and even the tone of the voice,⁶³ all form important elements for the court's consideration. On the other hand, statements made when the declarant is obviously suffering and in pain, statements, as it were, wrung from him as a relief to his sufferings,

⁵⁹ *Guild v. Pringle*, 130 Fed. 419, 64 C. C. A. 621. See, also, *Louisville etc. R. Co. v. Pearson*, 97 Ala. 211, 12 South. 176; *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106; *Luman v. Golden Ancient etc. Co.*, 140 Cal. 700, 74 Pac. 307; *Chicago etc. R. Co. v. Becker*, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; *State v. Deuble*, 74 Iowa, 509, 38 N. W. 383; *Atchison etc. R. Co. v. Logan*, 65 Kan. 748, 70 Pac. 878; *Leistriz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294; *White v. Marquette*, 140 Mich. 310, 103 N. W. 698; *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194; *Lahey v. Ottmann & Co.*, 73 Hun, 61, 25 N. Y. Supp. 897; *Denton v. State*, 1 Swan (Tenn.), 279.

⁶⁰ *Starks v. State*, 137 Ala. 9, 34 South. 687; *Washington etc. R. Co. v. McLane*, 11 App. Cas. (D. C.) 220; *Christopherson v. Chicago etc. R. Co.*, 135 Iowa, 409, 124 Am. St. Rep. 284, 109 N. W. 1077; *State v. Wagner*, 61 Me. 178; *State v. Martin*, 124 Mo. 514, 28 S. W. 12; *State v. Arnold*, 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926; *Crookham v. State*, 5 W. Va. 510.

⁶¹ *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194. See, also, able discussion in *State v. Martin*, 124 Mo. 514, 28 S. W. 12.

⁶² *Jackson v. Commonwealth*, 18 Ky. Law Rep. 670, 37 S. W. 847.

⁶³ *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746.

bear so strongly the impress of genuineness and unpremeditation as to warrant their admission for spontaneity.⁶⁴

§ 349a (352). **Same, continued.**—In the preceding section we alluded to the inadmissibility of a statement of a party that he suffered pain, made long after the injury; but when a *physician* is called as an *expert*, his evidence is not thus limited. He may base his opinions upon a statement given by the patient in relation to his condition and sensations, past and present. Thus only can the expert ascertain the condition of the party; and he may, of course, be guided to some extent by the data thus furnished.⁶⁵ The declarations of the party to his physician or to other persons as to the *cause of the injury*, or those charging liability upon other persons, are not admissible when not

⁶⁴ Chielinsky v. Hoopes etc. Co., 1 Marv. (Del.) 273, 40 Atl. 1127; Louisville etc. R. Co. v. Shaw, 21 Ky. Law Rep. 1041, 53 S. W. 1048; Styles v. Decatur, 131 Mich. 443, 91 N. W. 622; Murray v. Boston etc. R. Co., 72 N. H. 32, 101 Am. St. Rep. 660, 61 L. R. A. 495, 54 Atl. 289; Scheir v. Quirin, 177 N. Y. 568, 69 N. E. 1130; Elkins v. McKean, 79 Pa. 493; Gosa v. Southern Ry., 67 S. C. 347, 45 S. E. 810; International etc. R. Co. v. Smith (Tex.), 14 S. W. 642; International etc. R. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; North Amer. Acc. Assn. v. Woodson, 64 Fed. 689, 12 C. C. A. 392; Georgia Ry. etc. Co. v. Gilleland, 133 Ga. 621, 66 S. E. 944; Weeks v. Boston etc. R. Co., 190 Mass. 563, 77 N. E. 654; State v. Draughon, 151 N. C. 667, 65 S. E. 913; Price v. State, 1 Okl. Cr. 358, 98 Pac. 447; Missouri etc. R. Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; Dixon v. Northern Pac. R. Co., 37 Wash. 310, 107 Am. St. Rep. 810, 2 Ann. Cas. 620, 68 L. R. A. 895, 79 Pac. 943; Soto v. Territory, 12

Ariz. 36, 94 Pac. 1104; State v. Alton, 105 Minn. 410, 15 Ann. Cas. 806, 117 N. W. 617; Vogel v. State, 138 Wis. 315, 119 N. W. 190.

⁶⁵ Averson v. Kinnaird, 6 East, 188, 103 Eng. Reprint, 1258; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81; Roosa v. Boston Loan Co., 132 Mass. 439; Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513, 33 Am. Rep. 821, 74 N. W. 658; Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389; Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Omberg v. United States etc. Ins. Co., 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909. See qualifying opinion in Lush v. McDaniel, 13 Ired. (N. C.) 485, 57 Am. Dec. 566; Rogers v. Crain, 30 Tex. 284; Abbott v. Heath, 84 Wis. 314, 54 N. W. 574. See, also, the following recent cases: Indianapolis etc. R. Co. v. Tucker (Ind. App.), 98 N. E. 431; De Haven v. Danville Gaslight Co., 150 Ky. 241, 150 S. W. 322; Pomeroule v. Postal etc. Cable Co. (Mo. App.), 152 S. W. 114; Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48; Acme Cement Plaster Co. v. Westman (Wyo.), 122 Pac. 89.

made at the time of the injury.⁶⁶ But declarations as to the cause of an injury are competent when made at the time of the accident as a part of the *res gestae*.⁶⁷ The narration of *past occurrences*, for example, the manner in which a party has been injured, are no more competent when related by a physician, than when stated by a non-professional witness.⁶⁸ Nor are the declarations of *one physician or surgeon to another* respecting the injury, made in the absence of the party, competent;⁶⁹ nor is the plaintiff, the injured party, allowed to state what the physician told him as to the nature of the injury.⁷⁰ Declarations of the character now under discussion are regarded as verbal acts, and, when coming within the rules already given, are admissible although made *during the pendency of an action* for the injuries in question or even when an action is contemplated. These are facts which may, of course, materially affect the credibility of the evidence, but they do not render it incompetent.⁷¹ Under such circumstances

⁶⁶ State v. Gedicke, 43 N. J. L. 86; Roosa v. Boston Loan Co., 132 Mass. 439; Smith v. State, 53 Ala. 486; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81; Collins v. Waters, 54 Ill. 485; Carthage T. Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364; Morrissey v. Ingham, 111 Mass. 63; Ashland v. Marlborough, 99 Mass. 47; Grand Rapids etc. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Lush v. McDaniel, 13 Ired. (N. C.) 485, 57 Am. Dec. 566; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. Rep. 69, 4 L. R. A. 296, 11 S. W. 694; Gray v. McLaughlin, 26 Iowa, 279. Declarations made four years after the accident were rejected: Laughlin v. Grand Rapids Ry. Co., 80 Mich. 154, 44 N. W. 1049. As to admissibility as *res gestae* of statements or declarations made by injured person to physician while latter was examining him, in order to qualify as a witness,

see note to Shaughnessy v. Holt, 21 L. R. A., N. S., 826.

⁶⁷ North American Acc. Assn. v. Woodson, 64 Fed. 689, 12 C. C. A. 392; Delaware, L. & W. Ry. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368.

⁶⁸ Dundas v. Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, 5 L. R. A. 143, 42 S. W. 1011; Will v. Mendon, 108 Mich. 251, 66 N. W. 58. See § 346, *ante*. See note on "Admissibility of Testimony of Physician as to Statements Made to Him by Patient Relating to History of Case," to State v. Blydenburg, 14 Ann. Cas. 449.

⁶⁹ Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365.

⁷⁰ Armstrong v. Ackley, 71 Iowa, 76, 32 N. W. 180; Alabama Ry. Co. v. Arnold, 80 Ala. 600, 2 South. 337.

⁷¹ Aveson v. Kinnaird, 6 East, 188, 102 Eng. Reprint, 1258; Quaipe v. Chicago & N. W. Ry. Co., 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658;

and, indeed, whenever declarations are admissible, it is for the jury to determine whether they express the real feelings of the party or whether they are feigned; and for obvious reasons, whenever there appears a motive to manufacture testimony, the declarations should be subjected to the closest *scrutiny*.⁷² In some cases the rule illustrated in this section has been so applied as to admit declarations to prove the *mental condition* or state of mind of the declarant,⁷³ or his design or plan.⁷⁴

§ 350 (353). Declarations showing motive or intent.—On the grounds already stated, it is the constant practice to receive evidence of the declarations of parties accompanying their acts to show the motive or intent or state of mind with which such acts were performed. Thus, when the issue is one of *fraud*, the natural and unpremeditated declarations of the parties during the negotiations are admissible.⁷⁵ “Where the question is whether a party has acted prudently, wisely, or in *good faith*, the information

Matteson v. New York Central R. Co., 35 N. Y. 487, 91 Am. Dec. 67; *Brown v. New York C. Ry. Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *Barber v. Merriam*, 11 Allen (Mass.), 322.

⁷² *Central Ry. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31, and note; 1 Greenl. Ev., § 102. Such declarations may be proved by any witness hearing them: *Howe v. Plainfield*, 41 N. H. 135.

⁷³ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 909; *Commonwealth v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235, 31 N. E. 961; *State v. Howard*, 32 Vt. 380; *Cornelius v. State*, 12 Ark. 782. See note on “Necessity and Competency of Evidence as to Mental Suffering,” to *Willis v. Western Union Tel. Co.*, 2 Ann. Cas. 55, and as affecting question of dam-

ages, to *Western Union Tel. Co. v. Cleveland*, Ann. Cas. 1912B, 538.

⁷⁴ *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348; *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L. R. A. 121, 61 Pac. 606; *Weightnovel v. State*, 46 Fla. 1, 35 South. 856; *Commonwealth v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235, 31 N. E. 961; *State v. Hayward*, 62 Minn. 474, 65 N. W. 63; *Sheehan v. Kearney*, 82 Miss. 688, 35 L. R. A. 102, 21 South. 41; *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624; *Sharland v. Washington Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307; *Rens v. Northwestern Relief Assn.*, 100 Wis. 266, 75 N. W. 991; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16.

⁷⁵ *Banfield v. Parker*, 36 N. H. 353. As to declarations by co-conspirators, see note to *People v. McQuade*, 1 L. R. A. 273.

on which he acted, whether true or false, is original and material evidence, and not hearsay.”⁷⁶ Where emotions, feelings, or *state of mind*, of third parties are to be proved, the courts often permit their declarations as original evidence although such statements have many of the elements of hearsay. This has often been illustrated in actions for the alienation of wife’s affections, and in other actions where state of feeling has been relevant.⁷⁷ As we have shown it is an interesting illustration of the principle on which declarations are received as part of the *res gestæ* that even *declarations of bystanders*, when made in a state of nervous excitement and when made spontaneously in such a manner as to be a part of the transaction throwing light upon it, are admitted.⁷⁸ In an action by an infant passenger to recover for personal injuries received by jumping from a train in motion, the evidence of one traveling in the car with the injured person to the effect that he told the latter that he thought the train would stop was held admissible, as it was in immediate connection with the plaintiff’s act and explanatory of his motives and mental condition.⁷⁹ In an action for *false representations* in the sale of property, the defendant may show the statements made to him when he purchased the property, for the

⁷⁶ *Friend v. Hamill*, 34 Md. 298; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

⁷⁷ *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *McKenszie v. Lautenschlager*, 113 Mich. 171, 71 N. W. 489; *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67; *Roesner v. Darrah*, 65 Kan. 599, 70 Pac. 597; *Horner v. Yance*, 93 Wis. 352, 67 N. W. 720; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784 (alienation of husband’s affection); *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Ash v. Prunier*, 105 Fed. 722, 44 C. C. A. 675 (alienation of husband’s affections). See note to *Fratini v. Caslini*, 44 Am. St. Rep. 848. In

other actions: *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118; *Driver v. Driver*, 153 Ind. 88, 54 N. E. 389; *State v. Butts*, 107 Iowa, 653, 78 N. W. 687; *Horner v. Yance*, 93 Wis. 352, 67 N. W. 720; *Lawrence v. Lawrence*, 164 Ill. 367, 45 N. E. 1071; declarations as to *reason for conduct*: *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Academy of Music Co. v. Davidson*, 85 Wis. 129, 55 N. W. 172; *Charley v. Potthoff*, 118 Wis. 258, 95 N. W. 124; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085.

⁷⁸ See § 346, *ante*.

⁷⁹ *Hemmingway v. Chicago, M. & St. P. Ry. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804.

purpose of showing his motive, as well as the information on which he had acted; and also that he believed it to be true.⁸⁰ The declarations of a grantor made contemporaneously with the execution of a deed, though not in the presence of the grantee, may be admissible in favor of creditors to show a fraudulent intent.⁸¹ The declarations of a wife made a few days after marriage, as to her desire not to live with her husband, taken in connection with other circumstances tending to prove that she was not then under constraint, are admissible as part of the *res gestae* in an action against the father by the husband for enticing her from him.⁸²

§ 351 (354). **Declarations by possessor of personal property.**—We have already dealt with the subject of declarations by former owners of personal property;⁸³ and we have now to consider those made by persons in present possession of them. The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as part of the *res gestae*. Possession, unexplained, is *prima facie* evidence of ownership in the possessor. But such possession is entirely consistent with ownership in another; and, therefore, the conduct and declarations of the possessor may be material to show the *nature* of his *possession* whether as owner, part owner or agent.⁸⁴ Thus, the declarations of a *debtor*, while in pos-

⁸⁰ Beach v. Bemis, 107 Mass. 498.

⁸¹ McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305; Pearson v. Forsyth, 61 Ga. 537. The subject of knowledge and intent are dealt with in § 142 et seq., *ante*; and the question of direct proof of intent, motives and belief in § 170, *ante*, both considered in their relation to relevancy, and where many other illustrations will be found.

⁸² Bennett v. Smith, 21 Barb. (N. Y.) 439.

⁸³ § 244, *ante*.

⁸⁴ Holman v. Clark, 148 Ala. 286, 41 South. 765; Nelson v. Howison, 122 Ala. 573, 25 South. 211; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Yarbrough v. Arnold, 20 Ark. 592; Doane v. Glenn, 1 Colo. 495; Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323; Long v. State, 44 Fla. 134, 32 South. 870; Belcher v. Black, 68 Ga. 93; Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252; Martin v. Martin, 174 Ill. 371,

session of personal property after a sale or transfer by him, which show fraud in the transfer, are admissible against the vendee, and in favor of creditors.⁸⁵ The declarations of employees or other persons in possession of goods, while at work upon them, that they belonged to the plaintiff are admissible in his favor. Such declarations of the persons in possession are not only competent to rebut a title set up by or under the party who made them, but are affirmative evidence of title in the party for whom the person in possession declares that he holds it. Any creditor has a right to know whether a person in possession of property has any claim hostile to his right to levy on it, and the declarations of employees in charge, in their employer's absence, made in reply to inquiries by his creditors, are admissible as in the nature of *res gestæ*, to explain a possession of chattels claimed to be held under an unrecorded bill of sale to one whose rights are kept secret.⁸⁶ If goods in a husband's possession are levied on, and his wife interposes a claim to them in an action to try the right of property, conversations had between the claimant and her husband prior to the levy are a part of the

66 Am. St. Rep. 290, 51 N. E. 691; Traylor v. Hollis, 45 Ind. App. 680, 91 N. E. 567; Durham v. Shannon, 116 Ind. 403, 9 Am. St. Rep. 860, 19 N. E. 190; Gaar etc. Co. v. Shaffer, 139 Ind. 191, 38 N. E. 811; Hardy v. Moore, 62 Iowa, 65, 17 N. W. 200; Reiley v. Haynes, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440; Fellows v. Smith, 130 Mass. 378; Davis v. Zimmerman, 40 Mich. 24; State v. Schneider, 35 Mo. 533; McDonald v. Bayha, 93 Minn. 139, 100 N. W. 679; Abeel v. Van Gelder, 36 N. Y. 513; Hall v. Young, 37 N. H. 134; Bradley v. Spofford, 23 N. H. 444, 55 Am. Dec. 205; Gross v. Smith, 132 N. C. 604, 44 S. E. 111; Lloyd v. Farrell, 48 Pa. 73, 86 Am. Dec. 563; Adams v. Lathan, 14 Rich. Eq. (S. C.) 304; Brooks v. Lowenstein, 95 Tenn. 262,

35 S. W. 89; San Antonio Brewing Assn. v. Magoffin (Tex. Civ. App.), 99 S. W. 187; Eddy v. Davis, 34 Vt. 209; Kuykendall v. Fisher, 61 W. Va. 87, 11 Ann. Cas. 700, 8 L. R. A., N. S., 94, 56 S. E. 48; Roebke v. Andrews, 26 Wis. 311; Davies v. Pierce, 2 Term Rep. 53, 100 Eng. Reprint, 30; Doe v. Rickarby, 5 Esp. 4; Doe v. Payne, 1 Stark. 86, 18 R. R. 747. In Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24, testimony of such declarations was received after the death of the declarant.

⁸⁵ Willies v. Farley, 3 Car. & P. 395; Talcott v. Wilcox, 9 Conn. 134; Burgert v. Borchert, 59 Mo. 80. See § 244, *ante*.

⁸⁶ Bradley v. Spofford, 23 N. H. 444, 55 Am. Dec. 205; Haynes v. Leppig, 40 Mich. 602.

res gestae relating to the fact of ownership of the goods, or of the husband's agency in purchasing and controlling them, and as such are admissible in evidence.⁸⁷ Other illustrations of the rule are the declarations of a *guardian* at the time of purchasing property, and afterward while in possession of it,⁸⁸ or those of a *bailee* in possession.⁸⁹ But it has been held that the declarations of a *servant in possession* of chattels attached for his debt, to the effect that they are his property, are inadmissible against his master in an action against the attaching officer;⁹⁰ and in another case the declarations of the *agent in possession* were received in favor of the principal on the question of ownership, but on the ground that the declarations were made while the agent was separating different parcels for the purpose of distinguishing what belonged to one person and what to another, and hence the declarations were regarded as a part of the transaction.⁹¹ While declarations which relate to the nature of the possession may be admitted as a part of the *res gestae*, yet they *must be confined to that subject*; and those which relate to the origin of the title, or to the contract under which possession is held or to the mode or manner of payment, and other independent

⁸⁷ *Jones v. Chenault*, 124 Ala. 610, 82 Am. St. Rep. 211, 27 South. 515. So where, in trover by a woman for a horse and other chattels alleged to have been given her by her husband, but seized and sold under a mortgage given by him, she testified that that after he gave her the chattels she gave directions for the keeping of the horse, and controlled it, it was held that this was admissible as part of the *res gestae*, that her statement that he gave her the chattels was not that of a conclusion of law merely, and that the question of a change of possession must be determined by the circumstances of the case, upon a fair preponderance

of evidence: *Davis v. Zimmerman*, 40 Mich. 24.

⁸⁸ *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194. *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442, is sometimes cited as in conflict with this decision, but comparison will show it is not.

⁸⁹ *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323. As to declarations of a defendant, while in possession of goods in an action for larceny see *Reg. v. Abraham*, 2 Car. & K. 550; *Allen v. State*, 73 Ala. 23.

⁹⁰ *Abbott v. Hutchins*, 14 Me. 390, 31 Am. Dec. 59.

⁹¹ *Pool v. Bridges*, 4 Pick. (Mass.) 378.

facts should be excluded.⁹² Declarations relating to the possession of property are received on the ground that they are part of the *res gestae*, and not merely on the ground that they are admissions, or against the interest of the declarant; and hence, if coming within the rule in other respects, they may be *admitted although favorable to the interest of the declarant*.⁹³ Therefore, the explanation of a man in charge of a vehicle as to the ownership of it, made, not for explanatory purposes, but with reference to an accident which had occurred, and to show that it belonged to the defendant in an action arising out of such accident, was held inadmissible, where the man in question was a witness in the case, and his sworn testimony would have been the better evidence.⁹⁴ It is indispensable that the declaration should be made while the declarant is in possession, otherwise to seek its admission as part of the *res gestae* would be almost a contradiction in terms. It is because it is of the possession that it has the claim to admission.⁹⁵

§ 352 (355). Declarations by one in possession of land—When admitted in disparagement of title.—Under the subject of admissions we have discussed the question of the admissibility of declarations of former owners of land as

⁹² *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176; *Sweet v. Wright*, 57 Iowa, 510, 10 N. W. 870; *Ray v. Jackson*, 90 Ala. 513, 7 South. 747. Declarations by a possessor of chattels as to the character of his holding are evidence against him and those holding under him, but not against strangers: *Carroll v. Frank*, 28 Mo. App. 69.

⁹³ *Lowman v. Sheets*, 124 Ind. 416, 7 L. R. A. 784, 24 N. E. 351; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. Rep. 860, 19 N. E. 190.

⁹⁴ *Cohn v. Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 South. 853.

⁹⁵ *Wright v. Smith*, 66 Ala. 514; *Doane v. Glenn*, 1 Colo. 495; *Woodwell v. Brown*, 44 Pa. 121. In *Dubois v. Luthmers*, 147 Iowa, 315, 126 N. W. 147, where plaintiff sued for personal injury resulting from an explosion of gasoline placed in a can, and a controversy arose as to the identity of the can, which was seen in the possession of plaintiff's children, it was held that their declarations as to what they were going to do with it were admissible as verbal acts explanatory of their possession. See, also, *Griswold v. Nichols*, 126 Wis. 401, 105 N. W. 815; *Drefahl v. Security Savings Bank*, 132 Iowa, 563, 107 N. W. 179.

against those in privity with them; and it is now necessary to consider another class of declarations by persons in the possession of lands.⁹⁶ Where the declarations of a person in possession of land are clearly in disparagement of his title or adverse to his interest, such declarations may, subject to proper limitations, be received against the declarant or those holding under him on the general principles governing admissions.⁹⁷ But it sometimes happens that declarations accompanying the possession of land and explaining or characterizing such possession are *received, although they are not adverse* to the interest of the declarant or those holding under him. *The test* is whether the declaration forms a part of or tends to explain a transaction which is material and relevant to the issue.⁹⁸ The declarations of a party in possession of land are competent evidence as against those claiming the land under him.⁹⁹ Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title.¹⁰⁰ The better view is that such declarations, when made in good faith by persons who are at the time in possession of land or tenements, are verbal acts, which may be admitted for the purpose of showing the character of

⁹⁶ See § 239 et seq., *ante*.

⁹⁷ *Bowen v. Chase*, 93 U. S. 254, 25 L. Ed. 47; *Poorman v. Miller*, 44 Cal. 269; *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Marcy v. Stone*, 8 Cush. 4, 54 Am. Dec. 736; *Melvin v. Bullard*, 82 N. C. 33; *Potts v. Everhart*, 26 Pa. 493; *Miller v. Feenane*, 50 N. J. L. 32, 11 Atl. 136.

⁹⁸ *Davies v. Pierce*, 2 Term Rep. 53, 100 Eng. Reprint, 30; *Doe v. Rickarby*, 5 Esp. 4; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Blake v. White*, 13 N. H. 267; *Daggett v. Shaw*, 5 Met. (Mass.) 223; *Abeel v. Van Gelder*, 36 N. Y. 513; *Cuddy v.*

Foreman, 107 Wis. 519, 83 N. W. 1103. See, also, *Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263.

⁹⁹ *Waring v. Warren*, 1 Johns. (N. Y.) 340; *Jackson v. McCall*, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343.

¹⁰⁰ *Dodge v. Freedman's Savings etc. Co.*, 93 U. S. 379, 23 L. Ed. 920; *Pitts v. Wilder*, 1 N. Y. 525; *Gibney v. Marchay*, 34 N. Y. 301; *Jackson v. Miller*, 6 Cow. (N. Y.) 751; *Jackson v. McVey*, 15 Johns. (N. Y.) 234. To show that the party went into possession under the lessors is a common instance of the admissibility of such declarations: *Jackson v. Dobbins*, 3 Johns. (N. Y.) 223.

the possession, whether they are in disparagement of the declarant's title or otherwise.¹ Thus in ejectment, where the issue is whether the possession of the land in question has been *adverse to*, or as a *tenancy* under, the plaintiff, evidence of the acts and declarations of the person in possession tending to explain his relation to the property are admissible, although he is not a party.² The declarations of one occupying land to the effect that he occupies it as a tenant of another person are admissible to prove possession by the latter in an action brought against him by a third person claiming title to the land;³ and in an action for trespass, the declarations of a former occupant under whom defendant claims were held admissible for the same purpose.⁴ The declarations explanatory of the possession or the object with which it was obtained are alone receivable, being strictly limited; and the moment they travel beyond those limits are subject to rejection as hearsay. In an action of forcible entry and detainer, declarations of his intentions by the claimant at the time of taking possession are part of the *res gestae*;⁵ as are also those by a surveyor as to his intentions in regard to the property and the purpose for which the survey is being made, where it was alleged the entry was for the purpose of taking possession of the land.⁶ Without multiplying illustrations, it may be taken that the rule is well supported which confines the admissibility of such declarations to explana-

¹ Ward v. Cochran, 71 Fed. 127, 18 C. C. A. 1.

² Moore v. Hamilton, 44 N. Y. 666; Harper v. Morse, 114 Mo. 317, 21 S. W. 517. See note to Nelson v. Iverson, 60 Am. Dec. 449.

³ Marey v. Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736.

The declarations or admissions of one in possession of property explanatory of his possession, as that he held in his own right, or as a tenant or as a trustee of another, are

admissible evidence, because it explains the character of his possession; but his declaration in regard to the contract by which he came into possession cannot be received in his favor: McBride v. Thompson, 8 Ala. 650; Darrett v. Donnelly, 38 Mo. 492.

⁴ Morss v. Salisbury, 48 N. Y. 636.

⁵ Rowley v. Hughes, 40 Ill. 316.

⁶ Stephens v. McCloy, 36 Iowa, 659.

tions of the claim of possession,⁷ and excludes such as travel beyond the limit referred to, whether in the nature of questions of his predecessor's title or that of some adverse claimant; or, as it is concisely put in an Alabama case,⁸ "the doctrine cannot be extended to include declarations as to the history and source of such title."⁹ When declarations are merely narrative of a past occurrence, they cannot be received as proof of the existence of it.¹⁰ But where it is proved that a *party in possession is a tenant*, his *declarations are not admissible against his landlord*, unless such declarations were made known to the landlord.¹¹ In ejectment, where it is shown that an occupant of the land had paid rent, his declarations and statements accompanying the act and relating thereto are admissible to explain his interest and object. But statements made at the same time as to the title of former owners of the land or other *collateral matters* are not competent.¹² So the *declarations made by the warrantor in a deed*, while in possession, which go to show in what character and with what intent he entered upon and continued his possession, are admissible in favor of the title derived from him to show in what character he had entered and held possession.¹³ If a grantor retains possession of the

⁷ Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Stone v. O'Brien, 7 Colo. 458, 4 Pac. 792; Sears v. Hayt, 37 Conn. 406; Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252; Godfrey v. Dixon Power etc. Co., 247 Ill. 124, 93 N. E. 116; Shirts v. Irons, 37 Ind. 98; Pond v. Okey, 70 Iowa, 244, 30 N. W. 500; Morrill v. Titcomb, 8 Allen (Mass.), 100; Kansas City etc. R. Co. v. Smith, 156 Mo. 608, 57 S. W. 555; Smith v. Powers, 15 N. H. 546; Skinner v. Odenbach, 85 Hun, 595, 33 N. Y. Supp. 282; Roberts v. Roberts, 82 N. C. 29; Cheeseman v. Kyle, 15 Ohio St. 15; Besser v. Joyce, 9 Or. 310; Hickman v. Gillum, 66 Tex. 314, 1 S. W. 339;

Hunnicut v. Peyton, 102 U. S. 333, 26 L. Ed. 113.

⁸ Baker v. Drake, 148 Ala. 513, 41 South. 845.

⁹ Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631; Morgan v. Larned, 10 Met. (Mass.) 50; Roberts v. Roberts, 82 N. C. 29; Bell v. Adams, 81 N. C. 118; Bynum v. Thompson, 25 N. C. 578; Colt v. Selden, 5 Watts (Pa.), 525; Wardlaw v. Hammond, 9 Rich. (S. C.) 454; McDow v. Rabb, 56 Tex. 154.

¹⁰ 1 Greenl. Ev., § 110.

¹¹ Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549. See § 243, *ante*.

¹² Rigg v. Cook, 4 Gilm. (Ill.) 336, 46 Am. Dec. 462.

¹³ Jackson v. Vredenbergh, 1 Johns. (N. Y.) 159.

premises in a manner inconsistent with the terms of the deed, his declarations respecting the ownership or the terms on which he holds possession are competent. But they are not competent, if such possession is consistent with the terms of the conveyance;¹⁴ and when the vendor remains in possession, his declarations as to the claim under which he holds are competent to show his good faith, where that is in issue.¹⁵

§ 353 (356). Same—Possession must be shown.—Before declarations of the character under discussion can be received, it must, of course, be shown that the declarant had possession. This may appear by *actual occupancy* and inclosure,¹⁶ or by partial occupancy under deed or contract which carries out a *constructive* possession commensurate with its terms of local description, or by other acts of ownership.¹⁷ For example, in an action of ejectment, the plaintiffs were allowed to prove the declarations of two men, while they were owners of the property, with a view to show the extent of their actual occupation, although they were off the premises at the time. They were owners, and in constructive, if not in the actual, possession, and were defining their possession to a person negotiating for the purchase.¹⁸ Possession being the principal fact, such declarations are admissible as part of the *res gestae* of the possession itself, and are admissible when made by a party while on the land, or in possession thereof, whether actually on the land or not at the time of making the same.¹⁹

¹⁴ *Williamson v. Williams*, 11 Lea (Tenn.), 355; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. Rep. 137, 9 L. R. A. 645, 8 South. 137.

¹⁵ *Osgood v. Eaton*, 63 N. H. 355.

¹⁶ *Lawrence v. Alabama State Land Co.*, 146 Ala. 524, 41 South. 612; *Comins v. Comins*, 21 Conn. 413; *Spence v. Smith*, 18 N. H. 587; *Alexander v. Jennings*, 10 Lea (Tenn.), 419; *Roebke v. Andrews*, 26 Wis. 311.

¹⁷ *Phill. Ev. (Cow. & H. Notes)* 217, note 166.

¹⁸ *Abeel v. Van Gelder*, 36 N. Y. 513; *Owen v. Moxon*, 167 Ala. 615, 52 South. 527.

¹⁹ *Owen v. Moxon*, *supra*; *Yarbrough v. Arnold*, 20 Ark. 592; *Ellis v. Janes*, 10 Cal. 456; *Saugatuck Congregational Soc. v. East Saugatuck School District*, 53 Conn. 478, 2 Atl. 751; *Fraser v. State*, 112 Ga. 13, 37 S. E. 114; *Hardy v. Moore*, 62

The declarations made while in such possession cannot be used to prove the fact of possession. In all cases, that must be proved as the foundation for the declarations, just as agency cannot be proved by the declarations of the agent.²⁰ It was held in an English case that the mere cutting of timber on land was *prima facie* such an evidence of ownership as to admit the declarations of such person to the effect that some other person was owner.²¹ But some of the American cases have declined to give such latitude to the declarations of those in mere constructive possession.²² In the Kentucky case referred to in the note, the court said: "Conversations, or declarations, made by the actor or party concerned, at the time an act is done, and which explain the *quo animo* and design of the performance, may, whenever the nature of the act is called in question, be given in evidence, as part of the *res gestae*. Without tolerating this explanation of the acts of men, by receiving their accompanying declarations, we should be often misled as to their true nature and character; and consequently, liable to fall into errors, in respect to them. The rule requiring *res gestae* declarations to be received as evidence, is a necessary, and very useful one; but in the present case, we think it will not sanction the reception of the testimony objected to." That testimony extended further than the mere claim to the possession, and consisted of statements with reference to the blaze-marks on certain trees, which the declarant said were included in a portion of the land which he was to clear for a third person, thus establishing a contract between him and such third person, who was thereby made the adverse possessor, by con-

Iowa, 65, 17 N. W. 200; Elwood v. Saterlie, 68 Minn. 173, 71 N. W. 13; Rollins v. Strout, 6 Nev. 150; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Brolaskey v. McClain, 61 Pa. 146; Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

²⁰ Thomas v. Degraffenreid, 17 Ala. 602; Jaffray v. Brown, 91 Ga.

57, 16 S. E. 223; Whitney v. Wagoner, 84 Minn. 211, 87 Am. St. Rep. 351, 87 N. W. 602; Stranahan v. Terry, 9 Lea (Tenn.), 560.

²¹ Doe ex dem. Stansbury v. Arkwright, 5 Car. & P. 575.

²² West v. Price, 2 J. J. Marsh. (Ky.) 380.

struction, of another's land to the extent of the blazed demarkation. In a frequently cited Connecticut case,²³ the court, after approving the admission of testimony accompanying acts of possession, said that other declarations of the owner, made while he was absent from the premises, and which accompanied no act, but which were mere statements of what he had done, or intended to do, respecting the premises, were inadmissible for the purpose for which they were offered. "These were mere naked declarations, and were no part of a *res gesta*, because they accompanied no act and therefore could not tend to explain or characterize any. It did not appear, nor was it claimed, that they were made in the hearing of the defendant, so that they could be construed into any admissions by him; indeed, they stood upon no higher ground than a bare statement, by any other person than the owner, as to what the latter intended to do, or had done, and therefore come within the general objection to mere hearsay."

§ 354 (357). Declarations proper to show character of possession—Not to destroy record title.—From what we have already said, it is abundantly clear that the declarations of a party in possession of land are competent to show the character of his possession, as that he holds as a tenant or by virtue of an executory contract to purchase,²⁴ or as agent of another,²⁵ or as joint occupant with another,²⁶ or that the occupancy is adverse to or in subordination to the title of another,²⁷ yet there are certain limita-

²³ *Comins v. Comins*, 21 Conn. 413.

²⁴ *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379, 23 L. Ed. 920; *Jackson v. Dobbin*, 3 Johns. (N. Y.) 223; *Gibney v. Marchay*, 34 N. Y. 301; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836.

²⁵ *Kirkland v. Trott*, 66 Ala. 417.

²⁶ *Darling v. Bryant*, 17 Ala. 10, 52 Am. Dec. 162.

²⁷ *Beasley v. Howell*, 117 Ala. 499, 22 South. 989; *Poorman v. Miller*, 44

Cal. 269; *Little v. Libby*, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; *West Cambridge v. Lexington*, 2 Pick. (Mass.) 536; *Marcy v. Stone*, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; *King v. Frost*, 28 Minn. 417, 10 N. W. 423; *South Hampton v. Fowler*, 54 N. H. 197; *Sheaffer v. Eakman*, 56 Pa. 144; *Potts v. Everhart*, 26 Pa. 493; *Hurt v. Evans*, 49 Tex. 311; *Beecher v.*

tions which must be observed. Such declarations are only competent to show the *character of the possession* of the person making them, and by what title he holds. They are *not* competent to *sustain or destroy the record title*; and declarations contrary to the tenor of deeds or similar documents which a party has executed are not admissible.²⁸ If such declarations are inconsistent with the title under which the declarant holds, that is, are adverse to it, it is manifest they are not admissible except and until the fact is established that they have been made to or brought under the notice of the owner. The declarations, for example, of one while in possession under another, inconsistent with the terms of his holding, could not possibly affect that other until the declaration was brought to his notice.²⁹ Declarations which do not bear upon the quality of any possession of the declarant, and have no reference to the identity or location of boundaries or monuments, or to any matter concerning physical conditions or use, are properly excluded; and, where their sole purpose is to show that the title which the record showed to exist did not in fact exist, they are not admissible, whether the declarant was in or out of possession, or is living or dead.³⁰

§ 355 (358). Declarations as to boundary lines.—It must be borne in mind that statements of those in possession of lands with regard to their boundary lines are evidence only of the claim or disclaimer made by the declarant. They are in no sense evidence of the accuracy of the line

Parmelee, 9 Vt. 352, 31 Am. Dec. 633; Bowen v. Chase, 98 U. S. 254, 25 L. Ed. 47; Peaceable v. Watson, 4 Taunt. 16, 128 Eng. Reprint, 232.

²⁸ Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 379, 23 L. Ed. 920; Bowen v. Chase, 98 U. S. 254, 25 L. Ed. 47; Gibney v. Marchay, 34 N. Y. 301; Parry v. Parry, 130 Pa. 94, 18 Atl. 628; McKinon v. Meston, 104 Mich. 642, 62 N. W.

1014; Gilbert v. Odum, 69 Tex. 670, 7 S. W. 510. See § 241, *ante*.

²⁹ Butler v. Butler, 133 Ala. 377, 32 South. 579; Mann v. Edson, 39 Me. 25; Crawford v. Crawford, 60 Kan. 126, 55 Pac. 842; Morgan v. Larned, 10 Met. (Mass.) 50; Salmon v. Davis, 29 Mo. 176; Harral v. Wright, 57 Ga. 484; Hays v. Hays, 66 Tex. 606, 1 S. W. 895.

³⁰ Fall v. Fall, 100 Me. 98, 60 Atl. 718.

described. It is in the aspect of their claim only that declarations of those in possession, in respect to the boundary lines or the extent of their occupation, are sometimes received as part of the *res gestæ*.³¹ Thus to establish adverse possession, the plaintiff may prove the declarations of former owners under whom he claims, when such declarations were made during possession and while defining or pointing out the boundaries to a person negotiating for the purchase.³² Where the owners of lands adjacent to a highway have acquiesced for many years in a change in the highway lines, have located the lines of buildings with reference to such change, and the last grantor of a lot has conveyed to another with an oral declaration recognizing such new boundary, the description in such conveyance as against subsequent grantees must be construed with regard to such boundary. "The jury were at liberty to find, in this case, that the declarations of the grantor were contemporaneous with the making of the deed, and were made for the purpose of settling the street boundary. They were therefore admissible."³³ But in a Wisconsin case it was held no part of the *res gestæ* where the declarations pointing out the boundary were made by the grantor at the time of sale. It was held that the declarations did not accompany the act of possession, but rather the act of parting with the title and possession, and when the declarant was directly interested, to claim the largest dimensions for the land.³⁴ So *declarations of the grantor after the convey-*

³¹ *Brewer v. Brewer*, 19 Ala. 481; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Davis v. Campbell*, 1 Ired. (20 N. C.) 482; *Abeel v. Van Gelder*, 36 N. Y. 513; *Yates v. Shaw*, 24 Ill. 367; *Redding v. McCubbin*, 1 Har. & McH. (Md.) 368; *Bower v. Earl*, 18 Mich. 367; *Donahue v. Case*, 61 N. Y. 631; *Dawson v. Mills*, 32 Pa. 302; *Davis v. Jones*, 3 Head (Tenn.), 603; *Swerdferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153; *Driver v. King*, 145 Ala. 585, 40

South. 315; *Emmett v. Perry*, 100 Me. 139, 60 Atl. 872; *Gray v. Kelley*, 190 Mass. 184, 76 N. E. 724; *Brenstein v. North American Realty Co.*, 119 N. Y. Supp. 1; *Holden v. Cantrell*, 88 S. C. 281, 70 S. E. 815. See § 304 et seq., *ante*.

³² *Abeel v. Van Gelder*, *supra*.

³³ *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691.

³⁴ *Lampe v. Kennedy*, 60 Wis. 110, 18 N. W. 730.

ance of the land by him are clearly inadmissible.³⁵ In Massachusetts declarations of owners or persons in possession made while pointing out the boundaries seem to be held inadmissible, unless made by persons deceased who had no motive to misrepresent.³⁶ In West Virginia it has been held that experimental surveys and maps thereof made at the instance of a land owner, endeavoring to find the boundaries of his land, cannot be given in evidence against him as admissions as to boundary locations, unless accompanied by evidence appreciably tending to prove his adoption thereof as being correct.³⁷

§ 356 (359). **Declarations of agents.**—Whatever an agent does in the lawful exercise of his authority is imputable to the principal, and where the acts of the agent will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constituting part of the transaction, and declarations of this character are often classed in the decisions as *res gestae*.³⁸ The question

³⁵ Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Castro v. Fry, 33 W. Va. 449, 10 S. E. 799; Chase v. Horton, 143 Mass. 118, 9 N. E. 31; Vrooman v. King, 36 N. Y. 477; Brown v. Callender, 105 Ill. 88.

³⁶ Long v. Colton, 116 Mass. 414; Modrill v. Titecomb, 8 Allen (Mass.), 100; Adams v. Swansea, 116 Mass. 591; Fellows v. Smith, 130 Mass. 378. As to representations as to private boundaries, see Corbleys v. Ripley, 22 W. Va. 154, 46 Am. Rep. 502. See note on "Declarations of Deceased Former Owners as to Boundaries," to Cadwalader v. Price, 19 Ann. Cas. 551.

³⁷ State v. King, 64 W. Va. 546, 63 S. E. 468. In proceedings founded on a caveat for the determination of the location of boundary lines of entries and surveys, preparatory to the procurement of patents,

the rules of evidence relating to admissions of the parties and locations made by them are more liberal than those applied in proceedings to determine the location of lines designated in patents; the difference being analogous to that obtaining between proceedings for the enforcement of executory contracts of sale of land and those pertaining to the vindication of legal rights accruing under deeds of conveyance.

³⁸ American Fur Co. v. United States, 2 Pet. (U. S.) 358, 7 L. Ed. 450; Vicksburg & M. Ry. Co. v. O'Brien, 119 U. S. 99, 30 L. Ed. 299, 7 Sup. Ct. Rep. 118; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Burnham v. Ellis, 39 Me. 319, 63 Am. Dec. 625; Thalhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Jones v. Jones, 126 N. Y. 589, 24 N. E. 1016; Gott v.

whether the evidence is admitted as part of the *res gestæ* or by reason of the rules controlling the binding power of an agent's statements within the scope of his authority has frequently been raised, and so far without any definite result as to classification or effect. It is clear that the agent stands on no different footing from anyone else, so far as his voluntary or spontaneous utterances, forming part of the actual *res gestæ* are concerned. The exclamation, for example, of an engine driver at the time of an accident on a railroad is admissible, not solely because he is an agent of the railroad corporation, but because he was there, and his utterance was an actual part of the occurrence. If he were not the engineer, his exclamation would be admissible just the same. We are not now dealing with the effect of his evidence upon others, or whether or not he was an agent, or the corresponding difference in degree of weight, but desire rather to call attention to the twofold character created and to illustrate the indiscriminate use of the terms.³⁹ A very similar illustration is afforded in a

Dinsmore, 111 Mass. 45; Linblom v. Ramsey, 75 Ill. 246; Hawk v. Applegate, 37 Mo. App. 32; St. Louis & St. F. Ry. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; United States v. Gooding, 12 Wheat. (U. S.) 460, 6 L. Ed. 693. See Prof. Thayer's discussion to the effect that such declarations should not be received under the rules as to *res gestæ* but under general rules of agency, 15 Am. L. Rev. 80. See exhaustive note to Johnson v. McLain Inv. Co., 131 Am. St. Rep. 306; and note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 391, on "Declarations of Carrier's Agent Respecting Baggage." See, also, note to Binewicz v. Haglin, 14 Ann. Cas. 227. See, also, § 255, *ante*; § 357, *post*.

³⁹ Durkee v. Central Pac. R. Co., 2 Cal. Unrep. 599, 9 Pac. 99; Louisville etc. R. Co. v. Buck, 116 Ind.

566, 9 Am. St. Rep. 883, 2 L. R. A. 520, 19 N. E. 453; Alsever v. Minneapolis etc. R. Co., 115 Iowa, 338, 56 L. R. A. 748, 88 N. W. 841; Ensley v. Detroit etc. R. Co., 134 Mich. 195, 96 N. W. 34; O'Connor v. Chicago etc. R. Co., 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481; Union etc. R. Co. v. Elliott, 54 Neb. 299, 74 N. W. 627; Texas etc. R. Co. v. Robertson, 82 Tex. 657, 27 Am. St. Rep. 929, 17 S. W. 1041; Hermes v. Chicago etc. R. Co., 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; United Rys. etc. Co. v. Cloman, 107 Md. 681, 69 Atl. 379; Maller v. Long Island R. Co., 122 App. Div. 463, 106 N. Y. 784; Swanson v. Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795; International etc. R. Co. v. Bryant (Tex. Civ. App.), 54 S. W. 364.

Maryland case. "In an action against a street railway company for personal injuries received in a collision between plaintiff's wagon and defendant's car, where it appeared that about the time of the accident someone wearing the uniform of defendant company, with a conductor's badge, rushed into a saloon, asking for a telephone, and stating that they had struck a wagon at a certain point; that he appeared very much frightened and excited; that those hearing him reached the place stated in less than a minute, and found the broken wagon and the car without a conductor—the statements were admissible as part of the *res gestae*, as against an objection that the one making the statements was not shown to be the conductor of the car."⁴⁰

§ 356a (359). **Same—Further illustrations.**—In an action for purchase money, the *false representations* of the vendor's agent made during the negotiations may be shown.⁴¹ The same is true in an action for refusing to accept merchandise sold; the declarations of the agent of the defendant as to the quality of the goods, while weighing and receiving of them, are competent.⁴² In an action against a railroad company for ejecting a passenger from the car, the language of the *employee* while in the performance of the act is admissible.⁴³ Where a corporation, such as a railroad or an insurance company, invests an agent with general authority to adjust claims against it, his declarations made while endeavoring to secure an adjustment of the claim are competent evidence against the principal.⁴⁴

⁴⁰ *United Rys. Co. v. Cloman*, *supra*. We have extracted this from the excellent syllabus furnished by the West Publishing Company to that case in 69 Atl. 379.

⁴¹ *Wiggins v. Leonard*, 9 Iowa, 194; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598. So as to the sale of a note: *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358.

⁴² *Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

⁴³ *Marion v. Chicago Ry. Co.*, 64 Iowa, 568, 21 N. W. 86. But language used a few minutes afterward is not admissible: *Barker v. St. Louis, I. M. & S. Ry. Co.*, 126 Mo. 143, 28 S. W. 866.

⁴⁴ *Adams Exp. Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 7 L. R. A. 214, 21 N. E. 340. As to declarations by agents of corporations, see next section.

An *agent* who has charge of the construction of a building may bind his employer by his admissions explaining payments relating thereto.⁴⁵ Other illustrations of statements admissible against the principal are those of the agent at the time of the sale of personal property,⁴⁶ or at the time of a fire, to the effect that it was caused by his negligence.⁴⁷

§ 356b (359). Prerequisites to admission of such declarations.—It is, of course, an indispensable requisite to the admission of the declarations of an agent as part of the *res gestæ* that such *agency* or *authority* be *first proved*.⁴⁸ Such *agency* cannot be proved by the declarations them-

⁴⁵ Cook v. Hunt, 24 Ill. 535.

⁴⁶ Gilson v. Wood, 20 Ill. 37.

⁴⁷ Shafer v. Lacoek, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44. An excellent collection of modern illustrations of declarations held competent will be found appended to the following cases in 15 Current Law, p. 1767, note 74: Abingdon Mills v. Grogan, 167 Ala. 146, 52 South. 596; Lowe v. Yolo County etc. Water Co., 157 Cal. 503, 108 Pac. 297; Rathbun v. White, 157 Cal. 248, 107 Pac. 309; Sanders v. Keller, 18 Idaho, 590, 111 Pac. 350; Cox v. Cline, 147 Iowa, 353, 126 N. W. 330; Dean v. Toledo etc. R. Co., 148 Mo. App. 428, 128 S. W. 10; Sills v. Burge, 141 Mo. App. 148, 124 S. W. 605; Head & Dowst Co. v. New England Breeders' Club, 75 N. H. 449, 75 Atl. 982; Laughlin v. Manson, 6 Misc. Rep. 492, 120 N. Y. Supp. 110; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931; Joslyn v. Cadillac etc. Co., 177 Fed. 863, 101 C. C. A. 77. And where they have been held incompetent in the same note to the following cases: Byrne v. Hafner Feed Co., 143 Mo. App. 85, 122 S. W. 349; Conner v. Martin, 45 Ind. App. 141, 92 N. E. 3; Caldwell v. Nelson Morris & Co., 125 La.

301, 51 South. 205; American Towing etc. Co. v. Baker-Whitely Coal Co., 111 Md. 504, 75 Atl. 341; Kurrle v. Baltimore, 113 Md. 63, 77 Atl. 373; Crowley v. Boston El. R. Co., 204 Mass. 241, 90 N. E. 532; Baker v. Temple, 160 Mich. 318, 125 N. W. 63; Sheridan Coal Co. v. C. W. Hull Co., 87 Neb. 117, 138 Am. St. Rep. 435, 127 N. W. 218; Case Threshing Mach. Co. v. Wright Hardware Co. (Tex. Civ. App.), 130 S. W. 729; Lamar County v. Talley (Tex. Civ. App.), 127 S. W. 273; Meyers v. San Pedro etc. R. Co., 36 Utah, 307, 21 Ann. Cas. 1229, 104 Pac. 736; Atchison etc. R. Co. v. Sullivan, 173 Fed. 456, 97 C. C. A. 1.

⁴⁸ Reynolds v. Continental Ins. Co., 36 Mich. 131; Harker v. De-ment, 9 Gill (Md.), 7, 52 Am. Dec. 670; Maxey v. Heckethorn, 44 Ill. 437; Carter v. Burnham, 31 Ark. 212; Dawson v. Landreaux, 29 La. Ann. 363; Peck v. Ritchey, 66 Mo. 114; French v. Wade, 35 Kan. 391, 11 Pac. 138; Stollenwerck v. Thacher, 115 Mass. 224; Wood M. Co. v. Crow, 70 Iowa, 340, 30 N. W. 609. See, also, § 255, *ante*, and cases there cited, where the subject is treated under the head of "Admissions."

selves, no matter how publicly made;⁴⁹ nor by such declarations accompanied by acts purporting to be in behalf of the principal unless they are brought to his knowledge.⁵⁰ It is also a requisite to the admission of such declarations that they be made *during the continuance of the agency*, and in regard to a transaction still pending. Here again the term, "part of the *res gestae*," is applied to such declarations, and to such as come under the head of narrative statements; whereas in fact the admissibility rests upon the exercise of the powers of the agent within the scope of his authority. While so far the consequences of treating such declarations of agents under both heads has not resulted in any demonstrable harm, we think that time would be economized if the discussion were excluded altogether from the realm of *res gestae*, and confined to treatment as suggested by Thayer, under the general rule of evidence applicable to agency. Illustrations of the admissibility of such declarations will be found in the cases cited.⁵¹ Thus, a conversation between agents or employees of a railroad company concerning a past transaction is clearly incompetent as evidence against the company;⁵² and the declarations of the president of a corporation relative to its ownership or as to its former dealings with other parties, which are not shown to have been made while in the per-

⁴⁹ *Mussey v. Beecher*, 3 Cush. (Mass.) 517; *Brigham v. Peters*, 1 Gray (Mass.), 145; *Trustees v. Bledsoe*, 5 Ind. 133; *McCormick v. Roberts*, 36 Kan. 552, 13 Pac. 827; *Kirchner v. Laughlin*, 5 N. M. 365, 23 Pac. 175; *Wood M. Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609.

⁵⁰ *Mussey v. Beecher*, 3 Cush. (Mass.) 517; *Brigham v. Peters*, 1 Gray (Mass.), 145; *Trustees v. Bledsoe*, 5 Ind. 133.

⁵¹ *New York Min. Syndicate etc. v. Rogers*, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719, 17 Morr. Min. Rep. 123; *Kern v. Des Moines City R. Co.*, 141 Iowa, 620, 118 N. W. 451;

Louisville etc. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866; *Keyser v. Chicago etc. R. Co.*, 66 Mich. 390, 33 N. W. 867; *Homan v. Boyce*, 15 Neb. 545, 19 N. W. 590; *International etc. R. Co. v. Bryant* (Tex. Civ. App.), 54 S. W. 364; *Robinson v. Superior etc. R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 34 L. R. A. 205, 68 N. W. 961; *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 43 L. Ed. 492, 19 Sup. Ct. Rep. 233.

⁵² *Union Pac. Ry. Co. v. Fray*, 35 Kan. 700, 12 Pac. 98; *Erie & W. V. Ry. Co. v. Smith*, 125 Pa. 259, 11 Am. St. Rep. 895, 17 Atl. 443.

formance of his duties as such officer, or while doing business contemporaneously with the declarations, are not binding on the company.⁵³

§ 357 (360). Declarations by agents of corporations.—This subject is frequently illustrated in the case of declarations of agents and employees of corporations and other defendants in *actions for negligence*. Thus, the declarations of an employee or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration *did not accompany the act* from which the injuries arose and was not explanatory of anything in which he was then engaged, but that it was a *mere narration* of a past occurrence.⁵⁴ So the declarations of a secre-

⁵³ Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600, 5 South. 353; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. Ed. 515, 7 Sup. Ct. Rep. 318. See § 357, *post*.

⁵⁴ Vicksburg Ry. Co. v. O'Brien, 119 U. S. 99, 30 L. Ed. 299, 7 Sup. Ct. Rep. 118. The same rule has been applied in a great variety of cases, Alabama etc. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403 (similar declarations a few minutes after the accident); Durkee v. Central Pac. Ry. Co., 69 Cal. 553, 58 Am. Rep. 562, 11 Pac. 130 (five minutes after). In the following cases the declarations were made immediately or soon after the accident and yet they were rejected: Fort Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Little Rock T. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Leistritz v. American Zylonite Co., 154 Mass. 382, 28 N. E. 294; Ryan v. Gilmer, 2 Mont. 517, 25 Am. Rep. 744; Rus-

chenberg v. Southern Electric Co., 161 Mo. 70, 61 S. W. 626; Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894; Patterson v. Wabash St. Louis Co., 54 Mich. 91, 19 N. W. 761; Luby v. Hudson River R. Co., 17 N. Y. 131; Erie Ry. Co. v. Smith, 125 Pa. 259, 11 Am. St. Rep. 895, 17 Atl. 443; Cleveland etc. R. Co. v. Mara, 26 Ohio St. 185; Southerland v. Wilmington & W. Ry. Co., 106 N. C. 100, 11 S. E. 189; Chesapeake Ry. Co. v. Reeves, 11 Ky. Law Rep. 14, 11 S. W. 464; Chicago Ry. Co. v. Becker, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; Richmond & D. Ry. Co. v. Hammond, 93 Ala. 181, 9 South. 577; Chattanooga Ry. Co. v. Liddell, 85 Ga. 482, 21 Am. St. Rep. 169, 11 S. E. 853; San Antonio & A. P. R. Co. v. Gray, 95 Tex. 424, 67 S. W. 763; Northern Pac. Ry. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246.

tary of a towing company that the hawser used in towing certain scows, which were lost through the alleged negligence of his company, was an improper one, were incompetent, because it was mere opinion, and there was no presumption that he was an expert arising from his official position.⁵⁵ Statements by an employee of a railroad corporation as to the purpose of certain chains on the cars and the necessity for keeping them fastened, made merely in general conversation to a coemployee, who was injured, are incompetent to bind the employer, unless the employee has been made its agent for that purpose.⁵⁶ But, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act is construed less strictly, and in which such declarations are admitted, although *not technically contemporaneous*, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable.⁵⁷ Accordingly, in numerous cases the declarations of employees and agents, made soon after an accident, have been received as part of the *res gestae*.⁵⁸ The transaction may be of such a char-

⁵⁵ *American Towing etc. Co. v. Baker-Whitely Coal Co.*, 111 Md. 504, 75 Atl. 341.

⁵⁶ *Crowley v. Boston El. R. Co.*, 204 Mass. 241, 90 N. E. 532.

⁵⁷ *Springfield Consolidated Ry. Co. v. Welch*, 155 Ill. 511, 40 N. E. 1034; *Alsever v. Railway Co.*, 115 Iowa, 338, 56 L. R. A. 748, 88 N. W. 841. See § 346, *ante*.

⁵⁸ *Keyser v. Chicago & G. T. Ry. Co.*, 66 Mich. 390, 33 N. W. 867 (declarations made after fifty minutes); *Hooker v. Chicago, M. & St. P. Ry. Co.*, 76 Wis. 542, 44 N. W. 1085; *Illinois Cent. Ry. Co. v. Tronstine*, 64 Miss. 834, 2 South. 255 (after fourteen hours at the place of accident); *Wengler v. Missouri Pac. R. Co.*, 16 Mo. App. 493 (after several days); *Pennsylvania Ry. Co.*

v. Lyons, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759; *New York Mining Co. v. Rogers*, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719, 17 Morr. Min. Rep. 123; *O'Connor v. Chicago Ry. Co.*, 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Brownell v. Pacific R. Co.*, 47 Mo. 239; *Cleveland v. Newsome*, 45 Mich. 62, 7 N. W. 222; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *Leahey v. Cass Ave. Ry. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; *Ohio & M. Ry. Co. v. Stein*, 133 Ind. 243, 19 L. R. A. 733, 31 N. E. 180, 32 N. E. 831; *Hermes v. Chicago Ry. Co.*, 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; *Wabash Ry. Co. v. Brow*, 65 Fed. 941, 13 C. C. A. 222; *Spring-*

acter as to extend through a considerable period of time; and in such cases the declarations of the agent in reference to the business, if within the scope of his authority, may be received, provided they are made before such transaction is completed. Thus, a letter or other statement of an officer of a corporation respecting a transaction which forms the subject of the controversy is admissible in an action against the corporation, if made *while the transaction is in progress*.⁵⁹ The declarations of a baggage-master in answer to inquiries after lost baggage,⁶⁰ and the statements of an insurance agent during a controversy about the renewal of insurance, to the effect that he delivered a certificate of renewal, are admissible on the same ground.⁶¹ Although most of the illustrations given above relate to the declarations of agents of corporations, it need hardly be added that the same general principles govern as in the case of the agents of individuals.⁶² To bind the prin-

field Consolidated Ry. Co. v. Welch, 155 Ill. 511, 40 N. E. 1034; Ellledge v. National C. & O. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720, 852; San Antonio & A. P. Ry. Co. v. Gray, 95 Tex. 424, 67 S. W. 763; Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111; Wilson v. Southern Pac. Co., 13 Utah, 352, 57 Am. St. Rep. 766, 44 Pac. 1040; Sample v. Consolidated Light & Ry. Co., 50 W. Va. 472, 57 L. R. A. 186, 40 S. E. 597, 694. But mere exclamations by agents of corporations, not relating to the cause of the accident, are not admissible: Butler v. Manhattan Ry. Co., 143 N. Y. 417, 42 Am. St. Rep. 738, 26 L. R. A. 46, 37 N. E. 826; Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921.

⁵⁹ First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 Sup. Ct. Rep. 845; Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa, 364, 55 N. W. 496 (railroad train sheet, as evi-

dence). See note to St. Louis etc. R. Co. v. Sutton, Ann. Cas. 1912B, 372.

⁶⁰ Morse v. Connecticut River R. Co., 6 Gray (Mass.), 450; Illinois Cent. Ry. Co. v. Tronstine, 64 Miss. 834, 2 South. 255; Nichols v. Southern Pac. Ry. Co., 23 Or. 123, 37 Am. St. Rep. 664, 18 L. R. A. 55, 31 Pac. 296, by ticket inspector.

⁶¹ Scott v. Home Ins. Co., 53 Wis. 238, 10 N. W. 387.

⁶² First Nat. Bank v. Alexander, 161 Ala. 580, 50 South. 45; St. Louis I. M. v. Kelley, 61 Ark. 52, 31 S. W. 884; Smith v. Sinbad Dev. Co., 11 Cal. App. 253, 104 Pac. 706; Denver etc. R. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67; Toll Bridge Co. v. Betsworth, 30 Conn. 380; Jacksonville etc. R. Co. v. Lockwood, 33 Fla. 573, 15 South. 327; Hematite Min. Co. v. East Tennessee R. Co., 92 Ga. 268, 18 S. E. 24; Axtell v. Northern Pac. R. Co., 9 Idaho, 392, 74 Pac. 1075; Prussian Nat. Ins. Co.

principal, the declarations must be *within the agent's authority, and must accompany an act* which he is authorized to do.⁶³ The same rules as to the inadmissibility of the narrations of past events apply as with ordinary agents.⁶⁴ A

v. Empire Catering Co., 113 Ill. App. 67; Pennsylvania Co. v. Weddle, 100 Ind. 138; Kern v. Des Moines City R. Co., 141 Iowa, 620, 118 N. W. 451; St. Louis etc. R. Co. v. Stone, 78 Kan. 505, 97 Pac. 471; Louisville R. Co. v. Johnson, 131 Ky. 277, 20 L. R. A., N. S., 133, 115 S. W. 207; Burnham v. Grand Trunk Ry. Co., 63 Me. 298, 18 Am. Rep. 220; Baltimore etc. R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Lane v. Boston etc. R. Co., 112 Mass. 455; McCammon v. Detroit etc. R. Co., 66 Mich. 442, 33 N. W. 728; Moore v. Chicago etc. R. Co., 59 Miss. 243; Dean v. Toledo etc. R. Co., 148 Mo. App. 428, 128 S. W. 10; Head & Dowst Co. v. New England Breeders' Club, 75 N. H. 449, 75 Atl. 982; Hill v. Adams Exp. Co., 77 N. J. L. 19, 71 Atl. 683; Bingham v. Hyland, 53 Hun. 633, 6 N. Y. Supp. 75; Porter v. Richmond etc. R. Co., 97 N. C. 46, 2 S. E. 374; Nichols v. Southern Pac. Co., 23 Or. 123, 37 Am. St. Rep. 664, 18 L. R. A. 55, 31 Pac. 296; Long v. North British etc. Ins. Co., 137 Pa. 335, 21 Am. St. Rep. 879, 20 Atl. 1014; People's etc. Co. v. Charleston etc. Ry., 83 S. C. 530, 65 S. E. 733; Wendt v. Chicago etc. R. Co., 4 S. D. 476, 57 N. W. 226; Sewanee Min. Co. v. McMahon, 1 Head (Tenn.), 582; Missouri etc. R. Co. v. Ramsey (Tex. Civ. App.), 128 S. W. 1184; Idaho Forwdg. Co. v. Firemen's Fund Ins. Co., 8 Utah, 41, 17 L. R. A. 586, 29 Pac. 826; Baltimore etc. R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Moran Bros. Co. v. Snoqualmie Falls Powder Co., 29 Wash. 292, 69 Pac. 759; Muhleman v. National Ins. Co., 6 W.

Va. 508; Hooker v. Chicago etc. R. Co., 76 Wis. 542, 44 N. W. 1085; Rock Springs Nat. Bank v. Luman, 5 Wyo. 159, 38 Pac. 678; Joslyn v. Cadillac etc. Co., 177 Fed. 863, 101 C. C. A. 77; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876, 18 Morr. Min. Rep. 98.

⁶³ Worden v. Humeston Ry. Co., 72 Iowa, 201, 33 N. W. 629; Fairfield Co. v. Thorp, 13 Conn. 173; Hayward v. Pilgrim Soc., 21 Pick. (Mass.) 270; Crump v. United States Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116; Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20; Loomis v. New York, N. H. & H. R. Ry. Co., 159 Mass. 39, 34 N. E. 82. See § 356, *ante*. See, also, the recent cases: Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359; Western Inv. etc. Co. v. First Nat. Bank, 23 Colo. App. 143, 128 Pac. 476; Schwartz v. Murphysboro etc. Ins. Co., 161 Ill. App. 254; Carson v. St. Joseph Stockyards Co., 167 Mo. App. 443, 151 S. W. 752; New York etc. Line v. Lewis Baer & Co. (Md.), 84 Atl. 251; Mealey v. Bemidji Lumber Co., 118 Minn. 127, 136 N. W. 1090; Quinn v. North Sand Co., 140 N. Y. Supp. 390; Seward v. Receivers, 159 N. C. 241, 75 S. E. 34; Deaver-Jeter Co. v. Southern R. Co., 91 S. C. 503, 74 S. E. 1071; Ft. Worth etc. R. Co. v. Southern Kansas R. Co. (Tex. Civ. App.), 151 S. W. 850; Peterson v. Paint Creek Collieries Co. (W. Va.), 76 S. E. 664; Freeman v. Dells Paper etc. Co., 150 Wis. 93, 135 N. W. 540.

⁶⁴ Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. Ed. 515, 7 Sup.

distinction to be noticed between the two kinds of agents referred to has sometimes been suggested, namely, that the agency for an individual does not carry with it the same suggestion of authority that surrounds the corporation agent. As a rule, an officer of a corporation is at the corporation offices, and the mere facts of his being there and of being an officer are apt to convey the impression of his being possessed of a wider authority than a mere private agent. But the law does not recognize any distinction. He is not the agent for all purposes simply because he is an officer,⁶⁵ and declarations by him out of the line of his duty, wrongly assuming to bind his principal, are not admissible.⁶⁶ In one case the cashier of a bank filled in a

Ct. Rep. 318; *St. Louis etc. R. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884; *Hematite Min. Co. v. East Tennessee etc. R. Co.*, 92 Ga. 268, 18 S. E. 24; *Ohio etc. R. Co. v. Stein*, 133 Ind. 243, 19 L. R. A. 733, 31 N. E. 180, 32 N. E. 831; *Acme Harvester Co. v. Madden*, 4 Kan. App. 598, 46 Pac. 319; *Franklin Bank v. Cooper*, 36 Me. 179; *Pemigewassett Bank v. Rogers*, 18 N. H. 255; *Walker Mfg. Co. v. Knox*, 136 Fed. 334, 69 C. C. A. 160; *Mobile L. R. Co. v. Baker*, 158 Ala. 491, 48 South. 119; *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 Pac. 307; *Baldwin v. Central Sav. Bank*, 17 Colo. App. 7, 67 Pac. 179; *Gould v. Aurora etc. Ry. Co.*, 141 Ill. App. 344; *Harrison Co. v. State Sav. Bank*, 127 Iowa, 242, 103 N. W. 121; *Farmers' Bank v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Bachant v. Boston etc. R. Co.*, 187 Mass. 392, 105 Am. St. Rep. 408, 73 N. E. 642; *Allington etc. Mfg. Co. v. Detroit Reduction Co.*, 133 Mich. 427, 95 N. W. 562; *Western etc. Co. v. Jackson*, 95 Miss. 471, 49 South. 737; *Lee v. St. Louis etc. R. Co.*, 112 Mo. App. 372, 87 S. W. 12; *Hogan v. Kelly*, 29 Mont.

485, 75 Pac. 81; *Dennison v. Daily News Pub. Co.*, 82 Neb. 675, 23 L. R. A., N. S., 362, 118 N. W. 568; *Blackman v. West Jersey etc. R. Co.*, 68 N. J. L. 1, 52 Atl. 370; *Walsh v. Carter-Crume Co.*, 126 App. Div. 229, 110 N. Y. Supp. 523; *Lyman v. Southern R. Co.*, 132 N. C. 721, 44 S. E. 550; *Gillespie v. First Nat. Bank*, 20 Okl. 768, 95 Pac. 220; *Alden v. Grande Ronde Lumber Co.*, 46 Or. 593, 81 Pac. 385; *Matteson v. New York etc. R. Co.*, 218 Pa. 527, 67 Atl. 847; *Rokard v. Atlantic etc. R. Co.*, 84 S. C. 190, 137 Am. St. Rep. 839, 27 L. R. A., N. S., 435, 65 S. E. 1047; *St. Louis etc. R. Co. v. Adams*, 55 Tex. Civ. App. 245, 118 S. W. 1155; *Meyers v. San Pedro R. Co.*, 36 Utah, 307, 21 Ann. Cas. 1229, 104 Pac. 736; *Blue Ridge etc. Co. v. Price*, 108 Va. 652, 62 S. E. 938; *Cook v. Stimson Mill Co.*, 36 Wash. 36, 78 Pac. 39; *Kamp v. Cox Bros. & Co.*, 122 Wis. 206, 99 N. W. 366.

⁶⁵ *Blanchard-Carlisle Co. v. Garritson*, 43 Ind. App. 303, 87 N. E. 151.

⁶⁶ *Pacific Mut. Life Ins. Co. v. Walker*, 67 Ark. 147, 53 S. W. 675; *Hill v. Barner*, 8 Cal. App. 58, 96

certificate blank, as to the president's performance of his duties, for a guaranty company, and having signed it forwarded it to them. In an action upon the indemnity bond issued thereafter⁶⁷ this certificate was excluded, because there was no showing that there had been special authority from the board of directors authorizing or directing the cashier to fill out and send it. It was argued that the cashier, by virtue of his office, and having charge of the correspondence of the bank, had full authority to answer this communication in the way which he did; and being in the apparent scope of his authority, the bank was bound by it. A majority of the court was of the opinion that the case was ruled by the supreme court decision⁶⁸ in which the president wrote a similar letter for the cashier, and it was held that the president of the bank, in the absence of express authority, could not bind the bank. Circuit Judge Day said: "There is no showing that the bank

Pac. 111; *Castner v. Rinne*, 31 Colo. 256, 72 Pac. 1052; *Morse v. Consolidated R. Co.*, 81 Conn. 395, 71 Atl. 553; *Hayzel v. Columbia Ry. Co.*, 19 App. Cas. (D. C.) 359; *Hematite Min. Co. v. East Tennessee etc. R. Co.*, 92 Ga. 268, 18 S. E. 24; *Hodgerson v. St. Louis etc. R. Co.*, 160 Ill. 430, 43 N. E. 614; *Blanchard-Carlisle Co. v. Garritson*, *supra*; *Swift v. Redhead*, 147 Iowa, 94, 122 N. W. 140; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Rowe v. Baltimore etc. R. Co.*, 82 Md. 493, 33 Atl. 761; *Crowley v. Boston Elevated R. Co.*, 204 Mass. 241, 90 N. E. 532; *Allington Mfg. Co. v. Detroit Reduction Co.*, 133 Mich. 427, 95 N. W. 562; *Halverson v. Chicago etc. R. Co.*, 57 Minn. 142, 58 N. W. 871; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Shoemaker v. Commercial Union Assur. Co.*, 75 Neb. 587, 106 N. W. 316; *Meyer v. Virginia etc. R. Co.*, 16 Nev. 341; *Rapp v. Easton Transit Co. (N. J. L.)*, 72 Atl. 38; *Statler v.*

George A. Ray Mfg. Co., 195 N. Y. 78, 88 N. E. 1063; *Wickham v. Lehigh Valley R. Co.*, 85 App. Div. 182, 83 N. Y. Supp. 146; *Branch v. Wilmington etc. R. Co.*, 88 N. C. 573; *Wicktorwitz v. Farmers' Ins. Co.*, 31 Or. 569, 51 Pac. 75; *Baltimore etc. Assn. v. Post*, 122 Pa. 579, 9 Am. St. Rep. 147, 2 L. R. A. 44, 15 Atl. 885; *Waldrop v. Greenwood etc. R. Co.*, 28 S. C. 157, 5 S. E. 471; *Plymouth County Bank v. Gilman*, 3 S. D. 170, 44 Am. St. Rep. 782, 52 N. W. 869; *North Am. etc. Ins. Co. v. Frazer (Tex. Civ. App.)*, 112 S. W. 812; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554; *Scott v. Home Ins. Co.*, 53 Wis. 238, 10 N. W. 387; *In re Coventry Evans Furniture Co.*, 166 Fed. 516.

⁶⁷ *Fidelity etc. Co. v. Courtney*, 103 Fed. 599, 43 C. C. A. 331.

⁶⁸ *American Surety Co. v. Pauly*, 170 U. S. 160, 42 L. Ed. 982, 18 Sup. Ct. Rep. 563.

authorized the cashier to fill out the certificate and return it. It is not a case of answering a usual letter of the bank in the course of its business. A certificate as to the prior conduct of McKnight (the president) was inclosed, and an answer required. Nothing is shown in this case showing express authority, and we do not think such inheres in the duties of the office of cashier without special authority."⁶⁹ The question invariably arises:—Was the declaration made by the agent in the scope of his authority or, as it is sometimes put, in the line of his duty? If so, it is admissible against the corporation. Illustrations innumerable are to be found in works on corporations of the admissions of those in the various offices of corporations from the president downward; but for all practical purposes, those cited in the notes will be found to cover generally the proposition that to bind the corporation, the declarations of the agent are admissible only when made in the execution of the duties imposed upon him, and concerning a matter regarding which he is called upon to act, and which matter is within the scope of the authority usually exercised by him.⁷⁰

⁶⁹ An excellent collection of illustrations will be found in 1 Ency. of Ev. under the head of admissions and in the 2d Biennial Supplement thereto (1910).

⁷⁰ *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 South. 299; *Lowe v. Yolo County etc. Water Co.*, 157 Cal. 503, 108 Pac. 297; *Starr v. Scott*, 8 Conn. 480; *Chicago etc. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597; *Louisville Gas Co. v. Kentucky Heating Co.*, 142 Ky. 253, 134 S. W. 205; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *City Bank of Baltimore v. Bateman*, 7 Har. & J. (Md.) 104; *Garfield etc. Coal Co. v. Pennsylvania Coal etc. Co.*, 199 Mass. 22, 84 N. E. 1020; *Baring v. Clark*, 19 Pick. (Mass.) 220; *Whitney v. Wagener*, 84 Minn. 211, 87 Am. St.

Rep. 351, 87 N. W. 602; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Utica City Nat. Bank v. Tallman*, 63 App. Div. 480, 71 N. Y. Supp. 861; *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063; *Bank of Monroe v. Field*, 2 Hill (N. Y.), 445; *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377, 4 Am. Dec. 280; *Younce v. Broad River Lumber Co.*, 155 N. C. 239, Ann. Cas. 1912C, 107, 71 S. E. 329; *Huntingdon etc. R. & Coal Co. v. Decker*, 82 Pa. 119; *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699; *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Chilcott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113; *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; *American Fur Co. v. United States*,

§ 358 (360). General rule and summary of the chapter.

In a leading case on this subject in Massachusetts, which has often been quoted and approved, the general rules governing the subject are summarized. These rules are illustrated by the cases already cited: *First*, the admission of evidence of this kind is not left to the discretion of the trial judge, but is governed by principles of law which must be applied to particular cases as other principles are applied in the exercise of a judicial judgment; and errors of judgment in this case, as in other cases, may be examined and corrected. *Second*, if a declaration has its force by itself as an abstract statement detached from any particular fact in question, depending for its effect upon the credit of the person making it, it is not admissible, but is mere narrative wholly detached from the fact to be proved. *Third*, when the act of a party may be given in evidence, his declarations made at the time are admissible, when they are calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, deriving its credit from the act itself. *Fourth*, there must be a main or principal fact or transaction, and only such declarations are admissible which grow out of the principal transaction and serve to illustrate its character, and are contemporary with and derive some degree of credit from it; and declarations bearing such relations to the main fact or act belong to the *res gestae*. *Fifth*, the credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay. *Sixth*, the main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction.⁷¹

2 Pet. (U. S.) 358, 7 L. Ed. 450;

Story on Agency, §§ 134, 135, 138;

2 Stark Ev., 29; 1 Greenl. Ev., §§

113, 114, 332.

⁷¹ Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36.

Seventh, the *res gestae* are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, the *res gestae* mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described. *Eighth*, every case has its own peculiar distinctive *res gestae*, and although it is often difficult and requires careful consideration and nice discrimination, it is necessary always first to determine whether or not there is properly a main fact, and next, what declarations, facts and circumstances belong to it, forming its *res gestae*.

CHAPTER 12.

OPINIONS.

- § 359. **Opinions in General Inadmissible.**
- § 360. Exceptions to the General Rule—Opinions of Ordinary Witnesses.
- § 361. Same—Identity.
- § 362. Same—Speed of Railroad Trains—Of Automobiles—Of Horses.
- § 363. Same—Values.
- § 364. Same—Sanity.
- § 365. Same—As to Sanity in Will Cases.
- § 366. Same—In General—Conclusion.
- § 367. Expert Testimony—Grounds of Admission.
- § 368. Same—Proof of Qualification of Experts.
- § 369. Same—A Preliminary Question for the Court.
- § 370. Mode of Examination—Hypothetical Questions.
- § 371. Hypothetical Questions to be Based upon Proof.
- § 372. The Expert not to Decide Questions of Fact.
- § 373. Same, Continued.
- § 374. Opinions Based upon Testimony Heard or Read by the Expert.
- § 375. Opinions Based upon Personal Knowledge.
- § 376. Opinions Based upon Hearsay—Conclusions of Law, etc.
- § 377. Form of Hypothetical Questions.
- § 378. Physicians and Surgeons.
- § 379. Same—Testimony of Physicians and Others as to Poisons.
- § 380. Mechanics and Machinists as Experts.
- § 381. Expert Testimony as to Railroads and Their Management.
- § 382. Experts in Agriculture.
- § 383. Experts in Insurance Matters.
- § 384. Illustrations of Expert Testimony by Surveyors and Engineers.
- § 385. Opinions of Nautical Men.
- § 386. Miscellaneous Illustrations.
- § 387. Expert Testimony as to Values.
- § 388. Opinions as to Amount of Damages.
- § 389. Cross-examination of Experts—Latitude Allowed.
- § 390. Infirmary of Expert Testimony.
- § 391. Same, Continued.
- § 392. Expert Testimony—When Valuable.

§ 359 (361). **Opinions in general inadmissible.**—One of the most interesting branches of the law relating to evidence is that which forms the subject of this chapter. It is not proposed to deal with it historically, but rather to describe it as it stands to-day, and to inquire into the mode of its application. In the courts, the general rule is that wit-

nesses must testify to the facts within their knowledge, and that they must not state their opinions.¹ The fact is, notwithstanding the rule, that opinions are received both from ordinary witnesses and experts. To the examination of the rule and what must be exceptions to it, therefore, it is necessary to draw attention, notwithstanding the acceptance of the rule has changed it into a legal axiom. We seek the reasons which warrant the reception of this opinion evidence. There is no more familiar principle in the law of evidence than that the opinions of witnesses are in general irrelevant. *Omne sacramentum debet esse certae scientiae*. Even when witnesses are limited in their statements to facts within their own knowledge, their bias, ignorance and disregard of the truth are obstacles which too often hinder in the investigation of the truth. If it were a general rule of procedure that witnesses might be allowed to state not only those matters of fact about which they are supposed to have knowledge, but also the opinions they might entertain about the facts in issue, or the im-

¹ Hunt v. Curtis, 151 Ala. 507, 44 South. 54; Dickerson v. Johnson, 24 Ark. 251; Pacheco v. Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833; Chamberlain v. Platt, 68 Conn. 126, 35 Atl. 780; Jones v. State, 44 Fla. 74, 32 South. 793; Shuler v. State, 126 Ga. 630, 56 S. E. 496; Village of Upper Alton v. Green, 112 Ill. App. 439; Grand Trunk etc. R. Co. v. State, 40 Ind. App. 695, 82 N. E. 1017; Allen v. Urdangen, 141 Iowa, 280, 119 N. W. 724; Jenkins v. Beachy, 71 Kan. 857, 80 Pac. 947; South Covington etc. R. Co. v. Core, 29 Ky. Law Rep. 836, 96 S. W. 562; Lewis v. Brown, 41 Me. 448; White v. Ballou, 8 Allen (Mass.), 408; Haney v. Pinckney, 155 Mich. 656, 119 N. W. 1099; Baltimore etc. R. Co. v. State, 107 Md. 642, 69 Atl. 439, 72 Atl. 340; Peerless Machine Co. v. Gates, 61 Minn. 124, 63 N. W. 260; Masterson v. St. Louis Transit Co., 204 Mo. 507, 98

S. W. 504, 103 S. W. 48; Beard v. Kirk, 11 N. H. 397; Berckmans v. Berckmans, 16 N. J. Eq. 122; Marino v. Collis, 54 Misc. Rep. 581, 104 N. Y. Supp. 747; State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; Bristol etc. Co. v. Skapple, 17 N. D. 271, 115 N. W. 841; Chicago etc. R. Co. v. Stibbs, 17 Okl. 97, 87 Pac. 283; Taylor v. Brown, 49 Or. 423, 90 Pac. 673; State v. Boyles, 80 S. C. 352, 60 S. E. 233; Norris v. Equitable Fire Assn., 19 S. D. 114, 102 N. W. 306; Woodward v. State, 4 Baxt. (Tenn.) 322; Sue v. State, 52 Tex. Cr. 122, 105 S. W. 804; Nichols v. Oregon etc. R. Co., 25 Utah, 240, 70 Pac. 996; Brown v. Doubleday, 61 Vt. 523, 17 Atl. 135; Metropolitan Life Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345; State v. Coella, 8 Wash. 512, 36 Pac. 474; Miles v. Stanke, 114 Wis. 94, 89 N. W. 833.

pression made upon them by, or conclusions or inferences to be drawn from, such facts, the administration of justice would become little less than a farce. But the general rule rejecting evidence as to the opinions of witnesses is subject to very important exceptions—for example, the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions.² So, while the ordinary witness may not testify to his opinions, he yet may state his conclusion, inference, or opinion from facts he sees or knows, when he draws it from so many minor details that it is impossible for him to state them so that the jury would have a fair opportunity to deduce a just inference, or to form a correct opinion from the narration or description he could give.³ A witness may give his opinion as to the identity of a person, as to his physical or mental condition, may testify that he was sick or intoxicated, or that he was pleased or angry or insane, because it is clearly impossible for him to describe to the jury the many, sometimes slight, yet sure, manifestations of the identity or state which he saw, so that they can have a fair opportunity to draw from them a fair conclusion. In cases of this kind a refusal to allow a witness to state his opinion would constitute a palpable error.⁴

² *Chicago etc. R. Co. v. Hale*, 176 Fed. 71, 99 C. C. A. 379; *United States Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159; *Lake v. Shenango Furnace Co.*, 160 Fed. 887; *Chicago etc. R. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239; *United States v. Ortiz*, 176 U. S. 422, 44 L. Ed. 529, 20 Sup. Ct. Rep. 466; *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708, 7 Sup. Ct. Rep. 614.

³ *Baltimore etc. Ry. Co. v. Rambo*, 59 Fed. 75, 8 C. C. A. 6; *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15

N. W. 257; *Kiesel v. Sun Ins. Office*, 88 Fed. 243, 31 C. C. A. 515.

⁴ *Kiesel v. Sun Ins. Co.*, *supra*, which continues with the useful comment: "But there are many cases so near the line between the rule and its exception that an appellate court should not be swift to reverse the rulings of the court below unless it is reasonably clear that a plain error of law has been committed. There is a wide difference in the ability of witnesses to describe what they have seen, and to narrate what they have heard.

The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule, or under one of its exceptions, the wise course is to place it under the rule;⁵ and it will be the object of this chapter to illustrate, with due regard to their importance, the principal exceptions to the rule. By far the most numerous exceptions to the general rule are those found in cases in which the opinions of *experts* are received in evidence. Evidence of this character is not admissible upon subjects that are within the knowledge of all men of common education and experience. Mere opportunity does not change an ordinary observer into an expert; and special skill will not entitle a witness to give an expert opinion, when the subject is one where the opinion of an ordinary observer is admissible, or where the jury is capable of forming its own conclusions from facts susceptible of proof in common form. The New Jersey supreme court has well marked the distinction. "The expert witness is one whose possession of special knowledge renders his opinion admissible upon a state of facts within his specialty, without regard to the manner in which the facts are established and without requiring that they should have come in whole or in part under the personal observation of the witness. Whereas the sole ground upon which a witness may give an opinion as to matters of ordinary knowledge is that they not only came within his personal observation, but that they come into proof so blended with

One witness may be able to make so graphic a word picture of the scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion

he drew from them. The trial court sees and hears each witness, and in doubtful cases is far better qualified than the court of appeals to determine whether a witness should be confined to the facts, or should be allowed to state his conclusions."

⁵ Kiesel v. Sun Ins. Office, *supra*.

the opinion to which they give rise that it is receivable in proof as a substitute for a specification of the host of circumstances that called it forth.”⁶

§ 360 (362). Exceptions to the general rule—Opinions of ordinary witnesses.—The necessity for exceptions to the rule manifested itself with the administration of the rule itself and is well illustrated in a leading Ohio case,⁷ referred to later on. We shall first call attention to a class of exceptions where the opinions of ordinary witnesses are received. It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without the opinion of the witness. Indeed, the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself.⁸ From many of the illustrations given below it will appear that, from the necessity of the case, the opinions of ordinary witnesses must often be received. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it.⁹

⁶ *Kocis v. State*, 56 N. J. L. 44, 27 Atl. 800; *Atchison, T. & S. F. Ry. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. 787; *Reynolds v. Van Beuren*, 10 Misc. Rep. 703, 31 N. Y. Supp. 827; *Coe v. Van Why*, 33 Colo. 315, 3 Ann. Cas. 552, 80 Pac. 894. These from the multitude of cases will serve to indicate the rule adopted by the courts.

⁷ *Railroad Co. v. Schultz*, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. 324, which also contains the serviceable epitome of the law on the subject set out later in the text.

⁸ *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Atchison Ry. Co. v.*

Miller, 39 Kan. 419, 18 Pac. 486; *Railway Co. v. Schultz*, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. 324; *Bates v. Sharon*, 45 Vt. 474; *Louisville, N. A. & C. Ry. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Baltimore & O. Ry. Co. v. Rambo*, 59 Fed. 75, 8 C. C. A. 6.

⁹ The opinions of those not experts may be received as to the disposition or *temper of animals*: *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185; *Sydleman v. Beekwith*, 43 Conn. 9; *Mattisen v. State*, 55 Ala. 224; *Noble v. St. Joseph St. Ry. Co.*, 98 Mich. 249, 57 N. W. 126; as to matters of *color, weight, quantity, light, darkness, the state of the weather,*

The opinions of nonexperts are admissible, therefore, provided they state, so far as practicable, the facts on which the opinions are based, on questions of identity as applied

temperature, and similar facts: Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Bass Furnace Co. v. Glasscock, 82 Ala. 452, 60 Am. Rep. 748, 2 South. 315; Filley v. Billings, 26 Neb. 537; Curtis v. Chicago etc. R. Co., 18 Wis. 312; Leopold v. Van Kirk, 29 Wis. 548; as to *measurement*, see note to Gardner v. Metropolitan St. R. Co., 18 Ann. Cas. 1175; the *state of feeling* existing between persons: Blake v. People, 73 N. Y. 586; McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547; Brownell v. People, 38 Mich. 732; the *appearance* of individuals: Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Wilkinson v. Moseley, 30 Ala. 562; South & N. Ala. R. Co. v. McLendon, 63 Ala. 266; Barker v. Coleman, 35 Ala. 221; Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; State v. Knapp, 45 N. H. 148; Rogers v. Crain, 30 Tex. 284; Thompson v. Stevens, 71 Pa. 161; Healey v. Visalia & T. Ry. Co., 101 Cal. 585, 36 Pac. 125; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164; Stone v. Moore, 83 Iowa, 186, 49 N. W. 76; Hare v. Board of Education, 113 N. C. 9, 18 S. E. 55, whether or not a person has African blood in his veins; the appearance of *animals*: State v. Ward, 61 Vt. 153, 17 Atl. 483; Welch v. Miller, 32 Ill. App. 110; the *age* of persons: Commonwealth v. O'Brien, 134 Mass. 198; Foltz v. State, 33 Ind. 215; Morse v. State, 6 Conn. 9; De Witt v. Barly, 17 N. Y. 340; Benson v. McFadden, 50 Ind. 431; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442; Marshall v. State, 49 Ala. 21; Elsner v. Knights of Honor,

98 Mo. 640, 11 S. W. 991; the *reputation* of parties or witnesses, when under other rules of evidence such reputation becomes material: Bryan v. Walton, 20 Ga. 480; Goodwyn v. Goodwyn, 20 Ga. 600; Snow v. Grace, 29 Ark. 131; Childs v. State, 55 Ala. 28; the competency of a *servant*: see note to Johnson v. Caughren, 19 Ann. Cas. 1151; the general *physical condition* of a person: Ferguson v. Davis Co., 57 Iowa, 601, 10 N. W. 906; *conclusions as to the appearance* of another person, as that he seemed nervous: State v. Baldwin, 36 Kan. 1, 12 Pac. 318; or sad: Culver v. Dwight, 6 Gray (Mass.), 444; Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547; or in pain or in good health: Chicago B. & Q. R. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239; Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364; Smalley v. Appleton, 70 Wis. 340, 35 N. W. 729; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Heddles v. Chicago & N. W. Ry. Co., 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115; Robinson v. Exempt Fire Co., 103 Cal. 1, 42 Am. St. Rep. 93, 24 L. R. A. 715, 36 Pac. 955; that a person's mind seemed to be clear or had failed: People v. Sanford, 43 Cal. 29; Commonwealth v. Brayman, 136 Mass. 438; Chickering v. Brooks, 61 Vt. 554, 18 Atl. 144; Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; State v. Leehman, 2 S. D. 171, 49 N. W. 3; that he needed medical assistance: Chicago, B. & Q. R. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239; the manner in which a person had acted, as, for example, that he acted in a childish manner: Par-

to persons, things, animals, or handwriting; and of the size, color and weight of objects; of time and distances; of the mental state or condition of another; of insanity and

sons v. Parsons, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; Irish v. Smith, 8 Serg. & R. (Pa.) 573, 11 Am. Dec. 648; or in an eccentric manner: Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; or in a jocular manner: Powers v. State, 23 Tex. App. 42, 5 S. W. 153; that a child was "fully developed": Hubbard v. State, 72 Ala. 164; that a person was *intoxicated*: People v. Eastwood, 14 N. Y. 562; Choice v. State, 31 Ga. 424; Pierce v. State, 53 Ga. 365; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Aurora v. Hillman, 90 Ill. 61; Pierce v. Pierce, 38 Mich. 412; Stacy v. Portland Pub. Co., 68 Me. 279; Cole v. Bean, 1 Ariz. 377, 25 Pac. 538; People v. Sehorn, 116 Cal. 503, 48 Pac. 495; State v. Cather, 121 Iowa, 106, 96 N. W. 722; Campbell v. Fidelity & C. Co., 109 Ky. 661, 60 S. W. 492; Burt v. Burt, 168 Mass. 204, 46 N. E. 622; Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447; *appeared angry*: Fields v. State, 46 Fla. 84, 35 South. 185; Jenkins v. State, 82 Ala. 25, 2 South. 150; State v. Shelton, 64 Iowa, 333, 20 N. W. 459; see notes to Commonwealth v. Eyler, 10 Ann. Cas. 788, and to Taylor v. Security Life etc. Co., 13 Ann. Cas. 253; *appeared ill*: West Chicago St. R. Co. v. Fishman, 169 Ill. 196, 48 N. E. 447; *appeared to be suffering*: Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; South & N. Ala. R. Co. v. McLendon, 63 Ala. 266; Wright v. Fort Howard, 60 Wis. 119, 50 Am. Rep. 350, 18 N. W. 750; Isherwood v. Lumber Co., 87 Minn. 388, 92 N. W. 230; Werner v. Railway Co., 105 Wis. 300, 81 N. W. 416; *looked badly*: Bailey v. Centreville,

108 Iowa, 20, 78 N. W. 831; *appeared disgusted*: Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209; *looked sick*: Reininghaus v. Merchants' L. Assn., 116 Iowa, 364, 89 N. W. 1113; O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587; Dominick v. Randolph, 124 Ala. 557, 27 South. 481; *appeared to be satisfied*: Plano Mfg. Co. v. Kautenberger, 121 Iowa, 213, 96 N. W. 743; *looked as though he had not slept*: State v. Marceaux, 50 La. Ann. 1137, 24 South. 611; *appeared pale*: Hall v. Austin, 73 Minn. 134, 75 N. W. 1121; *looked frightened*: State v. Tighe, 27 Mont. 327, 71 Pac. 3; Thornton v. State, 113 Ala. 43, 59 Am. St. Rep. 97, 21 South. 356; Manahan v. Halloran, 66 Minn. 483, 69 N. W. 619; *seemed to be weak*: Birmingham R. & F. Co. v. Francomb, 124 Ala. 621, 27 South. 508; such testimony has been *admitted* as to *appearance of wound*: Fuller v. State, 117 Ala. 36, 23 South. 688; *appearance of cartridge*: Orr v. State, 117 Ala. 69, 23 South. 696; that a woman was *nice looking*: Childs v. Muckler, 105 Iowa, 279, 75 N. W. 100; *facial appearance* as showing malice: Hainsworth v. State, 136 Ala. 13, 34 South. 203; *appearance of tracks* as if person was running and walking: Smith v. State, 137 Ala. 22, 34 South. 396; *position of assailant* as shown by wound: Stevens v. State, 138 Ala. 71, 35 South. 122; that parties on a bed seemed to have *sexual intercourse*: Bizer v. Bizer, 110 Iowa, 248, 81 N. W. 465; whether a call sounded like one in *distress*: State v. Taylor, 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729; that a man and woman

intoxication; of the affection of one for another; of the physical condition of another, as to health or sickness (in which latter case, however, the opinion of a nonexpert will not be heard upon the particular disease or the cause

were *intimate*: State v. Marsh, 70 Vt. 288, 40 Atl. 836; that defendant seemed *sincere* in making confession: Horn v. State, 12 Wyo. 80, 73 Pac. 705; *flight of time* by hours: Schwantes v. State, 127 Wis. 160, 106 N. W. 237; Reiter-Connolly Mfg. Co. v. Hamlin, 144 Ala. 192, 40 South. 280; Campbell v. State, 23 Ala. 44; Allison v. Wall, 121 Ga. 822, 49 S. E. 831; State v. Southern, 48 La. Ann. 628, 19 South. 668; Bayley v. Eastern R. Co., 125 Mass. 62; McGrath v. Great Northern R. Co., 80 Minn. 450, 83 N. W. 413; State v. M'Daniel, 39 Or. 161, 65 Pac. 520; the witness having a reasonable basis for his judgment: McCrary v. Chicago etc. R. Co., 109 Mo. App. 567, 83 S. W. 82; the result of observation as to the common *appearance of streams* at various seasons of the year from rains, damming, etc.: Porter v. Pequonnoc Mfg. Co., 17 Conn. 249; Winter v. Fulstone, 20 Nev. 260, 21 Pac. 201, 687; McPherson v. St. Louis etc. R. Co., 97 Mo. 253, 10 S. W. 846; a witness familiar with a locality may state whether a given picture is a substantially correct representation of it at the time of an alleged accident, no matter when the picture was taken: Hebbe v. Town of Maple Creek, 121 Wis. 668, 99 N. W. 442. See as to opinion in action for libel as to meaning or effect of words used, note to Linehan v. Nelson, 18 Ann. Cas. 833.

In the following instances the *evidence was excluded*: that a woman was in a delicate condition: State v. Reinheimer, 109 Iowa, 624, 80 N. W. 669; that another person was watch-

ing the boy: Handley v. Railway Co., 61 Kan. 237, 59 Pac. 271; that his conduct seemed natural and genuine: People v. Smith, 172 N. Y. 210, 64 N. E. 814; that he treated her very affectionately: State v. Brown, 86 Iowa, 121, 53 N. W. 92; that a person was shamming: Cole v. Lake Shore etc. Ry. Co., 95 Mich. 77, 54 N. W. 638; that a person was envious: People v. Dowd, 127 Mich. 140, 86 N. W. 546; that injuries were permanent: Atlanta St. Ry. Co. v. Walker, 93 Ga. 462, 21 S. E. 48. In these cases the data on which the opinion is based need not be stated beforehand: State v. McKnight, 119 Iowa, 79, 93 N. W. 63. Ordinarily witnesses are not allowed to state the *meaning* or their *understanding of conversations*: Fields v. Copeland, 121 Ala. 644, 26 South. 491; Whitmore v. Ainsworth, 4 Cal. Unrep. 872, 38 Pac. 196; Diehl v. State, 157 Ind. 549, 62 N. E. 51; State v. Brown, 86 Iowa, 121, 53 N. W. 92; Plano Mfg. Co. v. Kautenberger, 121 Iowa, 213, 96 N. W. 743; Peerless Mfg. Co. v. Gates, 61 Minn. 124, 63 N. W. 260; of course the *substance* may be stated, and in some cases the opinion of the witness as to meaning has been received: Shafer v. Hausman, 139 Ala. 237, 35 South. 691; Norton v. Parsons, 67 Vt. 526, 32 Atl. 481. See note on "Necessity and Competency of Evidence as to Mental Suffering as Affecting Question of Damages," to Western Union Tel. Co. v. Cleveland, Ann. Cas. 1912B, 538. See note to Commonwealth v. Sturtivant, 19 Am. Rep. 410, on opinions of nonexperts; and on opinion as to effect

thereof);¹⁰ of values; of the soundness of animals; and of all subjects where it is not practicable nor possible to put the jury in possession of all the primary facts upon which the opinions of the witnesses are grounded.¹¹ For a witness to undertake to place before a jury all the facts and symptoms from which he had formed the opinion that a person was angry, drunk, sick, in love, or insane, would be to abandon himself to a hopeless attempt at mimicry and undignified descriptions and imitations, as ludicrous as they would be vain and unprofitable. In the Ohio case referred to some general propositions are contained which, founded on the authorities carefully considered by Owen, J., constitute an unfailing guide to the law: 1. That witnesses shall testify to facts and not opinions is the general rule. 2. Exceptions to this rule have been found to be, in some cases, necessary to the due administration of justice. 3. Witnesses shown to be learned, skilled or experienced in a particular art, science, trade or business, may, in a

if parties had acted in a different manner, in Alabama etc. R. R. Co. v. Frazier, 30 Am. St. Rep. 38; as to opinion evidence on the question of age, see note to *Grand Lodge v. Bartes*, 111 Am. St. Rep. 586.

See, also, the late cases: *Ellis v. Casey*, 4 Ala. App. 518, 58 South. 724; *Majors v. Connor*, 162 Cal. 131, 121 Pac. 371; *Mathews v. Livingston* (Conn.), 85 Atl. 529; *Smith v. Kopitzki*, 254 Ill. 498, 98 N. E. 953; *Rump v. Woods* (Ind. App.), 98 N. E. 369; *Kelley v. Royal Neighbors* (Iowa), 139 N. W. 481; *Newport Rolling Mill Co. v. Mason*, 152 Ky. 224, 153 S. W. 220; *Grand Rapids etc. R. Co. v. Storks* (Mich.), 137 N. W. 551; *Cochran v. Stein*, 118 Minn. 323, 136 N. W. 1037; *Glenn v. Metropolitan St. R.*, 167 Mo. App. 109, 150 S. W. 1092; *Herrin v. Sieben*, 46 Mont. 226, 127 Pac. 323; *Schneider v. Newgold*, 139 N. Y. Supp. 998; *Needham v. Halverson*, 22 N. D. 594,

135 N. W. 203; *St. Louis etc. R. Co. v. Dunham* (Okl.), 129 Pac. 862; *Kansas etc. R. Co. v. Whittington* (Tex. Civ. App.), 153 S. W. 689; *Sedro-Woolley City v. Willard*, 71 Wash. 646, 129 Pac. 372; *Freeman v. Freeman* (W. Va.), 76 S. E. 657; *Christopher v. Jerdee* (Wis.), 139 N. W. 1132; *Rothe v. Pennsylvania Co.*, 195 Fed. 21, 114 C. C. A. 627.

¹⁰ *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742; *Boies v. McAllister*, 12 Me. 308; *Monongahela Water Co. v. Stewartson*, 96 Pa. 436; *Lush v. McDaniel*, 13 Ired. (N. C.) 485, 57 Am. Dec. 566; *Thompson v. Bertrand*, 23 Ark. 730; *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *United Brethren M. Aid Soc. v. O'Hara*, 120 Pa. 256, 13 Atl. 932; *Evans v. People*, 12 Mich. 27.

¹¹ *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

proper case, give their opinions upon a given state of facts. This exception is limited to experts. 4. In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry. 5. In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions. 6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses. 7. As the warrant for the admission of the opinions of witnesses as evidence is found in some exception to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinions as evidence was within some one of the established exceptions to such general rule; and where it does not appear upon the whole record but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses. Devoting to these conspicuously framed propositions the attention they command, we shall proceed to consider the application of the exceptions in cases where the necessity for the admission of such testimony arises.

§ 361 (363). **Same—Identity.**—Witnesses are allowed to testify when they can speak with reasonable certainty as to the *identity* of persons or things when, if they were merely allowed to specify the details and facts on which their conclusions depended, their testimony would be of no value.¹² Hence the statements of witnesses as to iden-

¹² Walker v. State, 58 Ala. 393; South. 474; Keith v. State, 157 Ind. Wiggins v. Henson, 69 Ga. 819; 376, 61 N. E. 716 (of a corpse); Roberson v. State, 40 Fla. 509, 24 State v. Ward, 61 Vt. 153, 17 Atl.

tity are not necessarily rejected although they are unable to describe the features of the person in question, or his clothing or other *particulars* on which the conclusion depends.¹³ For example, the identification may be based upon the *voice* alone; and it would be obviously impossible for a witness to describe the tones of voice in such a manner that from the description alone the jury could arrive at any satisfactory conclusion.¹⁴ The testimony of the chemist who has analyzed blood and that of the observer who has merely recognized it belong to the same legal grade of evidence, and though the one may be entitled to much

483; *State v. Babb*, 76 Mo. 501; *King v. New York C. etc. R. R. Co.*, 72 N. Y. 607; *Woodward v. State*, 4 Baxt. (Tenn.) 322; *Turner v. McFee*, 61 Ala. 468; *Commonwealth v. Sturivant*, 117 Mass. 122, 19 Am. Rep. 401; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *Commonwealth v. Williams*, 105 Mass. 62; *Way v. State*, 155 Ala. 52, 46 South. 273; *Mack v. State*, 54 Fla. 55, 14 Ann. Cas. 78, 13 L. R. A., N. S., 373, 44 South. 706 (by a person's voice); *Commonwealth v. Dorsey*, 103 Mass. 412 (by the hair); *Beale v. Poisey*, 72 Ala. 323 (by a person's walk); *Commonwealth v. Pope*, 103 Mass. 440; *State v. Morris*, 84 N. C. 756 (by the size of a person's foot); *State v. Reitz*, 83 N. C. 634 (by the form of a foot); *State v. Folwell*, 14 Kan. 105 (by peculiar tracks of a wagon which were identified); *Russell v. State*, 66 Neb. 497, 92 N. W. 751 (by horse tracks); *State v. Cushing*, 17 Wash. 544, 50 Pac. 512 (by shoe tracks); *Morris v. State*, 124 Ala. 44, 27 South. 336; *State v. Moelchen*, 53 Iowa, 310, 5 N. W. 186; *State v. Millmeier*, 102 Iowa, 692, 63 Am. St. Rep. 479, 72 N. W. 275; *excluded*: *Terry v. State*, 118 Ala. 79, 23 South. 776 (by foot tracks); *Russell v. State*, 62 Neb. 512, 87 N. W. 344

(by horse tracks); *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274 (by size).

¹³ *Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 South. 356; *Sydeleman v. Beckwith*, 43 Conn. 9; *Alford v. State*, 47 Fla. 1, 36 South. 436; *Kent v. State*, 94 Ga. 703, 19 S. E. 885; *Craig v. State*, 171 Ind. 317, 86 N. E. 397; *State v. Richards*, 126 Iowa, 497, 102 N. W. 439; *Gentry v. McMinnis*, 3 Dana (Ky.), 382; *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *Pritchett v. Johnson*, 5 Neb. Unof. 49, 97 N. W. 223; *King v. New York Cent. etc. R. R. Co.*, 72 N. Y. 607; *State v. Costner*, 127 N. C. 566, 80 Am. St. Rep. 809, 37 S. E. 326; *State v. Welch*, 33 Or. 33, 54 Pac. 213; *Woodman v. State*, 4 Baxt. (Tenn.) 322; *Harris v. State*, 62 Tex. Cr. 235, 137 S. W. 373; *Cooper v. State*, 23 Tex. 331.

¹⁴ *Commonwealth v. Williams*, 105 Mass. 62. But in all cases of identity the testimony must depend upon personal knowledge and not upon information derived from others: *Woodman v. State*, 4 Baxt. (Tenn.) 322. As to identification of person by voice, see note to *Mack v. State*, 13 L. R. A., N. S., 373.

greater weight than the other with the jury, the exclusion of either would be illegal.¹⁵ It must not, however, be lost sight of, that such an opinion as to identification of another, to be admissible, must be based upon knowledge of the person identified, and be the result of the witness' recollection of the person, and the facts connected with his seeing or hearing him. An opinion as to the identity of a person, based solely upon the statement of another, is not admissible to prove identity.¹⁶ The rule applies as well to the identification of things as of persons. The opinion or belief of witnesses as to the identity of things, when such opinion or belief rests upon facts within the witness' own knowledge is competent evidence, although the witness will not testify positively to such identity, and testimony of this character is, at least, a sufficient foundation for the submission of the question to the jury to allow them to finally determine the ultimate fact.¹⁷ These are only a few of the many illustrations that might be given to show that ordinary witnesses may thus identify objects in cases where any attempt at description to the jury would be obviously unsatisfactory. It is needless to add that from the very nature of the evidence, it being the opinion of the wit-

¹⁵ *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676. Experts may testify whether given blood stains are caused by human or animal blood: *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401. Ordinary witnesses may testify whether certain stains are blood stains: *Dillard v. State*, 58 Miss. 368; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636. See, also, *State v. Knight*, 43 Me. 11; *Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369; *People v. Gonzalez*, 35 N. Y. 49. See note on blood stains, to *State v. Alton*, 15 Ann. Cas. 811.

¹⁶ *People v. Gray*, 148 Cal. 507, 83 Pac. 707; *Whittier v. Town of Franklin*, 46 N. H. 23, 88 Am. Dec. 185; *Lawson, Exp. & Opn. Ev.* 323, 324.

¹⁷ *Jackson v. State*, 167 Ala. 77, 52 South. 730; *Askew v. People*, 23 Colo. 446, 48 Pac. 524; *West v. State*, 53 Fla. 77, 43 South. 445; *Wiggins v. Henson*, 68 Ga. 819; *State v. Seery*, 129 Iowa, 249, 105 N. W. 511; *Commonwealth v. Best*, 180 Mass. 492, 62 N. E. 748; *State v. James*, 194 Mo. 268, 5 Ann. Cas. 1007, 92 S. W. 679; *King v. New York Cent. etc. R. R. Co.*, 72 N. Y. 607; *Smith v. Northern etc. R. Co.*, 3 N. D. 555, 58 N. W. 345; *Harris v. State*, 62 Tex. Cr. 235, 137 S. W. 373; *State v. Clark*, 27 Utah, 55, 74 Pac. 119; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Richards v. Commonwealth*, 107 Va. 881, 59 S. E. 1104; *Hostetter Co. v. Gallagher Stores*, 142 Fed. 208.

ness, it is not necessary for him to speak positively as to the identification. His testimony according to his belief, the best of his belief or judgment, is all that can be called for; and the character and weight of that testimony is matter for the consideration of the jury.¹⁸

§ 362 (364). Same — Speed — Of railroad trains — Of automobiles—Of horses.—Since there is no reason why an intelligent observer of moving objects could not express an opinion of value as to the speed of a railroad train, such testimony is received and appraised according to the means of the observer and the standards he has used. These are invariably shown on his cross-examination. “The opinion might not be so accurate and reliable as that of one who had been accustomed to observe with time-piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject.”¹⁹ Hence it has frequently been held that those who have habitually observed the passage of railroad trains may give an estimate of their rate of speed, and that the testimony on the subject is not confined to experts,²⁰ although it has been held

¹⁸ *Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97, 21 South. 356; *State v. Richards*, 126 Iowa, 497, 102 N. W. 439; *State v. Harr*, 38 W. Va. 58, 17 S. E. 794.

¹⁹ *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *Garran v. Michigan Cent. R. Co.*, 144 Mich. 26, 107 N. W. 284; *Colorado etc. R. Co. v. Webb*, 36 Colo. 224, 85 Pac. 683; *Coffey v. Omaha etc. R. Co.*, 79 Neb. 286, 112 N. W. 589.

²⁰ *Nutter v. Boston etc. Ry. Co.*, 60 N. H. 483; *Guggenheim v. Lake Shore Ry. Co.*, 66 Mich. 150, 33 N. W. 161; *Missouri P. Ry. Co. v. Hildebrand*, 52 Kan. 284, 34 Pac. 738;

Salter v. Utica etc. R. R. Co., 59 N. Y. 631; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Pence v. Chicago, R. I. & P. Ry. Co.*, 79 Iowa, 389, 44 N. W. 686; *Louisville Ry. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58; *Walsh v. Missouri Pac. Ry. Co.*, 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64; *Thomas v. Chicago & G. T. Ry. Co.*, 86 Mich. 496, 49 N. W. 547; *Smith v. Northern Pac. Ry. Co.*, 3 N. D. 555, 58 N. W. 345 (locomotive identified); *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 South. 562; *McVey v. Railway*

that such evidence is of an unsatisfactory character, and is to be received with great caution.²¹ In Michigan, where the court had under consideration the question whether persons riding in the cars could give an estimate as to the rate of speed, it was held that such opinions should not be received, "unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits."²² Of course, in all such cases as have been cited, if the witness is unable to give any satisfactory basis or reasons for his opinion, the value of his testimony might be greatly impaired; and it is to be observed that the matters as to which ordinary witnesses are allowed to give their opinions are of such a character that they may be understood without special skill or training.²³ For in-

Co., 46 W. Va. 111, 32 S. E. 1012; Colorado & S. Ry. Co. v. Webb, 36 Colo. 224, 85 Pac. 683; Gregory v. Wabash R. Co., 126 Iowa, 230, 101 N. W. 761; Borneman v. Chicago etc. R. Co., 19 S. D. 459, 104 N. W. 208. But ordinary witnesses cannot give opinions as to the *distance* within which a *train can be stopped*: Gourley v. St. Louis etc. Ry. Co., 35 Mo. App. 87; Igo v. Chicago & A. R. Co., 38 Mo. App. 377; Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742 (conductor competent to testify as to such fact). As to opinion as to speed of trains and hand-cars, see note to Bracken v. Pennsylvania R. R. Co., 34 L. R. A., N. S., 790. As to speed of automobiles or other road vehicles, see note to Dugan v. Arthurs, 34 L. R. A., N. S., 778, and to Wolfe v. Ives, 19 Ann. Cas. 754. As to speed of street-cars, see note to Tecklenburg v. Everett Ry. etc. Co., 34 L. R. A., N. S., 784.

²¹ Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. 227.

See, also, Citizens' St. Ry. Co. v. Spahr, 7 Ind. App. 23, 33 N. E. 446.

²² Grand Rapids etc. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Mott v. Detroit etc. Ry. Co., 120 Mich. 127, 79 N. W. 3. But a more liberal rule prevails in Wisconsin: Ward v. Chicago etc. R. Co., 85 Wis. 601, 55 N. W. 771. In Texas etc. R. Co. v. Brannon, 43 Tex. Civ. App. 531, 99 S. W. 1095, objection was raised to nonexperts testifying to the distance within which such a train as that which killed plaintiff's decedent could be stopped. It appeared, however, that the witnesses did not give such an opinion, but simply detailed instances in which they had seen similar trains stop at the same place, and the distance within which they were stopped.

²³ Southern R. Co. v. Bonner, 141 Ala. 517, 37 South. 702; St. Louis etc. R. Co. v. Brown, 62 Ark. 254, 35 S. W. 225; Colorado etc. R. Co. v. Webb, 36 Colo. 224, 85 Pac. 683; Evans v. Philadelphia etc. R. Co.

stance, where the witness had watched trains passing for many years, and was able to state their approximate rate of speed, but only *heard* the particular train (the subject matter of the action) pass without seeing it, his testimony that it was going a mile a minute was inadmissible.²⁴ Such testimony is of course not restricted to the speed of a railroad train. It applies with equal force to *automobiles*, as the following illustrations will show. A person injured upon a street crossing by an automobile, who sees it approaching him at a distance of ten or fifteen feet, and who has frequently observed the passage of automobiles and other vehicles, and ridden in them, and made observations of their rate of speed, may give his opinion of the speed of the car at the time of the collision.²⁵ The rate of speed of an automobile on a public highway is a matter of which the people generally in this country have some knowledge.

(Del.), 77 Atl. 831; Eckington etc. R. Co. v. Hunter, 6 App. Cas. (D. C.) 287; Seaboard Air Line Ry. v. Smith, 53 Fla. 375, 43 South. 235; Atlanta etc. R. Co. v. Strickland, 116 Ga. 439, 42 S. E. 864; Chicago etc. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Louisville etc. R. Co. v. Hendricks, 128 Ind. 462, 28 N. E. 58; Gregory v. Wabash R. Co., 126 Iowa, 230, 101 N. W. 761; Missouri Pac. R. Co. v. Hildebrand, 52 Kan. 284, 34 Pac. 738; Louisville etc. R. Co. v. Stewart, 131 Ky. 665, 115 S. W. 775; Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Garrahan v. Michigan Central R. Co., 144 Mich. 26, 107 N. W. 284; Union Pac. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543; Stotler v. Chicago etc. R. Co., 200 Mo. 107, 98 S. W. 509; Sherman v. Southern Pac. Co., 33 Nev. 385, 111 Pac. 416, 115 Pac. 909; Stone v. Boston etc. R. Co., 72 N. H. 206, 55 Atl. 359; Flanagan v. New York etc. R. Co., 70 App. Div. 505, 75 N. Y. Supp. 225; Baltimore

etc. R. Co. v. Van Horn, 21 Ohio C. C. 337; Bracken v. Pennsylvania R. Co., 222 Pa. 410, 34 L. R. A., N. S., 790, 71 Atl. 926; Missouri etc. R. Co. v. Pettit, 54 Tex. Civ. App. 358, 117 S. W. 894; Johnson v. Union Pac. R. Co., 35 Utah, 285, 100 Pac. 390; Norfolk etc. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721; Sears v. Seattle etc. R. Co., 6 Wash. 227, 33 Pac. 389, 1081; McVey v. Chesapeake etc. R. Co., 46 W. Va. 111, 32 S. E. 1012; Ward v. Chicago etc. R. Co., 85 Wis. 601, 55 N. W. 771. See, also, the late cases: Louisville etc. R. Co. v. Dilburn (Ala.), 59 South. 438; McLaughlin v. Griffin (Iowa), 135 N. W. 1107; Niehaus v. United Railways, 165 Mo. App. 606, 148 S. W. 389; Pierce v. Lincoln Traction Co., 92 Neb. 797, 139 N. W. 656.

²⁴ Parsons v. Syracuse etc. R. Co., 133 App. Div. 461, 117 N. Y. Supp. 1058.

²⁵ Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178; Neidy v. Littlejohn, 146 Iowa, 355, 125 N. W. 198.

It is not a matter exclusively of expert knowledge or skill. Where the rate of speed of such a vehicle is material in an action, any person of ordinary ability and means of observation who may have observed the vehicle may give his estimate as to the rate of speed at which it was moving. The extent of his observation goes to the weight of his testimony.²⁶ But it is essential that the one making an estimate of speed should have as a basis, at least, a reasonable opportunity to judge.²⁷ So, too, evidence may be given of the speed at which a horse is moving, and a witness has been permitted to testify whether it was going fast or slow from the sound that reached him, though he could not see it.²⁸

§ 363 (365). Same—Values.—The subject of values has already been discussed in the consideration of facts relevant to proof of value,²⁹ and the subject is illustrated by many cases in which evidence as to values has been received. As has been well said, “to describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value would be merely farcical; and this, indeed, is all that can be done to enable them to arrive at a conclusion as to its value, unless the witnesses are allowed to state their judgment or opinion together with the facts upon which such opinion is founded.”³⁰ The knowledge of

²⁶ *Miller v. Jenness*, 84 Kan. 608, 34 L. R. A., N. S., 782, 114 Pac. 1052; *Matla v. Rapid Motor Vehicle Co.*, 160 Mich. 639, 125 N. W. 708; *Hough v. St. Louis Car Co.*, 146 Mo. App. 48, 123 S. W. 83. In *Wolfe v. Ives*, 83 Conn. 174, 19 Ann. Cas. 752, 76 Atl. 526, Hall, C. J., said: “Generally an adult person of reasonable intelligence and ordinary experience in life who just before an accident observed the passing automobile, the rapid speed of which is claimed to have caused the accident, is presumably capable without proof of

further qualification to express an opinion as to how fast such automobile was going. The rule has been applied in criminal cases: *State v. Watson*, 216 Mo. 420, 115 S. W. 1011.”

²⁷ *Grand Rapids etc. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71.

²⁸ *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550.

²⁹ §§ 168, 169, *ante*, in which also are included the value of services.

³⁰ *Illinois etc. Ry. Co. v. Von Horn*, 18 Ill. 257. See, also, § 387, *post*.

values in most cases does not depend upon professional or other special skill; and witnesses, without having any special experience or training as would entitle them to be called experts, may yet have gained such knowledge of the land, or other subject under inquiry, as to aid the court or jury in arriving at a conclusion.³¹ The witness *should know the value* of land in the neighborhood.³² Persons by their common experience and observation necessarily gain some knowledge as to the values of those articles which are in common use by all or nearly all; and their evidence as to such values is not excluded by the fact that experts may have more accurate knowledge as to such values.³³ Obvi-

³¹ *Swan v. Middlesex Co.*, 101 Mass. 173; *Huff v. Hall*, 56 Mich. 456, 23 N. W. 88; *Pennsylvania etc. R. Co. v. Bunnell*, 81 Pa. 414; *Central R. R. v. Wolff*, 74 Ga. 664; *San Diego Land Co. v. Neale*, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; *Terre Haute etc. Ry. Co. v. Crawford*, 100 Ind. 550; *Alt v. California Fig. Co.*, 19 Nev. 118, 7 Pac. 174; *Dalzell v. Davenport*, 12 Iowa, 437; *Whitfield v. Whitfield*, 40 Miss. 352; *Cantling v. Hannibal etc. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; *Mish v. Wood*, 34 Pa. 451; *Thatcher v. Kaucher*, 2 Colo. 698; *Cooper v. State*, 53 Miss. 393; *Cooper v. Randall*, 59 Ill. 317; *Washington Ice Co. v. Webster*, 68 Me. 449; *Foster v. Ward*, 75 Ind. 594; *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 388, 2 South. 846; *Whiting v. Mississippi Ins. Co.*, 76 Wis. 592, 45 N. W. 672; *Ragan v. Kansas City Ry. Co.*, 111 Mo. 456, 20 S. W. 234; *Latham v. Brown*, 48 Kan. 190, 29 Pac. 400; *Finch v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 250, 48 N. W. 915; *Union Pac. Ry. Co. v. Lucas*, 136 Fed. 374, 69 C. C. A. 218. See, also, *Roberts v. City of Boston*, 149 Mass. 346, 21 N. E. 668; *Laing v. United N. J. Ry. Co.*, 54 N. J. L.

576, 33 Am. St. Rep. 682, 25 Atl. 409. See note on "Mere Ownership of Personality as Qualifying Witness to Testify as to Its Value," to *Molton v. Smith*, 8 Ann. Cas. 832.

³² *Reed v. Pittsburg C. & W. R. Co.*, 210 Pa. 211, 59 Atl. 1067; *Johnson v. Tacoma*, 41 Wash. 51, 82 Pac. 1092.

³³ *Chamness v. Chamness*, 53 Ind. 301; *Lincoln Supply Co. v. Graves*, 73 Neb. 214, 102 N. W. 457; *Maughan v. Burns' Estate*, 64 Vt. 316, 23 Atl. 583, as to the value of *board and lodging*. The opinions of witnesses have been received as to the value of a dog: *Cantling v. Hannibal etc. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; of a piano: *State v. Johnson*, 1 Mo. App. 219; of a gun: *Cooper v. State*, 53 Miss. 393; of articles of clothing: *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306; of a sealskin coat: *State v. Finch*, 70 Iowa, 316, 59 Am. Rep. 443, 30 N. W. 578; of a horse: *Reed v. New*, 35 Kan. 727, 12 Pac. 139; of a bull: *Alabama Ry. Co. v. Moody*, 92 Ala. 279, 9 South. 238; of oxen: *Plunkett v. Minneapolis Ry. Co.*, 79 Wis. 222, 48 N. W. 519; of bonds: *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499.

ously the witness must have *some means of knowledge* as to the nature and quality of the articles in question before he is qualified to express an opinion as to values. It would be an idle ceremony to allow witnesses to give their opinions in evidence, unless they had better means of knowledge as to the subject matter of their testimony than the jury might possess in common with all other persons.³⁴ And those means of knowledge should be detailed in support of their opinions. In cases where the value of property is involved, which has no fixed market value, witnesses can only state what, according to their best judgment or belief, they consider it worth.³⁵ The value of an estimate cannot be determined without knowing exactly from what standpoint it is made. Unless thoroughly tested by examination and cross-examination, it may happen that a witness giving an estimate is, unbeknown to the court and jury, governed by his computation from an improper basis, and his valuation is merely arbitrary and delusive and will be rejected.³⁶ The *qualification* of the witness is, of course, a *question for the court*.³⁷ There is no restriction upon the party with regard to witnesses to value, and the owner

³⁴ Whitney v. Boston, 98 Mass. 312; Haight v. Kimbark, 51 Iowa, 13, 50 N. W. 577; Daly v. Kimball Co., 67 Iowa, 132, 24 N. W. 756; Reed v. Drais, 67 Cal. 491, 8 Pac. 20; Russell v. Hayden, 40 Minn. 88, 41 N. W. 456; Teerpenning v. Corn Exch. Ins. Co., 43 N. Y. 279; Lamourea v. Caryl, 4 Denio, (N. Y.) 370; Bedell v. Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Clark v. Rockland Water Power Co., 52 Me. 68; Frederick v. Case, 28 Ill. App. 215; Chicago etc. Ry. Co. v. Mouriquand, 45 Kan. 170, 25 Pac. 567; Omaha Auction Co. v. Rogers, 35 Neb. 61, 52 N. W. 826; New York & C. Mining Co. v. Fraser, 130 U. S. 611, 32 L. Ed. 1031, 9 Sup. Ct. Rep. 665. See §§ 387, 388.

³⁵ Erd v. Chicago etc. Ry. Co., 41 Wis. 65.

³⁶ Arkansas etc. R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; People v. Smith, 3 Cal. App. 62, 84 Pac. 449; Butsch v. Smith, 40 Colo. 64, 90 Pac. 61; Haldeman v. Schuh, 109 Ill. App. 259; Long v. Douthitt, 142 Ky. 427, 134 S. W. 453; Phillips v. Terry, 3 Abb. Ct. App. Dec. (N. Y.) 607; Lengelet v. Piper (Tex. Civ. App.), 133 S. W. 490; Hawes v. Warren, 119 Fed. 978. If improperly received, it will endanger the judgment: Adler v. Pruitt, 169 Ala. 213, 32 L. R. A., N. S., 889, 53 South. 316; Walker-Edmund Co. v. Adams Express Co., 146 Ill. App. 176.

³⁷ Stillwell etc. Mfg. Co. v. Phelps, 130 U. S. 520, L. Ed. 1035, 9 Sup. Ct. Rep. 601.

is credited with some idea of the value of his property, and may testify to it.³⁸ Practically, the chief qualification is that the witness should have an intelligent idea of the value, founded on reliable observation, and capable of being conveyed by him in the form of an estimate, and its basis, to the court.³⁹ The same rule applies to the valuation of services, which may be made by the ordinary witness or the party himself. The latter knows the precise nature of the services rendered, and of their value. However he might be inclined to state it, the weight is for the jury.⁴⁰ When the plaintiff's own valuation is ill-founded, it will be rejected.⁴¹

§ 364 (366). **Same—Sanity.**—In some jurisdictions the rule has prevailed that nonprofessional witnesses cannot give their opinions as to the sanity or insanity of a party. It is maintained in those cases that such testimony consists of mere opinions of persons having no peculiar knowledge upon such subjects, and that the court or jury are quite as competent to form opinions from the facts presented as are unskilled witnesses.⁴² The court in a leading Maine case said: "Where the issue—sanity or insanity—is directly raised, and the question is a doubtful one, the rule which excludes the opinions of nonprofessional witnesses works favorably. The issue is not generally simple

³⁸ *Haan v. Metropolitan St. R. Co.*, 34 Misc. Rep. 523, 69 N. Y. Supp. 888. If the owner is, in addition, able to testify from other sources of information, *a fortiori*, his testimony is admissible: *Hass v. Green*, 7 Misc. Rep. 176, 27 N. Y. Supp. 347.

³⁹ See remarks of Shepley, J., in *Carpenter v. Robinson*, 1 Holmes, 67, Fed. Cas. No. 2431.

⁴⁰ *City Electric R. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724; *Chicago etc. R. Co. v. Bivans*, 142 Ill. 401, 32 N. E. 456; *Carter v. Christie*, 1 Kan. App. 604, 42 Pac. 256; *Mercer v. Vose*, 67 N. Y. 56.

⁴¹ *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049; *Story v. Maclay*, 3 Mont. 480.

⁴² *Wyman v. Gould*, 47 Me. 159; *Hastings v. Rider*, 99 Mass. 622; *Dewitt v. Barley*, 9 N. Y. 371; *People v. Packenham*, 115 N. Y. 200, 21 N. E. 1035; *Holcomb v. Holcomb*, 95 N. Y. 316; *In re Myer's Will*, 184 N. Y. 54, 6 Ann. Cas. 26, 76 N. E. 920. Later New York cases show that that state has adopted the view of the great majority of the other states: *People v. Koerner*, 117 App. Div. 40, 102 N. Y. Supp. 93.

enough for a witness to pass his judgment upon. There are various forms and kinds of insanity or mental unsoundness, many of which cannot be easily or accurately defined, the subject itself in some of its aspects being beyond the reach of human investigation. The popular sentiment upon the subject of insanity differs from the legal standard in most cases."⁴³ But the contrary rule is supported by the great *weight of authority*; and the opinions of ordinary witnesses have been received on this issue in many cases upon the obvious ground that it is often impossible for witnesses in such cases to adequately describe to the court or jury the actions, looks and symptoms which properly constitute the basis for determining the question. So that the distinction formerly made between the opinions of expert and nonexpert witnesses in these cases now (with the exception of one or two states) has entirely disappeared, and with certain limitations as to qualification dealt with hereafter, the opinion of the intelligent nonexpert observer is received in evidence, to be weighed according to its merits.⁴⁴ In some states nonexpert witnesses in insanity

⁴³ *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741.

⁴⁴ *Parrish v. State*, 139 Ala. 16, 36 South. 1012; *Dominick v. Randolph*, 124 Ala. 557, 27 South. 481; *Pulaski County v. Hill*, 97 Ark. 450, 134 S. W. 973; *Green v. State*, 64 Ark. 523, 43 S. W. 973; *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; *Beller v. Jones*, 22 Ark. 92; *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289; *People v. Wreden*, 59 Cal. 392; *Denver & R. G. R. Co. v. Scott*, 34 Colo. 99, 81 Pac. 763; *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826; *Fields v. State*, 46 Fla. 84, 35 South. 185; *Glover v. State*, 129 Ga. 717, 59 S. E. 816; *Frizzell v. Reed*, 77 Ga. 724; *Weber v. Dello Mountain Min. Co.*, 14 Idaho, 404, 94 Pac. 441; *Graham v. Deutermaun*, 244 Ill. 124, 91 N. E. 61; *Keithley v. Stafford*, 126 Ill. 507,

18 N. E. 740; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755; *Blume v. State*, 15 Ind. 343, 56 N. E. 771; *In re Walker*, 152 Iowa, 154, 128 N. W. 386; *State v. Winter*, 72 Iowa, 627, 34 N. Y. 475; *State v. Rumble*, 81 Kan. 16, 25 L. R. A., N. S., 376, 105 Pac. 1; *Stafford v. Tarter*, 29 Ky. Law Rep. 1184, 96 S. W. 1127; *Wise v. Foote*, 81 Ky. 10; *State v. Montgomery*, 121 La. 1005, 46 South. 997; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984; *Chase v. Winans*, 59 Md. 475; *People v. Casey*, 124 Mich. 279, 82 N. W. 883; *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; *Bishop v. State*, 96 Miss. 846, 52 South. 21; *Wood v. State*, 58 Miss. 741; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *State*

cases are limited to intimate acquaintances, and the reason for their opinion is a statutory requirement.⁴⁵ The opinions of nonprofessional witnesses, however, are not admissible in such cases, unless such opinions are based upon their *own knowledge and observation* of the person's appearance; and it is generally held that before giving an opinion the witness must state the facts and circumstances on which his opinion is based.⁴⁶ The object of so stating

v. Bryant, 93 Mo. 273, 6 S. W. 102; State v. Berberick, 38 Mont. 423, 100 Pac. 209; Hilmer v. Accident Assn., 86 Neb. 285, 27 L. R. A., N. S., 319, 125 N. W. 535; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; State v. Lewis, 20 Neb. 333, 22 Pac. 241; Patten v. Cilley, 67 N. H. 520, 42 Atl. 47; Genz v. State, 58 N. J. L. 482, 34 Atl. 816; Schoenberg v. Ulman, 51 Misc. Rep. 83, 99 N. Y. Supp. 650; State v. Banner, 149 N. C. 519, 63 S. E. 84; Smith v. Smith, 117 N. C. 326, 23 S. E. 270; State v. Potts, 100 N. C. 457, 6 S. E. 657; Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481; Queenan v. Territory, 11 Okl. 261, 61 L. R. A. 324, 71 Pac. 218; State v. Fiester, 32 Or. 254, 50 Pac. 561; Commonwealth v. Gearhardt, 205 Pa. 387, 54 Atl. 1029; Shaver v. McCarthy, 110 Pa. 339, 5 Atl. 614; Price v. Richmond etc. R. Co., 38 S. C. 199, 17 S. E. 732; Halde v. Schultz, 17 S. D. 465, 97 N. W. 369; State v. Leehman, 2 S. D. 171, 49 N. W. 3; Jones v. Galbraith (Tenn. Ch. App.), 59 S. W. 350; Rankin v. Rankin (Tex. Civ. App.), 134 S. W. 392; Holcomb v. State, 41 Tex. 125; In re Christensen, 17 Utah, 412, 70 Am. St. Rep. 794, 41 L. R. A. 504, 53 Pac. 1003; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253; Chickering v. Brooks, 61 Vt. 554, 18 Atl. 144; Hopkins v. Wampler, 108 Va. 705,

62 S. E. 926; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. 575; State v. Craig, 52 Wash. 66, 100 Pac. 167; State v. Maier, 36 W. Va. 757, 15 S. E. 991; Duthey v. State, 131 Wis. 178, 10 L. R. A., N. S., 1032, 111 N. W. 222; Lowe v. State, 118 Wis. 641, 96 N. W. 417; Turner v. American Security etc. Co., 213 U. S. 257, 53 L. Ed. 788, 29 Sup. Ct. Rep. 420; Queenan v. Oklahoma, 190 U. S. 548, 47 L. Ed. 1175, 23 Sup. Ct. Rep. 762; Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. Ed. 536, 4 Sup. Ct. Rep. 535. See full note to Ryder v. State, 38 L. R. A. 721-747, and the recent case of In re Huston's Estate, 163 Cal. 166, 124 Pac. 852.

⁴⁵ Cal. Code Civ. Proc., § 1870, subsec. 10. See Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101. And in that state it has recently been held that a jailer, having had the custody of a prisoner for three years, is an intimate acquaintance within the meaning of the section referred to: People v. Delhantie, 163 Cal. 461, 125 Pac. 1066.

⁴⁶ Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Appleby v. Brock, 76 Mo. 314; Ellis v. State, 33 Tex. Cr. 86, 24 S. W. 894; Sharp v. Kansas City Ry. Co., 114 Mo. 94, 20 S. W. 93; Lassas v. McCarty, 47 Or. 474, 84 Pac. 76; Chicago Union Traction Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024; Boorman v. North-

the facts is to decisively limit the nonexpert opinion and prevent the utterance of an opinion based, perhaps, on hearsay. The opinion must not be even partially based upon hearsay, such as the observation of others. In a recent case,⁴⁷ the opinion of Dodge, J., is as interesting as it is important. The question put to the witness, who was the accused's jailer, after testimony that he had a large experience as jailer in dealing with insane people committed to his custody was: "From your knowledge gained from such observation and care of those people and from Duthey's actions, conversations, and manner and appearance as you saw him at the jail Saturday night, September 23d, and as you testified here, would you say he was sane or insane? Answer: Sane." "Hardly any question," says Dodge, J., "of mere practice is so clouded by an indigestible mass of rulings, *dicta*, and decision as that of the admissibility of opinions of nonexperts as to sanity."⁴⁸ It is worth considering the reasons why anything more than evidence of the actual physical facts observed by the witness should be allowed to be stated. It is obvious that one, not an expert, can no more aid the jury by an expert opinion as to sanity than any other fact or condition. If all the physical facts can be stated, the jury are as competent to form an opinion as the witness, and their province ought not to be invaded. The learned judge continues: "But all experience teaches the frequent, if not general, impossibility of stating all things which the eye and ear note in an interview with another, the wildness of the eye, the incoherence of the ideas in speech, hurried or erratic manner,

western Relief Assn., 90 Wis. 144, 62 N. W. 924; Hempton v. State, 111 Wis. 127, 86 N. W. 596. See cases cited in note 45, *supra*.

⁴⁷ Duthey v. State, 131 Wis. 178, 10 L. R. A., N. S., 1032, 111 N. W. 222.

⁴⁸ It was the ultimate recognition of the dissenting opinion of Doe, J., in State v. Pike, 49 N. H. 399, 6 Am. Rep. 533, that gave the impetus to

these rulings. The confusion on the subject is partially illustrated by an extended note to Ryder v. State, 100 Ga. 528, 62 Am. St. Rep. 334, 38 L. R. A. 721, 28 S. E. 246. Practical application of rules with reference to it will be found in a long line of Wisconsin cases, beginning with Burnham v. Mitchell, 34 Wis. 117, and ending with Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234.

and the like. Ordinarily, it is impossible for the narrator either to remember the specific acts, words, and gestures, or to adequately describe them so as to convey to his hearer their significance to the real information desired, namely, the mental state, without stating that they were excited, incoherent, unreasonable, unusual, or the like, all of which is but statement of conclusion or opinion. Hence the rule has grown that the ordinary observer may so state his impression of his interview.” The United States supreme court in a case already cited,⁴⁹ in which the opinion is from the pen of the late Justice Harlan, presents ideal illustration of the best manner of propounding the proper question to the witness. After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially, “What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed?” This was approved.⁵⁰ When the nonexpert witness testifies that in his opinion a person is of unsound mind, the facts on which the opinion is based must be given; but if the witness testifies that the person is sane, no such necessity exists, for in that case the subject of the testimony would not give manifestations of certain eccentricities which usually mark the conduct of the mind diseased.⁵¹ But no general rule can be laid down as to what shall be deemed a sufficient opportunity for observation, this being a question for the jury in view of all the circumstances of the case, under proper instructions from the court.⁵² It was properly held in a criminal trial⁵³ that there was neither reason nor authority for saying that it

⁴⁹ Connecticut Mut. L. Ins. Co. v. Lathrop, *supra*.

⁵⁰ See Duthey v. State, *supra*.

⁵¹ Ford v. State, 71 Ala. 385; State v. Soper, 148 Mo. 217, 49 S. W. 1007.

⁵² Clary v. Clary, 2 Ired. (N. C.) 78; McClackey v. State, 5 Tex. App. 320; Taylor v. Commonwealth, 109 Pa.

262; Chase v. Winans, 59 Md. 475; Wood v. State, 58 Miss. 741; Wise v. Foote, 81 Ky. 10; Kempf v. Koppa, 74 Kan. 153, 85 Pac. 806; Stutsman v. Sharpless, 125 Iowa, 335, 101 N. W. 105.

⁵³ State v. Von Kutzleben, 136 Iowa, 89, 113 N. W. 484.

is competent for the state to call nonexpert witnesses from the bystanders to express their judgment, founded alone on observations made during the trial, of the conduct of the accused—whether or not in his expression of face, and movement of the body he was feigning or assuming a part he did not feel. If matters inhering in the personal appearance and actions of an accused person as he sits in the chair placed for him by the sheriff, or as he walks into or from the courtroom, could by any possibility become material matter to be considered by the jury in determining upon his guilt or innocence, the jurors themselves are as competent to judge as could be any nonexpert witness, and it would be their exclusive province to judge. The absence of sufficient opportunity for observation in such case is self-evident.

§ 365 (367). **Same—As to sanity in will cases.**—Even in those states where in general the opinions of witnesses are not received on the question of sanity, the rule is not held applicable to the subscribing *witnesses to a will*, since they are the persons chosen by the testator for the purpose, and are required to take notice of the state of his mind. Special exception has been properly made of such witnesses, founded beyond doubt on the necessity for their particular form of attestation that the testator had acknowledged the document as his will, and the solemnity of the occasion demanding the signatures of the testator and witnesses in the presence of each other. All the facts seen or known by the witness at the time are proper subjects of inquiry by either party, and it is proper that they should be. But it is not legally necessary that all should be detailed by the witness, if not asked by either party, before he can give his opinion. The weight and value of his opinion may depend very much upon his means of observation and knowledge; and if he can give few grounds for his belief or opinion, his testimony would, doubtless, have very little weight with the jury. But it is for the parties to bring out from the witness such facts as they deem important, touch-

ing the extent of knowledge on which the witness bases his opinion.⁵⁴ The fact of their being the subscribing witnesses is a sufficient qualification for testimony as to the testator's mental condition at the time they witnessed his signature.⁵⁵ There are obvious objections to allowing witnesses to answer the general question, whether or not a person was capable of making a will or contract, and the courts have generally excluded conclusions of witnesses in answer to questions whether persons were competent to make wills or to transact other business.⁵⁶ But in other cases testimony of this character has been received.⁵⁷ The distinction is, however, invariably made between the general conclusion of mental capacity and the special conclusion of mental capacity to make a will. So long as the opinion of the witness is an inference of fact which may be helpful to the jury, it is generally received. When it involves an inference of law to be drawn by the court; it is not admissible. A witness competent to give his opinion as to the mental capacity of a party may give his opinion as to the degree of it.⁵⁸ A witness may, of course, always testify

⁵⁴ *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473.

⁵⁵ *Walker v. Walker*, 34 Ala. 469; *Kelly v. McGuire*, 15 Ark. 555; *De Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Lodge v. Lodge*, 2 Houst. (Del.) 418; *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183; *Call v. Byram*, 39 Ind. 499; *Hertrich v. Hertrich*, 114 Iowa, 643, 89 Am. St. Rep. 389, 87 N. W. 689; *Struth v. Decker*, 100 Md. 368, 59 Atl. 727; *Poole v. Richardson*, 3 Mass. 330; *Pancoast v. Graham*, 15 N. J. Eq. 294; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Van Huss v. Rainbolt*, 2

Cold. (Tenn.) 139; Garrison v. Blanton, 48 Tex. 299. See full note to *Stetson's Will*, 39 L. R. A. 715.

⁵⁶ *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410; *McGibbons v. McGibbons*, 119 Iowa, 140, 93 N. W. 55; *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348.

⁵⁷ *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

⁵⁸ *United States v. Guiteau*, 1 Mackey (D. C.), 498, 47 Am. Rep. 247; *Horah v. Knox*, 87 N. C. 483; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310. In the last-named case the language of the court upon this point is as follows: "For the purpose of

to the fact, when such fact is within his personal knowledge, that the testator's mental condition was such that he was not able to transact business, or to do any other particular act which would indicate the condition of his mind.⁵⁹ Although there has been considerable conflict as to the admissibility of testimony of this character, it is clearly the rule that opinions of *ordinary witnesses* after the proper foundation is laid may be *received* on the general subject of sanity and insanity.⁶⁰ The law wisely provides that non-expert witnesses may give their opinions as to the sanity or insanity of an accused party in a criminal trial. Such witnesses are, of course, required to state the facts upon which they base their opinions, and from these facts, perhaps, more than the opinion of the witnesses, the jurors form their conclusion.⁶¹

§ 366 (368). Same—In general—Conclusion.—A glance at the list of questions in this section on which nonexpert testimony has been taken will show how obviously impracticable it would be to collect and illustrate all the instances in which the opinions of ordinary witnesses have been received as to matters of common knowledge by reason of

showing the extent of mental impairment, it is not unusual nor improper to ask a duly qualified witness whether in his opinion the testator possessed sufficient understanding to be able to transact the ordinary business matters incident to the management of his household affairs and property: *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740. The mental power required to attend to such ordinary affairs may be regarded as so much a matter of common knowledge and experience as to be a fair standard of comparison, readily understood by both witness and jury, by which to illustrate the degree of intelligence of one whose mental condition is the subject of investigation. It has been held to be proper to permit a witness to com-

pare the mental power of the testator to that of 'an average child of seven or eight years': *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82.

⁵⁹ *Hayes v. Candee*, *supra*.

⁶⁰ *State v. Shuff*, 9 Idaho, 115, 72 Pac. 664; *Fenton's Will*, 97 Iowa, 192, 66 N. W. 99; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *Clarke v. Irvin*, 63 Neb. 539, 83 N. W. 873; *Commonwealth v. Brown*, 193 Pa. 507, 44 Atl. 497. See cases cited in last section. See note on "Admissibility of Opinion Evidence as to Mental Capacity of Person to Execute Contract or Deed," to *Nashville etc. R. R. Co. v. Brundige*, 4 Ann. Cas. 888.

⁶¹ *State v. Shuff*, *supra*.

the necessity of the case. The circumstances under which such opinions are admitted are well summarized in a New Hampshire case in the following language: "Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention."⁶² Admittedly difficult as the task of framing a rule on the subject is, Foster, C. J., in the New Hampshire case referred to, formulated a rule, which, if properly applied, will serve as a useful instruction.

⁶² *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441. See, also, *Wilson v. New York, N. H. & H. R. Ry. Co.*, 18 R. I. 598, 29 Atl. 300; *Healy v. Visalia & T. Ry. Co.*, 101 Cal. 585, 36 Pac. 125; *Union Pac. Ry. Co. v. Gilland*, 4 Wyo. 396, 34 Pac. 953; *Commonwealth v. Dorsey*, 103 Mass. 412; *McIntire v. McConn*, 28 Iowa, 480; *Dickinson v. Dickinson*, 61 Pa. 401; *Pidecock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; 1 Whart. Cr. Law, § 48. A nonexpert familiar with the facts is held in *Atwood v. Atwood*, 84 Conn. 169, 37 L. R. A., N. S., 591, 79 Atl. 59, to be properly allowed to express the opinion that, on the day when a deed was signed by a sick person, he was so ill as to be "beyond asking him anything, and in a condi-

tion to know nothing really." As to opinion evidence by nonexperts as to intoxication, see note to *Commonwealth v. Eyler*, 11 L. R. A., N. S., 639. As to opinion evidence as to intemperance of particular person, see note to *Taylor v. Security Life etc. Co.*, 15 L. R. A., N. S., 583. As to competency of witnesses to handwriting, see note to *Ratliff v. Ratliff*, 63 L. R. A. 964, and to *Ware v. Burch*, 12 Ann. Cas. 671. As to competency of nonexpert to testify as to authorship of writings when he bases his opinion upon letters purporting to come from the person whose handwriting is in question, see note to *State v. McBride*, 7 L. R. A., N. S., 557.

*Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.*⁶³ "As the question of the sanity or insanity of an individual is a question of conduct as well as a question of nosology, as a man is regarded as insane who acts in a way different from that of a majority of his fellows, it might well seem that the evidence of experts in such cases was inadmissible, since there can be no doubt that persons of common sense, conversant with mankind, and having a practical knowledge of the world, if brought into the presence of a lunatic, would, in a short time, be enabled to form an accurate and reliable opinion, not, perhaps, of the specific and precise character of the insanity as referable to a particular class of the insane malady, but, certainly, in a general way, of his mental unsoundness."⁶⁴

⁶³ How can a witness describe the weight of a horse, or his strength, or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? The learned judge (Foster, C. J.) then says: "And so, also, in the investigation of mental and psychological conditions; because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances; because you cannot, from the nature of the case, describe emotions, sentiments and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description; the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person: 'He seemed to be frightened'; 'he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was

pleased'; 'he was angry.' All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual; appearances which are plainly enough recognized by a person of good judgment, but which he cannot otherwise communicate than by an expression of results in the shape of an opinion". Hardy v. Merrill, *supra*.

⁶⁴ Hardy v. Merrill, *supra*. See Browne on the Med. Jur. of Insanity, § 506. Dr. Ray (Med. Jur. of Insanity, 5th ed., 626) advises medical witnesses to be prepared with a well-ordered, well-digested, comprehensive knowledge of mental phenomena, in a sound as well as an unsound state, and recommends Shakespeare and Moliere as preferable text-books to Stewart and Locke, showing that it is the practical knowledge of character in its relation to conduct that he regards as the most important requisite, in the way of knowledge, of a medical witness. An excellent

§ 367 (369). Expert testimony—Grounds of admission. We have so far excluded from consideration the opinion evidence of those other than ordinary witnesses. It is well settled, however, that with respect to certain classes of questions involving peculiar skill, science, or knowledge, witnesses possessing such skill, science, or knowledge, denominated “experts,” may testify, not only to the facts, but to their opinions respecting the facts, so far as necessary to enlighten the jury, and to enable them to come to a right verdict. It is the purpose of the following sections of this chapter to ascertain the cases in which expert testimony is admissible, and to determine who are qualified to give such testimony. We have seen that in the administration of justice it is often found necessary to admit

illustration is furnished by the learned Chief Justice in the case referred to. “Suppose,” he says, “the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased and had an opportunity to see whether he appeared to be well or sick; suppose the lawyer is asked, ‘Did you observe any indications of his being well or sick?’ and the answer to be, ‘I observed no indication of his being sick; he appeared as well as usual, as well as I ever saw him’; suppose the farmer is asked, ‘Did you notice anything unusual in his appearance or conduct?’ and the answer is, ‘No, I did not’; suppose the blacksmith is asked, ‘In your opinion was he well or sick?’ and the answer is, ‘In my opinion, he was perfectly well; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain.’ What legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man’s physical condition in relation to health or disease. The use or the omission of

the word ‘opinion,’ in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony ‘opinion’ does not make it ‘opinion’; and calling it something else (as in *Barker v. Comins*, 110 Mass. 477, and *Nash v. Hunt*, 116 Mass. 237) does not make it something else. It is opinion, not because the word ‘opinion’ is used, but because it is the judgment of the witness, exercised upon what he personally saw and heard of the deceased, and the conclusion of his own mind upon the question of physical health or disease a conclusion formed by the witness, not by the jury, and formed upon sights and sounds which enabled the witness to form an opinion satisfactory to himself, although it is one which he might be unable to describe to a jury so as to enable them to form as satisfactory an opinion as they would if they had seen and heard what the witness saw and heard; and such evidence is more valuable than the testimony of experts unacquainted with the testator.”

the opinions of ordinary witnesses as evidence. It might, indeed, be urged with some force that in many of the cases cited in the preceding sections the witnesses testified not as to their opinions, but as to independent facts; and it must be conceded that in the admission of testimony it is often difficult to draw the line between the domain of fact and that of inference or opinion. It has been suggested that it would be more logically accurate to say that mere opinions, even of experts, are not admissible as such, but that, facts having been proved, the testimony of men skilled in such matters may be admitted to prove the existence of mere general facts or the laws of nature or the course of business, so as to enable the jury to form their own inferences.⁶⁵ If the nonprofessional witness must, on grounds of necessity, be sometimes allowed to state the inferences which irresistibly rise in his mind from those minute facts which he cannot detail, they are still stronger reasons for receiving, under proper limitations, the opinions of those skilled in matters of trade or science. In a great variety of cases where the subjects under investigation are wholly unfamiliar to the jury or even to the judge, there would be no adequate mode of arriving at any satisfactory conclusion, if expert testimony were rejected. In recognition of this fact the courts have adopted the rule of admitting the opinions of witnesses whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to attain a knowledge of it.⁶⁶

⁶⁵ *Mayor etc. of N. Y. v. Pentz*, 24 Wend. (N. Y.) 668. But illustrations in the succeeding pages will show that experts are themselves constantly allowed to draw inferences and state opinions based upon facts proved: See note to *Commonwealth v. Sturdivant*, 19 Am. Rep. 410. See, also, the Canadian cases: *Cain v. Uhlman*, 20

N. S. R. 148; *Wright v. Shattuck*, 5 Terr. L. R. 264.

⁶⁶ *Folkes v. Chadd*, 3 Doug. 157, 99 Eng. Reprint, 589; *Rex v. Searle*, 1 Moody & R. 75; *Thornton v. Royal Exchange Assur. Co.*, Peake, 25; *Chaurand v. Angerstein*, Peake, 43; *McNaghten's Case*, 10 Clark & F. 200, 8 Eng. Reprint, 718; *Fenwick v. Bell*,

The ordinary function of experts is, by their superior knowledge, to assist the jury in forming a correct conclusion from the facts in testimony before them. Hence, as a general rule, such witnesses merely give their opinions upon undisputed facts, or upon facts hypothetically stated to them. They may, however, testify to general facts resulting from scientific knowledge or professional skill, where such facts are material.⁶⁷ They may be examined as to questions of art or science peculiar to their trade or profession, to explain terms of art, and the state of the art at any given time.⁶⁸

§ 368 (370). Same—Proof of qualifications of experts.—

It is not necessary at this day to draw any nice distinctions between the various definitions of the word "expert." It has been said to mean one "instructed by experience," "a man of science," "a person of skill," "an experienced person," a person "possessed of some peculiar science or skill."⁶⁹ Mr. Justice Doe says:⁷⁰ "An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject." It now becomes necessary to discuss at some length the conditions under which expert testimony may be given. While it is clear that the witness, in order to be competent as an expert, must show himself to be skilled in the business or profession to which the subject relates,⁷¹ there is no precise

1 Car. & K. 312; *Kelly v. Richardson*, 69 Mich. 430, 37 N. W. 514; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Schwantes v. State*, 127 Wis. 160, 185-187, 106 N. W. 237; *Schutz v. Railway Co.*, 181 N. Y. 33, 73 N. E. 491.

⁶⁷ Thus a statement by such a witness, in a proper case, that gas factories are known to have rendered neighborhoods exempt from cholera, yellow fever, etc., is competent: *Emerson v. Lowell Gaslight Co.*, 6 Allen (Mass.), 146, 83 Am. Dec. 621.

⁶⁸ *Winans v. New York etc. R. Co.*, 21 How. (U. S.) 88, 16 L. Ed. 68.

⁶⁹ See authorities on the subject generally collected in note to *Hammond v. Woodman*, 66 Am. Dec., at pages 231, 232.

⁷⁰ *Jones v. Tucker*, 41 N. H. 546.

⁷¹ *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626, 53 South. 162; *Grigsby v. Clear Lake Waterworks Co.*, 40 Cal. 396; *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367; *Gilmore v. American Tube etc. Co.*,

rule as to the mode in which such skill or experience must be acquired. Thus, the witness may have become qualified by actual *experience* or long observation without having made a study of the subject.⁷² On the other hand, he may

79 Conn. 498, 66 Atl. 4; McMahon v. Bangs, 5 Penne. (Del.) 178, 62 Atl. 1098; Berry v. State, 10 Ga. 511; O'Rourke v. Sproul, 147 Ill. App. 609; Scott v. Thrall, 77 Kan. 688, 127 Am. St. Rep. 449, 17 L. R. A., N. S., 184, 95 Pac. 563; Conley v. Portland Gaslight Co., 99 Me. 57, 58 Atl. 61; State v. Flanigan, 111 Md. 481, 74 Atl. 818; Boston etc. R. Corp. v. Old Col. etc. R. Corp., 3 Allen (Mass.), 142; American etc. Tel. Co. v. Noble, 98 Mich. 67, 56 N. W. 110; Merchants' etc. Assn. v. Wood (Miss.), 3 South. 248; Jones v. Tucker, 41 N. H. 546; Morrell v. Preiskell (N. J.), 74 Atl. 994; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Snow Lumber Co. v. Atlantic Coast Line L. Co., 151 N. C. 217, 65 S. E. 920; Bachert v. Lehigh Coal etc. Co., 208 Pa. 362, 57 Atl. 765; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Southern Tel. etc. Co. v. Evans, 54 Tex. Civ. App. 63, 116 S. W. 418; Wright v. Williams, 47 Vt. 222; Norfolk etc. Traction Co. v. Ellington, 108 Va. 245, 17 L. R. A., N. S., 117, 61 S. E. 779; Park v. Northport Smelting etc. Co., 47 Wash. 597, 92 Pac. 442; State v. Musgrave, 43 W. Va. 672, 28 S. E. 813; Hupfer v. National Distilling Co., 127 Wis. 306, 106 N. W. 831; American Car. etc. Co. v. Thornton, 183 Fed. 114, 105 C. C. A. 33; McCaugherty v. Gutta Percha etc. Co., 2 Ont. W. R. 204.

⁷² Slater v. Wilcox, 57 Barb. (N. Y.) 604 (testimony of a farmer as to the diseases of cattle); Mason v. Fuller, 45 Vt. 29 (of a midwife as to a premature birth); In re Toomes'

Estate, 54 Cal. 509, 35 Am. Rep. 83 (held, that the experience and training of a priest had fitted him to give an opinion as to the sanity of a person); Emrick v. Merriman, 23 Ill. App. 24 (testimony of a cattleman as to the diseases of cows); McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253, 10 S. W. 846 (opinion of a farmer as to capacity of a railroad culvert to carry away water); Kerns v. Chicago, M. & St. P. Ry. Co., 94 Iowa, 121, 62 N. W. 692 (of an old railroad man as to the usual mode of coupling cars); Kershaw v. Wright, 115 Mass. 361 (of a packer as to meat keeping good when shipped in hot weather). See, also, Macon R. etc. Co. v. Mason, 123 Ga. 773, 51 S. E. 569 (osteopath but not licensed physician); Zarnik v. C. Reiss Coal Co., 133 Wis. 290, 113 N. W. 752 (machinist of experience); McConnell v. State, 77 Neb. 773, 110 N. W. 666 (general physician); Freemont v. Boston etc. R. R. Co., 111 App. Div. 831 98 N. Y. Supp. 179 (machinist of experience); Galveston etc. R. Co. v. Worth, 53 Tex. Civ. App. 351, 116 S. W. 365 (physician testifying to plaintiff's inability to perform locomotive engineer's duties). See note on "Competency of Expert to Testify to Expectancy of Life," to Kansas City Southern Ry. Co. v. Morris, 10 Ann. Cas. 621. See, also, the Canadian cases: The Queen v. Prepper, 22 N. S. R. 174; McKenzie v. Gordon, 1 N. S. D. 153; Attrill v. Pratt, 10 S. C. R. 425.

be an expert although his knowledge has been derived from the *study* of the subject, and not from actual experience or practice in the business or profession. Thus, it has sometimes been held that a *physician* may give opinions as to matters connected with his profession or with medical science, although in his own practice he may not have had experience as to such matters, and although his knowledge in respect thereto is derived from study only,⁷³ even though he may not have made the disease under inquiry a specialty.⁷⁴ On the same principle, one who is familiar with the diseases of man may be allowed to testify as an expert

⁷³ *Mendum v. Commonwealth*, 6 Rand. (Va.) 704; *State v. Clark*, 12 Ired. (N. C.) 151; *State v. Wood*, 53 N. H. 484; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. 192; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Boswell v. State*, 114 Ga. 40, 39 S. E. 897; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40. But see *Soquet v. State*, 72 Wis. 659, 40 N. W. 391, where a physician who had never had a case of arsenical poisoning was held incompetent as an expert. See, also, *Kath v. Railway Co.*, 121 Wis. 503, 99 N. W. 217. But the opposite rule was declared in *Siebert v. People*, 143 Ill. 571, 32 N. E. 431. See, also, *Caleb v. State*, 39 Miss. 721. In *Howard v. Great Western Ins. Co.*, 109 Mass. 384, a chemist's opinion was received as to a substance in which he had never dealt. In *Central R. Co. v. Mitchell*, 63 Ga. 173, the opinion of a civil engineer derived solely from books was admitted. In *Castner v. Sliker*, 33 N. J. L. 95, 507, it was held that a physician, not an oculist or surgeon, may testify as to an injury to the

eye. Conversely, if the facts are of such nature as call for no special knowledge or skill, the opinions of experts are inadmissible: *Schutz v. Railway Co.*, 181 N. Y. 33, 73 N. E. 491; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813. See note on "Competency of Physician to Testify as Expert in Respect to Wound or Injury Where He has not had Similar Case," to *State v. Megorden*, 14 Ann. Cas. 137. See, also, § 379 *post*.

⁷⁴ *Hathaway v. National Life Ins. Co.*, 48 Vt. 335. For example, in cases of insanity: *Hastings v. Rider*, 99 Mass. 622; *State v. Reddick*, 7 Kan. 143; *Baxter v. Abbott* 7 Gray (Mass.), 71; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *State v. Windsor*, 5 Harr. (Del.) 512; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783. The following cases contain contrary decisions: *Commonwealth v. Rich*, 14 Gray (Mass.), 335; *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Russell v. State*, 53 Miss. 367; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832.

concerning the diseases of animals.⁷⁵ The *law* of a *foreign* country or sister state may be proved not only by jurists and lawyers who have practiced their profession in that jurisdiction,⁷⁶ but also by those not lawyers who, from their official position or business relations, have become acquainted with such laws.⁷⁷ Courts will take notice that certain pursuits are so intimately connected with others as to give those following one of such pursuits unusual facilities for becoming acquainted with the other; and if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the subject, he may be competent as an expert, although engaged in some *other occupation*,⁷⁸ or even if he has

⁷⁵ State v. Sheets, 89 N. C. 543; Horton v. Green, 64 N. C. 64; Pierson v. Hoag, 47 Barb. (N. Y.) 243; House v. Fort, 4 Blackf. (Ind.) 293.

⁷⁶ Dyer v. Smith, 12 Conn. 384; Wilson v. Carson, 12 Md. 54; Bollinger v. Gallagher, 163 Pa. 245, 43 Am. St. Rep. 791, 29 Atl. 751; Baron De Bode's Case, 8 Q. B. 208, 115 Eng. Reprint, 854; Mowry v. Chase, 100 Mass. 79; Consolidated Real Estate etc. Co. v. Cashow, 41 Md. 59; Layton v. Chalon, 4 La. Ann. 318; Wilson v. Smith, 5 Yerg. (Tenn.) 379; McNeill v. Arnold, 17 Ark. 154; Brenner v. Luth, 28 Kan. 581; Temple v. Board of Commissioners, 111 N. C. 36, 15 S. E. 886. But a particular construction of a statute cannot thus be shown: Clark v. Eltinge, 39 Wash. 696, 83 Pac. 901. See note to Gasaway v. Thomas, 20 Ann. Cas. 1339.

⁷⁷ Vander Donckt v. Thellusson, 8 Com. B. 812, 65 E. C. L. 812, 9 L. J. C. P. 12; Wilcock v. Phillips, 1 Wall. Jr. (U. S.) 47, Fed. Cas. No. 17,639; American Life Ins. etc. Co. v. Rosenagle, 77 Pa. 507; Pickard v. Bailey, 26 N. H. 152; ~~Sussex~~

Peerage Case, 11 Clark & F. 134, 8 Eng. Reprint, 1034; Bird v. Commonwealth, 21 Gratt. (Va.) 800; People v. McQuaid, 85 Mich. 123, 48 N. W. 161; Massucco v. Tomassi, 78 Vt. 188, 62 Atl. 57. See § 502, *post*.

⁷⁸ Detroit etc. R. Co. v. Van Steinburg, 17 Mich. 99 (opinion of a mail agent as to running and stopping of a train); Wilson v. Bauman, 80 Ill. 493 (opinion of builders as to the custom of architects); Nelson v. Wood, 62 Ala. 175 (of the owner of a tannery, though not a practical tanner, as to the process of tanning); Barnes v. Ingalls, 39 Ala. 193 (daguerrean as to photography); Brabbits v. Chicago & N. W. Ry. Co., 38 Wis. 289 (of the engineer of a stationary engine as to a locomotive); Mobile etc. Ry. Co. v. Blakely, 59 Ala. 471 (of a conductor as to the means of stopping a train); Snyder v. Western Union R. Co., 25 Wis. 60 (opinion of farmers as to the value of lands). In Kilbourne v. Jennings, 38 Iowa, 533, a painter was not allowed to testify as to the quality of carpen-

abandoned the business to which the inquiry relates.⁷⁹ It is necessary that the witness should possess the requisite skill either from actual study, experience or observation. The *mere opportunity* of obtaining such skill does not suffice.⁸⁰ It must be shown that he is skilled or scientific, or at least that he has superior actual skill or knowledge in relation to the question to that possessed by ordinary witnesses or observers.⁸¹ To entitle a witness to answer as an expert, it is true "he must, in the opinion of the court, have special acquaintance with the immediate line of inquiry; yet he need not be thoroughly acquainted with the differentia of the specific specialty under consideration. If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be sufficient."⁸² The value of the testimony is enhanced or depreciated according to the experience or study of the witness.⁸³

§ 369 (371). Same — A preliminary question for the court.—When a witness is offered as an expert, it becomes

ter work which he painted. The same rule excluding the testimony has also been held when there is no such opportunity for knowledge: *Brown v. Providence etc. R. Co.*, 12 R. I. 238; *Teerpenning v. Corn Exch. Ins. Co.*, 43 N. Y. 279 (farmer not allowed to testify as to value of goods destroyed by the burning of a store).

⁷⁹ *Bearss v. Copley*, 10 N. Y. 93; *Robertson v. Knapp*, 35 N. Y. 91 (opinion of a farmer who had become a mechanic); *Tullis v. Kidd*, 12 Ala. 648 (of a physician who had become a lawyer); *Everett v. State*, 62 Ga. 65 (of a retired physician). See, also, *McEwen v. Bigelow*, 40 Mich. 215 (witness excluded who had abandoned the business for

twenty years); *Farnum v. Pitcher*, 151 Mass. 470, 24 N. E. 590 (or for twenty-three years).

⁸⁰ *Ellingwood v. Bragg*, 52 N. H. 488 (opinion of a lawyer as to handwriting); *Goldstein v. Black*, 50 Cal. 462 (a clerk of court as to handwriting); *Page v. Parker*, 40 N. H. 47; *Perkins v. Stickney*, 132 Mass. 217.

⁸¹ *Page v. Parker*, 40 N. H. 47; *Hinds v. Harbou*, 58 Ind. 121.

⁸² *Washington v. Cole*, 6 Ala. 212; *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121; *Alabama etc. Co. v. Heald*, 168 Ala. 626, 53 South. 162; 1 Whart. Ev., 2d ed., p. 386. § 439.

⁸³ *Wells v. Leek*, 151 Pa. 431, 25 Atl. 101.

a preliminary question for the court to determine whether he has the requisite qualifications;⁸⁴ and for the purpose of determining this question, the *witness himself* may be examined as to his opportunities and means of knowledge of the subject under inquiry.⁸⁵ *Other witnesses* may also be called upon this preliminary question; and those who are qualified may give their opinions thereon.⁸⁶ But the expert

⁸⁴ *Scott v. State*, 141 Ala. 1, 37 South. 357; *McDonough v. Williams*, 86 Ark. 600, 112 S. W. 164; *Evans Ditch Co. v. Lakeside Ditch Co.*, 13 Cal. App. 119, 108 Pac. 1027; *Rimmer v. Wilson*, 42 Colo. 180, 93 Pac. 1110; *Ferguson v. Rochford*, 84 Conn. 202, Ann. Cas. 1912B, 1212, 79 Atl. 177; *Bradley v. Dist. of Columbia*, 20 App. Cas. (D. C.) 169; *Schley v. State*, 48 Fla. 53, 37 South. 518; *Graham v. Deuterman*, 244 Ill. 124, 91 N. E. 61; *La Porte Carriage Co. v. Sullender* (Ind. App.), 71 N. E. 922; *State v. Donovan*, 128 Iowa, 44, 102 N. W. 791; *Conley v. Portland Gaslight Co.*, 99 Me. 57, 58 Atl. 61; *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552, 72 N. E. 81; *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Spino v. Butler Bros.*, 113 Minn. 326, 129 N. W. 590; *Pearson v. State*, 97 Miss. 841, 53 South. 689; *Ray v. Chicago etc. R. Co.*, 147 Mo. App. 332, 126 S. W. 543; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *Modlin v. Jones*, 84 Neb. 551, 121 N. W. 984; *Pattee v. Whitecomb*, 72 N. H. 249, 56 Atl. 459; *Burns v. Delaware etc. Tel. Co.*, 70 N. J. L. 745, 67 L. R. A. 956, 59 Atl. 220, 592; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992; *Epstein v. Interborough Rapid Transit Co.*, 52 Misc. Rep. 184, 101 N. Y. Supp. 793; *State v. Barry*, 11 N. D. 428, 92 N. W. 809; *Farmers' etc. Nat. Bank*

v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 420; *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65; *Howard v. Providence*, 6 R. I. 514; *Virginia-Carolina etc. Co. v. Kirven*, 57 S. C. 445, 35 S. C. 745; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Galveston etc. R. Co. v. Worth*, 53 Tex. Civ. App. 351, 116 S. W. 365; *Wright v. Southern Pac. R. Co.*, 15 Utah, 421, 49 Pac. 309; *State v. Ward*, 39 Vt. 225; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Winkler v. Power etc. Mach. Co.*, 141 Wis. 244, 124 N. W. 273; *Chateaugay Ore etc. Co. v. Blake*, 144 U. S. 476, 36 L. Ed. 510, 12 Sup. Ct. Rep. 731; *Cain v. Uhlman*, 20 Nov. Sco. 148.

⁸⁵ *Boardman v. Woodman*, 47 N. H. 120; *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. 434. See note to *Davis v. Pennsylvania R. Co.*, 7 Ann. Cas. 583. See, also, the recent cases: *Johnston v. Johnston* (Ala.), 57 South. 450; *People v. Payne*, 161 Ill. App. 640; *Pierce v. Coffee* (Iowa), 139 N. W. 1092.

⁸⁶ *Mendum v. Commonwealth*, 6 Rand. (Va.) 704; *Tullis v. Kidd*, 12 Ala. 648; *Laros v. Commonwealth*, 84 Pa. 200; *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837; *State v. Maynes*, 61 Iowa, 119, 15 N. W. 864; *Hoag v. Wright*, 174 N. Y. 36, 63 L. R. A. 163, 66 N. E. 579.

cannot give his own opinion as to his own qualifications.⁸⁷ Nor is the evidence of the other witnesses admissible as to such qualifications, *after the evidence* has been received.⁸⁸ In determining the question in any given case the court has first to decide whether the subject is one upon which the opinion of an expert can be received, and also what are the qualifications necessary to entitle the witness to testify as an expert.⁸⁹ It is the prevailing rule that the decision of the trial court as to the competency of the expert is a preliminary question resting in the *discretion* of the court, and unless founded on some error of law, or on serious mistake, or abuse of discretion, this ruling is not reversible.⁹⁰ Some of the cases go very far upon this point, for some of them hold that the decision of the trial

⁸⁷ Boardman v. Woodman, 47 N. H. 120; Langston v. Southern Electric Ry. Co., 147 Mo. 457, 48 S. W. 835. He cannot be asked, for instance, whether he is an expert: Braham v. State, 143 Ala. 28, 38 South. 919.

⁸⁸ Tullis v. Kidd, 12 Ala. 648; De Phue v. State, 44 Ala. 32; Brabo v. Martin, 5 La. 275; Birmingham Ry. & Electric Co. v. Ellard, 135 Ala. 433, 33 South. 276.

⁸⁹ Chicago & A. R. Co. v. Springfield & N. W. R. Co., 67 Ill. 142; Heald v. Thing, 45 Me. 392; State v. Secrest, 80 N. C. 450; Tullis v. Kidd, 12 Ala. 648; State v. Ward, 29 Vt. 225; Tyler v. Todd, 36 Conn. 218; Sandwich Mfg. Co. v. Nicholson, 32 Kan. 666, 5 Pac. 164; Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; Lincoln v. Barre, 5 Cush. (Mass.) 590; State v. Cole, 63 Iowa, 695, 17 N. W. 183; Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. Rep. 653.

⁹⁰ White v. State, 133 Ala. 122,

32 South. 139; Hygeia D. W. Co. v. Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534; Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; Davis v. State, 44 Fla. 32, 32 South. 822; Jenny Electric Co. v. Branham, 145 Ind. 314, 33 L. R. A. 395, 41 N. E. 448; White v. McPherson, 183 Mass. 533, 67 N. E. 643; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115; New Jersey, Z. & I. Co. v. Lehigh Zinc & I. Co., 59 N. J. L. 189, 35 Atl. 915; State v. Wilcox, 132 N. C. 1120, 44 S. E. 625; Ennis v. Little, 25 R. I. 342, 55 Atl. 884; Garr v. Cranney, 25 Utah, 193, 70 Pac. 853; Czarecke v. Seattle etc. Ry. Co., 30 Wash. 288, 70 Pac. 750; Marston v. Dingley, 88 Me. 546, 34 Atl. 414; Gila Valley R. R. Co. v. Lyon, 203 U. S. 465, 51 L. Ed. 276, 27 Sup. Ct. Rep. 145; Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311; Flint v. Union Water Power Co., 73 N. H. 483, 62 Atl. 788; Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340.

court is conclusive; but we think the cases which hold that where there is no evidence at all tending to prove that the witness is qualified to testify as an expert, or where there is palpable abuse of discretion, the ruling of the trial court is subject to review, are supported by the better reason.⁹¹ Whatever may be the true rule upon this point, it is quite clear that the court must decide the question of the qualification of the witness; and, when it is made to appear *prima facie* that the witness possesses the requisite qualification, the court may admit the testimony, and is not bound to allow a preliminary cross-examination.⁹² It is difficult to perceive how any other conclusion could be reached when once it is granted that the court need only be satisfied that, *prima facie*, the witness is competent.⁹³ No exact standard by which to determine the competency of the witness exists, and much is necessarily left to the discretion of the trial court.⁹⁴ If the evidence satisfies the court of the qualification of the witness, it is not bound, as we have just said, to permit a preliminary cross-examination, though it would, no doubt, have a right to do so, and the right may be liberally exercised.⁹⁵ It is generally held by the courts that the regular cross-examination may fully go into the question of the competency of the witness; and, if it appear that he is not a qualified expert witness, his testimony will be weakened or entirely destroyed.⁹⁶ The right to a full cross-examination is thus secured; and, if it

⁹¹ *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

⁹² This was expressly decided in *Sarle v. Arnold*, 7 R. I. 582.

⁹³ *Rog. Exp. Test.* 50; *City of Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

⁹⁴ *Forgey v. First Nat. Bank*, 66 Ind. 123; *Goodwin v. State*, 96 Ind. 550; *State v. Maynes*, 61 Iowa, 119, 35 N. W. 864; *McEwen v. Bigelow*, 40 Mich. 215.

⁹⁵ *City of Fort Wayne v. Coombs*, *supra*. "When a witness has been adjudged competent upon the preliminary examination, opposing proof going to his incompetency is to be addressed to the jury to affect the value of his testimony, and not to the court for the purpose of excluding his testimony": *Rog. Exp. Test.* 50.

⁹⁶ *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Louisville etc. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

turns out that the witness is not qualified, the jury may be told that his opinion is of no weight; but, without such a direction, it must be presumed—as jurors are to be treated as men of fair intelligence—that the opinion of one not qualified would not be given any weight by them.⁹⁷ This plenary right of cross-examination affords full opportunity to discover the extent of the qualifications of the witness, and prevents material harm to the party against whom he testifies. And as we have shown, the jury are then in a position to give the evidence its due weight.

§ 370 (372). **Mode of examination—Hypothetical questions.**—We have now dealt with the opinion evidence of nonexperts, and have explained why and how ordinary witnesses are permitted to state their conclusions as to certain matters involving impracticable descriptions of the component details upon which their judgment is based. In such cases the facts are within their own knowledge, the result of their personal observation. It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is *not confined* to facts within their own *personal knowledge*, but that they may give their opinions upon an assumed state of facts. Indeed, it is probably true that in the majority of cases in which experts are examined their testimony is based upon *hypothetical questions*, or upon facts assumed for the purposes of the trial, and presented in some other form. While it is impossible to lay down any unyielding rule as to the form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of *facts which the counsel claims* to be proved, and which the testimony on his part *tends to prove*.⁹⁸ But hypothetical questions should not be

⁹⁷ Washington v. Cole, 6 Ala. 212; Louisville etc. Co. v. Falvey, *supra*.

⁹⁸ Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99;

Filer v. New York C. R. Co., 49 N. Y. 42; Peterson v. Chicago etc. Ry. Co., 38 Minn. 511, 39 N. W. 485; Stearns v. Field, 90 N. Y. 640; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305, and

put to nonexperts.⁹⁹ In an Ohio case¹⁰⁰ a nonexpert witness had given evidence as to his knowledge of the disposition of a dog, and had answered the question "From your knowledge of the dog, what do you say as to his being a peaceable, quiet dog?" and had been cross-examined as to the facts which formed the basis of his opinion, and as to his want of knowledge of certain facts. Counsel was then permitted to assume a state of facts, not within the knowledge of the witness, and upon that to demand of the nonexpert witness an opinion as to one of the material facts in issue in the case, a fact, too, as to which the testimony of experts was not competent. The question called for the hypothetical opinion of the witness so interrogated, in a matter which did not involve scientific knowledge or skill, and substituted that opinion for the deliberate judgment of the jury upon the sworn facts of the case. This was properly held reversible error. The cross-examination was beyond legal bounds.

§ 371 (373). Hypothetical questions to be based upon proof.—Before considering the form the hypothetical question should assume, we purpose discussing the substance of it. That substance must have a direct and intimate connection with the testimony in the case, otherwise the attention of the jury would be distracted from the issue and the very object of hearing the evidence defeated. If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be proved or offered to be proved;¹ and if there is no evidence to prove such facts,

note on hypothetical questions which may be asked; *Louisville Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Prentice v. Bates*, 88 Mich. 567, 50 N. W. 637; *Poole v. Dean*, 152

Mass. 589; *Fuchs v. Tone*, 218 Ill. 445, 75 N. E. 1014. See form of question, § 377, *post*.

⁹⁹ *Ragland v. State*, 125 Ala. 12, 27 South. 983.

¹⁰⁰ *Hayes v. Smith*, 62 Ohio, 161, 56 N. E. 879.

¹ *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *People v. Foley*, 64 Mich. 148, 39 N. W. 94;

or if the facts assumed in the interrogatory are wholly irrelevant to the issue, the question should be excluded.² If the foundation for the evidence is removed, there is, of course, no basis for the superstructure. The question is not necessarily to be rejected by the court, although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute; and it is sufficient if the question fairly states such facts as the proof of the examiner *fairly tends to establish*, and fairly presents his claim or theory.³ It cannot be expected that the

Quinn v. Higgins, 63 Wis. 664, 53 Am. Rep. 305, 24 N. W. 482; Reber v. Herring, 115 Pa. 599, 8 Atl. 830; Williams v. Brown, 28 Ohio St. 547; Muldowney v. Illinois Cent. R. Co., 39 Iowa, 615; Haish v. Payson, 107 Ill. 365; Woolner v. Spaulding, 65 Miss. 204, 3 South. 583; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514. But the court in its discretion may allow such questions on the claim of counsel that the evidence will be produced: People v. Sessions, 58 Mich. 594, 26 N. W. 291; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; Jarvis v. Metropolitan St. R. Co., 65 App. Div. 490, 72 N. Y. Supp. 829; Earl v. Tupper, 45 Vt. 275; Pittsburgh etc. R. Co. v. Moore, 110 Ill. App. 304; McDonald v. Rhode Island Co., 26 R. I. 467, 59 Atl. 391. If the promised evidence is not produced, the opponent should move to strike out the testimony given in regard to it: Dorr Cattle Co. v. Chicago etc. R. Co., 128 Iowa, 359, 103 N. W. 1003.

² People v. Augsburg, 97 N. Y. 501; Kelly v. Perrault, 5 Idaho. 221, 48 Pac. 45; Kelly v. Kelly, 103 Md. 548, 63 Atl. 1082; Fairechild v. Bascomb, 35 Vt. 398; Williams v. Brown, 28 Ohio St. 547; Burnett v.

Railway Co., 120 N. C. 517, 26 S. E. 819; People v. Harris, 136 N. Y. 423, 33 N. E. 65; In re Barber's Estate, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; North American Acc. Assn. v. Woodson, 64 Fed. 689, 12 C. C. A. 392. See note on "Competency of Abstract Question in Examination of Expert Witness," to State v. Maioni, 20 Ann. Cas. 207.

³ Where the facts are undisputed, the question should embody them; and where they are in dispute, it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case: Parish v. State, 139 Ala. 16, 36 South. 1012; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Williams v. State, 45 Fla. 128, 34 South. 279; McFall v. Smith, 32 Ill. App. 463; Howard v. People, 185 Ill. 552, 57 N. E. 441; Conway v. State, 118 Ind. 482, 21 N. E. 315; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Nave v. Tucker, 70 Ind. 15; Pierson v. Railway Co., 116 Iowa, 601, 88 N. W. 363; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Meeker v. Meeker, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; Kraatz v. Brush Electric Co., 82 Mich. 457, 46

interrogatory will include the proofs or *theory of the adversary*, since this would require a party to assume the truth of that which he generally denies.⁴ Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly.⁵ In such a case the questions must be so framed as to fairly reflect the party's theory as shown by the facts admitted or proved by him; and where the party's own evidence corroborates evidence which has been introduced by the other party to the action, such questions should fairly reflect all of the facts so admitted or proved by both sides.⁶ A question should not be rejected because it does not include all the facts,⁷ unless it thereby fails to present the case

N. W. 787; *Daniells v. Aldrich*, 42 Mich. 58, 3 N. W. 253; *State v. Hanley*, 34 Minn. 430, 26 N. W. 397; *Woolner v. Spalding*, 65 Miss. 204, 3 South. 583; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Hamblin v. State*, 81 Neb. 148, 16 Ann. Cas. 569, 115 N. W. 850; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *Cole v. Fall Brooks C. Co.*, 159 N. Y. 59, 53 N. E. 670; *Stearns v. Field*, 90 N. Y. 640; *People v. Angsbury*, 97 N. Y. 501; *State v. Anderson*, 10 Or. 448; *Hathaway v. National Life Ins. Co.*, 48 Vt. 335; *State v. Underwood*, 35 Wash. 558, 77 Pac. 863; *Werner v. Chicago etc. Ry. Co.*, 105 Wis. 300, 81 N. W. 416; *Quinn v. Higgins*, 63 Wis. 664, 53 Am. Rep. 305, and note, 24 N. W. 482; *Kiekhoefer v. Hildershide*, 113 Wis. 280, 89 N. W. 189; *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738; *North Am. Acc. Assn. v. Woodson*, 64 Fed. 689, 12 C. C. A. 392. See note to *State v. Crowe*, 18 Ann. Cas. 646.

On the general subject of this section, see the recent cases: *Vischer v. Northwestern El. R. Co.*, 256 Ill. 572, 100 N. E. 270; *In re Law's Estate (Iowa)*, 138 N. W. 531; *Emerson v. Butte El. R. Co.*, 46 Mont. 454, 129 Pac. 319; *Pigford v. Norfolk-Southern R. Co. (N. C.)*, 75 S. E. 860; *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057; *St. Louis etc. R. Co. v. Dean (Tex. Civ. App.)*, 152 S. W. 527; *Knutson v. Moe (Wash.)*, 130 Pac. 347; *McIntyre v. Modern Woodmen*, 200 Fed. 1.

⁴ *Goodwin v. State*, 96 Ind. 550.

⁵ *Guiterman v. Liverpool etc. S. S. Co.*, 83 N. Y. 358; *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464.

⁶ *Landis & Schick v. Watts*, 84 Neb. 671, 121 N. W. 980.

⁷ *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *People v. Hill*, 116 Cal. 562, 48 Pac. 711; *Chicago & E. I. R. Co. v. Wallace*, 202 Ill. 129, 66 N. E. 1096; *Morrill v. Hershfield*, 19 Mont. 245, 47 Pac. 997;

fairly.⁸ It is error to allow an expert to answer a hypothetical question which excludes from his consideration facts already proved by the testimony upon which the question is based, when a consideration of such facts is essential to the formation of an intelligent opinion concerning the matter.⁹ The court should reject questions which unfairly select part of the facts proved or which omit material parts.¹⁰ The court is the arbiter of the propriety of the question; and the real test of the propriety of any given hypothetical question is its fairness.¹¹ We speak now generally, for some jurisdictions have made a law unto themselves, and to a certain extent relieve the judge from the consideration of the question. In some it is held that all the undisputed facts bearing upon the matter concerning which the opinion of the witness is sought should be included in the hypothetical question.¹² In others all the *material or vital* undisputed facts must be inserted. This appears to be the safe rule; and the hypothetical question may be pronounced

Swensen v. Bender, 114 Fed. 1, 51 C. C. A. 967; State v. Doherty, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658; In re Barber's Estate, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 754; Brooks v. Sioux City, 114 Iowa, 641, 87 N. W. 682.

⁸ In re Barber's Estate, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; Nichols v. Oregon etc. Ry. Co., 25 Utah, 240, 70 Pac. 996.

⁹ Vosburg v. Putney, 80 Wis. 523, 27 Am. St. Rep. 47, 14 L. R. A. 226, 50 N. W. 403; Marshall Livery Co. v. McKelvy, 55 Mo. App. 240.

¹⁰ Barber's Estate, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; Schulz v. Modisett, 2 Neb. Unof. 138, 96 N. W. 338; Nichols v. Oregon etc. Ry. Co., 25 Utah, 240, 70 Pac. 996; Schaidler v. Chicago etc. Ry. Co., 102 Wis. 564, 78 N. W. 732.

¹¹ St. Louis etc. R. Co., v. Hook, 83 Ark. 584, 104 S. W. 217.

¹² In People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28, the court said: "All the undisputed facts of a case must be included in a hypothetical question, both as a matter of sound principle and of reason and justice. Neither party has a right to discard an important undisputed fact because the insertion of such fact may alter or vary the answer or opinion of the witness, to the prejudice of such party." 1 Thompson on Trials, section 610, says: "Where the facts are not disputed, it is proper to require that the hypothetical question shall embrace them all, and that the witness shall take them all into consideration in giving his answer." To the same effect are Davis v. State, 35 Ind. 496, 9 Am. Rep. 496; and Rog. Exp. Test., §§ 25, 26.

to be safe from ultimate attack where there is evidence tending to prove all the facts assumed in it, and such question calls for an opinion founded on all the material facts which the evidence tends to prove affecting the subject upon which the expert is asked to express an opinion.¹³ Merely abstract questions of science, or questions not sufficiently definite to enable the witness to form a conclusion, should be rejected.¹⁴ And a hypothetical question cannot be based upon testimony given by the witness himself, where this is merely assumed to be true.¹⁵ An expert may, however, include as a basis of his opinion facts known to be true, as well as those stated in the question, when by the statement of the question he is required to do so.¹⁶ The truth of facts assumed by the question is in doubtful cases a *question for the jury*; and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions; and the court will so in-

¹³ *Johnson v. Wilmington City R. Co.*, 7 Penne. (Del.) 5, 76 Atl. 961; *Fuchs v. Tone*, 218 Ill. 445, 75 N. E. 1014; *Wichita v. Coggs*, 3 Kan. App. 540, 43 Pac. 842; *Smith v. Minneapolis etc. R. Co.*, 91 Minn. 239, 97 N. W. 881; *Earp v. State (Miss.)*, 38 South. 288; *State v. Hyde*, 234 Mo. 200, Ann. Cas. 1912D, 191, 136 S. W. 316; *Mammerberg v. Metropolitan St. Ry. Co.*, 62 Mo. App. 563; *Schultz v. Modisett*, 2 Neb. Unof. 138, 96 N. W. 338; *State v. Thomson*, 153 N. C. 618, 69 S. E. 254; *Kemendo v. Fruit Dispatch Co. (Tex. Civ. App.)*, 131 S. W. 73; *Norfolk etc. R. Co. v. Spears*, 110 Va. 110, 65 S. E. 482; *Hoagland v. Canfield*, 160 Fed. 146. In *Woodward v. Chicago etc. R. Co.*, 122 Fed. 66, 58 C. C. A. 402, Sanborn, C. J., thus put the rule: "A hypothetical question which assumes and fairly states the existence of any state of facts which the evidence directly and reason-

ably tends to establish or justify, and which does not assume facts beyond the range of the evidence, may be properly asked and answered, although it does not assume or state every fact in the case."

¹⁴ *Parham v. State*, 147 Ala. 57, 42 South. 1; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Kuhns v. Wisconsin etc. R. Co.*, 70 Iowa, 561, 31 N. W. 868; *Turner v. Ridgeway Tp.*, 105 Mich. 409, 63 N. W. 406; *Palmer v. St. Louis etc. R. Co.*, 142 Mo. App. 440, 127 S. W. 96; *State v. Maioni*, 78 N. J. L. 339, 20 Ann. Cas. 204, 74 Atl. 526; *Illinois Silver etc. Co. v. Raff*, 7 N. M. 336, 34 Pac. 544; *Fisher v. Monroe*, 2 Misc. Rep. 326, 21 N. Y. Supp. 995.

¹⁵ In *re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

¹⁶ *Tebo v. City of Augusta*, 90 Wis. 405, 407, 63 N. W. 1045. See, also, *Pierce v. City of Boston*, 164 Mass. 92, 41 N. E. 227; *State v.*

struct them.¹⁷ But the court is not required to submit the matter to the jury, unless there is some substantial evidence tending to establish the hypothesis.¹⁸ While, however, the hypothetical question to an expert witness should not contain matter which there is no evidence tending to support, technical accuracy is not required as to this. It is for the jury to scrutinize the evidence, and to determine what part of the question is true or supported by the evidence and what is not; and the adverse party may ask for instructions that the jury do not accept the facts as true, but that they should determine whether such facts were in evidence, and that they might disregard the opinion of the expert if not based on facts in evidence.¹⁹ Expert witnesses may be cross-examined, and their opinion obtained, based on other states of facts, assumed by the party examining them to have been proven upon a hypothetical case, and they may be cross-examined on purely imaginary and abstract questions. Such questions are not only permissible in order to get the opinion of the expert witness upon all the possible theories of the case, but they are allowable, also, to test the value and accuracy of the opinion of the witness himself.²⁰

§ 372 (374). The expert not to decide questions of fact. Expert testimony being an exception to the general rule of law excluding opinions from evidence, and trenching, as it does, upon the province of the jury, is not to be extended beyond the necessities of the case. The determination of the matters directly in issue is not thereby to be taken from the jury. Hence, the ordinary rule is that the

Wright, 134 Mo. 404, 35 S. W. 1145; Selleck v. Janesville, 100 Wis. 157, 69 Am. St. Rep. 906, 41 L. R. A. 563, 75 N. W. 975.

¹⁷ People v. Foley, 64 Mich. 148, 31 N. W. 94; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; Epps v. State, 102 Ind. 539, 1 N. E. 491.

¹⁸ Nave v. Tucker, 70 Ind. 15.

¹⁹ Grand Lodge v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; Forsyth v. Doolittle, 120 U. S. 76, 30 L. Ed. 536, 7 Sup. Ct. Rep. 408; Goodwin v. State, 96 Ind. 550.

²⁰ Clark v. State, 12 Ohio 483, 40 Am. Dec. 481; People v. Sutton, 73 Cal. 243, 15 Pac. 86; Parrish v. State, 139 Ala. 16, 36 South. 1012.

opinions of experts upon the merits, or upon the very matter to be tried, are inadmissible.²¹ All questions calling for their opinions should be so framed as not to call upon them to determine controverted questions of fact, or to pass upon the preponderance of testimony.²² Thus, it would obviously be improper to ask the witness to state his opinion upon all the testimony in the case as to any given question, if the truth of part of such evidence were in dispute.²³ *A fortiori* where he had heard only a part of the evidence. Thus the question, "Do you believe from what you have heard of the testimony in this case that this arm has been the subject of consecutive luxation?" was held improper, when it appeared that the witness had been absent for twenty minutes while the plaintiff was testifying.²⁴ Dwight, J., said that during that time very material evidence upon the point in issue might have been

²¹ Hall v. Goodson, 32 Ala. 277; Muldraugh's Hill etc. Turnpike Co. v. Maupin, 79 Ky. 101; Tingley v. Cowgill, 48 Mo. 291; Teall v. Barton, 40 Barb. (N. Y.) 137.

²² Inland etc. Coasting Co. v. Tolsen, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. Rep. 653; McNaghten's Case, 10 Clark & F. 200, 8 Eng. Reprint, 718; Walker v. Rogers, 24 Md. 237; Negro Jerry v. Townshend, 9 Md. 145; Page v. State, 61 Ala. 16; Fairchild v. Bascomb, 35 Vt. 398; Chicago & A. R. Co. v. Springfield & N. W. R. Co., 67 Ill. 142; Printup v. Patton, 91 Ga. 422, 18 S. E. 311; Tingley v. Cowgill, 48 Mo. 291; Muldowney v. Illinois C. R. Co., 39 Iowa, 615; Hill v. Portland etc. R. R. Co., 55 Me. 438, 92 Am. Dec. 601; Clark v. Detroit Locomotive Works, 32 Mich. 348; State v. Cole, 94 N. C. 958; Baltimore Turnpike Co. v. Cassell, 66 Md. 419, 49 Am. Rep. 175, 7 Atl. 805; Smith v. Hickenbottom, 57 Iowa, 733, 11 N. W. 664; Boor v. Lowrey, 103 Ind.

468, 53 Am. Rep. 519, 3 N. E. 151; Yeaw v. Williams, 15 R. I. 20, 23 Atl. 33; Prentis v. Bates, 88 Mich. 567, 50 N. W. 637; Louisville E. & St. L. Ry. Co. v. Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; Weller v. Camp, 169 Ala. 275, 28 L. R. A., N. S., 1106, 52 South. 929; Columbia Val. Trust Co. v. Smith, 46 Or. 6, 107 Pac. 465; Johnson v. Highland, 124 Wis. 597, 102 N. W. 1085; Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. See note to Brown v. Mitchell, 36 L. R. A. 64-70. See Canadian cases: Napier v. Ferguson, 2 P. & B. 415; Wright v. Collier, 19 A. R. 298.

²³ State v. Felter, 25 Iowa, 67; Reed v. State, 62 Miss. 405; Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; Buxton v. Somerset Works, 121 Mass. 446; Carpenter v. Eastern Transp. Co., 71 N. Y. 574; State v. Bowman, 78 N. C. 509.

²⁴ Carpenter v. Blake, 2 Lans. (N. Y.) 206.

given, but in addition the question was obnoxious for a more serious reason. It called upon the witness for a conclusion from all the evidence he had heard in the case without assuming any facts as established thereby. The witness was therefore permitted to accept such of the evidence as he believed to be true and reject such as he did not deem reliable. This was to permit to him the province and prerogative of the jury. The objection is almost self-evident. The witness who is asked to state his conclusion on the testimony, even the whole of the testimony, given, logically is asked, "Having heard the whole of the evidence, state your conclusion from that which you select as the basis of your judgment"; whereas the hypothetical form of the question which should have been submitted, if permitted, would have called for his conclusion on the supposititious case submitted, and would have had value in proportion to the facts on which it was based being established or rejected in whole or in part by the jury. When the question is so framed as to call upon the expert to determine on which side the evidence preponderates or to reconcile conflicting statements, he is in effect asked to decide the merits of the case, which is a duty wholly beyond his province. Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must *not usurp the province of the court and jury* by drawing those conclusions of law or fact upon which the decision of the case depends. Although this view has been earnestly criticised, it is sustained by the undoubted weight of authority, and any lawyer who has had much participation in the actual trial of cases will understand that in many cases trials would become a mere farce if zealous experts were allowed to directly express their opinions upon the very issue to be tried.²⁵ It would be impossible to reconcile the conflicting decisions in which the

²⁵ *State v. Stevens*, 16 S. D. 309, 92 N. W. 420; *Denver & R. G. R. Co. v. Vitello*, 34 Colo. 50, 81 Pac. 766; *Aunes v. Ames*, 75 Neb. 473, 106 N. W. 585; *Martin v. Des Moines Edison Light Co.*, 131 Iowa, 724, 106 N. W. 359; *Central City v. Morquis*, 75 Neb. 233, 106 N. W. 221; *Read v.*

courts have considered the subject of the admissibility of opinions where objection was made that to receive them would allow the witness to trench upon the province of the jury. It is the general disposition of the courts to restrict the admission of expert testimony within the strict bounds of the necessity on which it is founded. Indeed, this kind of testimony has always been regarded by conservative jurists with disfavor.²⁶ Earl, J., has said:²⁷ "The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts."²⁸ We will only call attention to some of the classes of cases in which the question has arisen, and cite a few only of the many cases in which the evidence has been excluded or allowed. It

Valley Land & Cattle Co., 66 Neb. 423, 92 N. W. 622. See, also, the Canadian cases: *Key v. Thomson*, 2 Han. 224; *In re Estate of McLennan*, 28 N. S. R. 226.

²⁶ *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396; *Ferguson v. Hubbel*, 97 N. Y. 507, 49 Am. Rep. 544; *Tracy Peerage Case*, 10 Clark & F. 191, 8 Eng. Reprint, 700.

²⁷ *Ferguson v. Hubbell*, *supra*.

²⁸ In the *Tracy Peerage Case*, *supra*, Lord Campbell said that skilled witnesses came with such a bias on their minds to support the cause in which they were embarked that hardly any weight should be given to their evidence. "Without indorsing this strong language, which is, however, countenanced by

the utterances of other judges, and of some text-writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged, and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted." (Earl, J., in *Ferguson v. Hubbell*, *supra*.)

will be seen, however, that in the great majority of cases the evidence has been excluded for the reasons we have outlined.²⁹

²⁹ Inquiries involving problems like the following are given as illustrations (such testimony was excluded except where otherwise indicated): *Whether a given act could have been done or prevented* under the existing facts: Jones v. Hatchett, 14 Ala. 743; Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 South. 573; Little Rock T. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Lowman v. State, 109 Ga. 501, 34 S. E. 1019; Chicago & N. W. Ry. Co. v. Ingersoll, 65 Ill. 399; Chan Sing v. Portland, 37 Or. 68, 60 Pac. 718; Missouri P. R. Co. v. Fox, 56 Neb. 746, 77 N. W. 130; Parish v. Baird, 160 N. Y. 302, 54 N. E. 724; Summerlin v. Railway Co., 133 N. C. 550, 45 S. E. 898; *whether given machinery was properly managed, or constructed or had safe appliances*: Hurst v. Railway Co., 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695; Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311 (admitted); Dyas v. Southern P. Co., 140 Cal. 296, 73 Pac. 972 (admitted); McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367 (admitted); Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 343, 61 N. E. 332 (admitted); Donk Bros. C. & C. Co. v. Stroff, 200 Ill. 483, 66 N. E. 29 (admitted); Dougherty v. Milliken, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757; Fitch v. Mason C. & C. L. T. Co., 116 Iowa, 716, 89 N. W. 33; St. Louis Ry. Co. v. Ritz, 33 Kan. 404, 6 Pac. 533; Daly v. Milwaukee, 103 Wis. 588, 79 N. W. 752 (admitted); *whether a given object was likely to cause injury, or the contrary*: Orr v. State,

117 Ala. 69, 23 South. 696; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014 (admitted); Dean v. Sharon, 72 Conn. 667, 45 Atl. 963 (admitted); Brooks v. Sioux City, 114 Iowa 641, 87 N. W. 682; Missouri & K. Tel. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771; Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447; Lawson v. Railway Co., 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. 618; People v. Detroit & S. P. R. Co., 125 Mich. 366, 84 N. W. 290; Metz v. Butte, 27 Mont. 506, 71 Pac. 761; Nourie v. Theobald, 68 N. H. 564, 41 Atl. 182; Western Coal & M. Co. v. Berberich, 94 Fed. 329, 36 C. C. A. 364 (admitted); Childress v. Railway Co., 94 Va. 186, 26 S. E. 424; *whether proper or improper means were used under the circumstances of the case or how an act should have been performed*: Springfield R. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034; Chicago & E. I. R. Co. v. Grimm, 25 Ind. App. 494, 57 N. E. 641 (admitted); Cahow v. Railway Co., 113 Iowa, 224, 84 N. W. 1056; O'Brien v. Look, 171 Mass. 36, 50 N. E. 458 (admitted); Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285; Storrie v. Grand Trunk El. Co., 134 Mich. 297, 96 N. W. 569; Challis v. Lake, 71 N. H. 90, 51 Atl. 260; Finn v. Cassidy, 165 N. Y. 584, 53 L. R. A. 877, 59 N. E. 311 (admitted); Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565 (admitted); *or whether certain acts were necessary or not*: Kelly v. West Bend, 101 Iowa, 669, 70 N. W. 726; Chicago, R. I. & P. R. Co. v. Holmes,

§ 373 (375). *Same, continued.*—It is needless to say that on a question left, in a large measure, to the discretion of the trial court, differences in expression and in some

68 Neb. 826, 94 N. W. 1007; *State v. McCoy*, 15 Utah, 136, 49 Pac. 420 (admitted); what was the *duty or authority* of a person under the facts proved: *Quinlan v. Railway Co.*, 113 Iowa, 89, 84 N. W. 960 (admitted); *Louisville & N. R. Co. v. Bowen*, 18 Ky. Law Rep. 1099, 39 S. W. 31; *Lipscomb v. Railway Co.*, 95 Tex. 5, 93 Am. St. Rep. 804, 55 L. R. A. 869, 64 S. W. 923; *New York El. Eq. Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216; whether *care or good judgment* was used: *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 4 L. R. A. 673, 42 N. W. 873; *Wolschied v. Thorne*, 76 Mich. 265, 43 N. W. 12; *Hinds v. Keith*, 57 Fed. 10, 6 C. C. A. 231; *Phifer v. Railway Co.*, 122 N. C. 940, 29 S. E. 578; *Raynor v. Railway Co.*, 129 N. C. 195, 39 S. E. 821; *Heath v. Glisan*, 3 Or. 64 (admitted); *Cookson v. Railway Co.*, 179 Pa. 184, 36 Atl. 194 (admitted); *Auberle v. McKeesport*, 179 Pa. 321, 36 Atl. 212; *Woeckner v. Motor Co.*, 187 Pa. 206, 41 Atl. 28; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34; *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569, 3 Atl. 494; *Seliger v. Bastian*, 66 Wis. 521, 29 N. W. 244; *Buxton v. Somerset Potters' Works*, 121 Mass. 446; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574; *Hopkins v. Indianapolis etc. R. Co.*, 78 Ill. 32; *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio, 211; *Livingston v. Cox*, 8 Watts & S. (Pa.) 61; *Lawrence v. Hudson*, 12 Heisk. (Tenn.) 671; *Harley v. Buffalo Car Co.*, 142 N. Y. 31, 36 N. E. 813; *Louisville, E. & St. L. Co. v. Berry*, 9 Ind. App.

63, 35 N. E. 565, 36 N. E. 646; whether certain acts constituted *negligence*: *Mantel v. Chicago Ry. Co.*, 33 Minn. 62, 21 N. W. 853; *East Tennessee etc. R. R. v. Wright*, 76 Ga. 532; *Ballard v. New York etc. Ry. Co.*, 126 Pa. 141, 19 Atl. 35; *Bills v. Ottumwa*, 35 Iowa, 107; *Brant v. Lyons*, 60 Iowa, 172, 14 N. W. 227; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574; *Hoener v. Koch*, 84 Ill. 408; whether the facts proved would cause certain results and what results would ordinarily follow certain facts or conditions, and whether if acts were done in a certain way given results could or would necessarily follow: *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986 (admitted); *Simon v. Stare*, 108 Ala. 27, 18 South. 731 (admitted); *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186 (admitted); *Chatsworth v. Rowe*, 166 Ill. 114, 46 N. E. 763 (admitted); *Brink's Express Co. v. Kinnare*, 168 Ill. 643, 48 N. E. 446; *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245; *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038 (admitted); *Trott v. Railway Co.*, 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722 (admitted); *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871; *Baltimore City P. Ry. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188 (admitted); *Donnelly v. Railway Co.*, 70 Minn. 278, 73 N. W. 157 (admitted); *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38 (admitted); *Cole v. Fall Crook C. Co.*, 159 N. Y. 59, 53 N. E. 670 (admitted); *Stembridge v. Railway Co.*, 65 S. C. 440, 43 S. E. 968 (ad-

cases actual conflicts must result. As will be seen from the illustrations given in the notes, there are numerous exceptional cases in which the courts have approved interrogatories which seemed to substantially call for the

mitted); *State v. Noakes*, 70 Vt. 247, 40 Atl. 249 (admitted); *whether it was possible or probable under the circumstances that a person could have seen the object or heard the sound or done the act in question*: *Kansas C. M. & B. R. Co. v. Weeks*, 135 Ala. 614, 34 South. 16 (admitted); *People v. Valliere*, 123 Cal. 576, 56 Pac. 433 (admitted); *People v. Farley*, 124 Cal. 594, 57 Pac. 571; *Jones v. State*, 44 Fla. 74, 32 South. 793; *State v. Fontenot*, 50 La. Ann. 537, 69 Am. St. Rep. 455, 23 South. 634; *State v. Breaux*, 104 La. 540, 29 South. 222 (admitted); *Baltimore C. P. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859 (admitted); *Welch v. Railway Co.*, 176 Mass. 393, 57 N. E. 668; *Lawlor v. Wolff*, 180 Mass. 448, 62 N. E. 973; *Furbush v. Maryland C. Co.*, 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135; *Hamberg v. St. Paul etc. Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Fonda v. Railway Co.*, 77 Minn. 336, 79 N. W. 1043 (admitted); *Olsen v. Railway Co.*, 152 Mo. 426, 54 S. W. 470 (admitted); *State v. Buralli*, 27 Nev. 41, 71 Pac. 532 (admitted); *McGeary v. Railway Co.*, 21 R. I. 76, 41 Atl. 1007; *State v. Taylor*, 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729; *Rolling v. State*, 136 Ala. 126, 34 South. 348 (admitted); *whether certain conduct of a railroad company in the management of its trains was reasonable or unreasonable*: *Hill v. Portland etc. R. R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Louisville & N. Ry. Co. v. Hall*, 87 Ala. 708, 13 Am. St. Rep. 84, 4 L. R. A.

710, 6 South. 277; *whether the prisoner was insane*: *Reed v. State*, 62 Miss. 405; *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; *what had caused the death or a given injury for which the action was brought*: *State v. Bowman*, 78 N. C. 509; *whether rape had been committed in a given case*: *Noonan v. State*, 55 Wis. 258, 12 N. W. 379; *whether a physician had or had not been guilty of malpractice*: *Hoener v. Koch*, 84 Ill. 408; but on an assumed state of facts the witness may be asked whether the treatment was proper or improper, skillful or unskillful: *Jones v. Angell*, 95 Ind. 376; *Olmsted v. Gere*, 100 Pa. 127; *Wright v. Hardy*, 22 Wis. 348; *Twombly v. Leach*, 11 Cush. (Mass.) 397; *whether a person had testamentary capacity or the capacity to make contracts*: *Schneider v. Manning*, 121 Ill. 376; *Kempsey v. McGinniss*, 21 Mich. 123; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Fairchild v. Bascomb*, 35 Vt. 398; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; but it has been held proper to ask if the mind and memory of the testator were sufficiently sound to enable him to know and understand the business in which he was engaged at the time: *McClintock v. Curd*, 32 Mo. 411; *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *Melendy v. Spaulding*, 54 Vt. 517; *whether certain highways, bridges, crossings or walks were dangerous or safe*: *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141,

opinion of the expert as to the merits of the controversy;³⁰ and it may be conceded that it is sometimes difficult to frame the questions in such manner as to call for an opinion based merely upon assumed facts, and to thus avoid the objection under discussion.³¹ But the overwhelming weight of authority sustains the rule already declared, on the obvious ground that the expert is not called upon to perform any part of the functions of the judge or the jury. On the contrary, his testimony in connection with all other testimony in the case must be weighed by the tribunal to which the final decision is submitted.³² Although cases almost without limit might be cited which recognize the principle that an expert cannot be called upon to give opin-

583; *Kelley v. Fond du Lac*, 31 Wis. 179; *Weeks v. Town of Lyndon*, 54 Vt. 638; *Bliss v. Wilbraham*, 8 Allen (Mass.), 564; *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520; *Brown v. Cape Girardeau etc. Co.*, 89 Mo. 152, 1 S. W. 129; *Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Barnes v. Newton*, 46 Iowa, 567; *Fairbury v. Rogers*, 98 Ill. 554; *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33. Other cases in which the question has arisen and which contain useful discussions are: *Taylor v. Monroe*, 43 Conn. 36; *Laughlin v. Street Ry. Co.*, 62 Mich. 220, 28 N. W. 873; *Cross v. Lake Shore Ry. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361. See, also, *Miller v. Boone Co.*, 95 Iowa, 5, 63 N. W. 352. See note to *Baltimore etc. Co. v. Cassell*, 59 Am. Rep. 176; whether a child of a given age was capable of exercising *ordinary care*: *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188.

The following are also interesting illustrative cases: *Brandon v. Progress Distilling Co.*, 167 Ala. 365, 52 South. 640; *Pinnell v. Cleveland etc.*

R. Co., 146 Ill. App. 150; *Aetitis v. Spring Val. Coal Co.*, 150 Ill. App. 497; *Evans v. Philadelphia etc. R. Co.*, 1 Boyce (Del.), 562, 77 Atl. 831; *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000; *Wyckoff v. Kerr*, 24 S. D. 241, 123 N. W. 733; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *Werten v. Koosa*, 169 Ala. 258, 53 South. 98; *Farley v. Colver*, 113 Md. 379, 77 Atl. 589; *Russell v. Louisville etc. R. Co. (Ky.)*, 124 S. W. 841; *Louisville etc. R. Co. v. Willis*, 58 Fla. 307, 51 South. 134; *Cincinnati etc. R. Co. v. Cook*, 45 Ind. App. 401, 90 N. E. 1052; *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68.

³⁰ *Johnson v. Central Vermont R. Co.*, 56 Vt. 707; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Gardiner v. People*, 6 Park. C. C. (N. Y.) 155, 202; *People v. Clark*, 33 Mich. 112; *Davis v. State*, 38 Md. 15.

³¹ *People v. Lake*, 12 N. Y. 358. See, also, *White v. Bailey*, 10 Mich. 155.

³² See cases cited under § 372, *ante*.

ions determining the *merits of the case*, or to weigh *conflicting evidence* or judge the credibility of testimony, such witnesses are constantly allowed to state their opinions based upon facts within their own knowledge or facts assumed in hypothetical questions.³³ If the hypothetical question properly presents the fact which the evidence tends to prove, and does not call upon the witness to reconcile conflicting evidence or to pass upon the merits of the case, a wide range may be given by the court, and a liberal discretion allowed as to its form. The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded.³⁴

§ 374 (376). Opinions based upon testimony heard or read by the expert.—Opinions based upon testimony heard or read by the expert are undoubtedly open, in the great majority of cases, to the objection that the witness, however conscientious, will not found his opinion upon all the facts, but only upon those which his belief warrants him in assimilating. It is, no doubt, the better practice to so frame the question that the expert has only to assume the truth of the facts therein stated. When he is called upon to form an opinion upon testimony which he has heard or read, there is danger that the witness in arriving at a conclusion will unconsciously pass upon the weight or credibility of the evidence; that in determining the facts proved, he will in effect usurp the province of the jury. Questions calling upon the witness to form an opinion based on the evidence which he has heard have often been rejected.³⁵

³³ See § 367, *ante*.

³⁴ *Hunt v. Lowell Gas Light Co.*,

³ *Allen (Mass.)*, 169, 85 Am. Dec. 697; *Filer v. New York Cent. R. Co.*,

49 N. Y. 42; *Omaha etc. R. Co. v.*

Brady, 39 Neb. 27, 57 N. W. 767.

³⁵ *Sills v. Brown*, 9 Car. & P. 601;

State v. Bowman, 78 N. C. 509;

In several jurisdictions it is permitted to the trial court, in its discretion, and as a matter of convenience, to allow the hypothesis to be put to the witness by referring him to the testimony if he has heard it, instead of requiring the counsel to recapitulate it, predicated the inquiries upon the facts heard or read by the witness being true.³⁶ This mode of examination is clearly inadmissible if there are inconsistencies or discrepancies in the testimony of the witness or witnesses.³⁷ But the hypothetical question need not recapitulate the facts proven in all cases. Thus, if the expert has heard a *deposition read*, or has *heard the testimony* of a witness, or even of several witnesses in which *no conflict* appears, and if such testimony is not voluminous, he may give an opinion based on the assumption that such evidence is true;³⁸ and when there is no conflict as to the ma-

Smith v. Hickenbottom, 57 Iowa, 733, 11 N. W. 664; Butler v. St. Louis Life Ins. Co., 45 Iowa, 93; Woodbury v. Obear, 7 Gray (Mass.), 467; Elgin, A. & S. T. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. See § 372, *ante*.

³⁶ St. Louis etc. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; Howland v. Oakland etc. R. Co., 110 Cal. 513, 42 Pac. 983; Louisville etc. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Doherty v. Des Moines R. Co., 144 Iowa, 26, 121 N. W. 690; State v. Murray, 83 Kan. 148, 110 Pac. 103; Hanrahan v. Baltimore, 114 Md. 517, 80 Atl. 312 (which contains several useful rulings by Pearce, J.); Greene v. Boston etc. R. Co., 207 Mass. 467, 93 N. E. 837; Joslin v. Grand Rapids etc. Co., 53 Mich. 322, 19 N. W. 17; Crozier v. Minneapolis etc. R. Co., 106 Minn. 77, 118 N. W. 256; Meily v. St. Louis etc. R. Co., 215 Mo. 567, 114 S. W. 1013; Perkins v. Concord R. R., 44 N. H. 223; People v. Youngs, 151 N. Y. 210, 45 N. E. 460; Wal-

ters v. Rock, 18 N. D. 45, 115 N. W. 511; The Clipper v. Logan, 18 Ohio, 375; Davis v. State, 54 Tex. Cr. 236, 114 S. W. 366; McKinstry v. Collins, 74 Vt. 147, 52 Atl. 438; Davey v. Janesville, 111 Wis. 628, 87 N. W. 813; Eastern Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477.

³⁷ Guiterman v. Liverpool etc. Co., 83 N. Y. 358. Where the evidence is conflicting, see § 372 et seq., *ante*.

³⁸ McCollum v. Seward, 62 N. Y. 316; Rex v. Searle, 1 Moody & R. 75; Negro Jerry v. Townshend, 9 Md. 145; Burnside v. Town of Everett, 186 Mass. 4, 71 N. E. 82; Hunt v. Lowell Gas Light Co., 8 Allen (Mass.), 169, 85 Am. Dec. 697; Wright v. Harry, 22 Wis. 348; Dickenson v. Fitchburg, 13 Gray (Mass.), 546; Storer's Will, 28 Minn. 9, 8 N. W. 827; Jones v. Railway Co., 43 Minn. 279, 45 N. W. 444; State v. Cole, 94 N. C. 958; Bennett v. State, 5 Wis. 69, 46 Am. Rep. 26, 14 N.

terial facts, the question need not be hypothetical in form.³⁹ The witness is allowed to give an opinion from the evidence in such cases upon the ground that, by the terms of the question, the witness is required to assume that the facts given in testimony are true; and he is not required to draw any other conclusions or inferences as to the facts.⁴⁰ It is almost unnecessary to add that nonexperts cannot be asked for an opinion on facts testified to by other witnesses;⁴¹ and that an expert may not be asked to express an opinion upon an opinion of some other person.⁴² On the other hand, there are decisions which regard any question, other than the hypothetical one recapitulating the facts, as obnoxious and for good reasons unsafe.⁴³ A recent California case contains many of these reasons, supported by excellent authority.⁴⁴ After pointing out that, however

W. 912. In such cases it suffices if he has heard all the material testimony: *Carpenter v. Blake*, 2 Lans. (N. Y.) 206; *Hand v. Brookline*, 126 Mass. 324; *Davis v. State*, 38 Md. 15; *State v. Hayden*, 51 Vt. 296; *State v. Medlicott*, 9 Kan. 257. It is not proper for this purpose to read from the minutes of counsel: *Thayer v. Davis*, 38 Vt. 163. And when the question is limited to a part of the evidence, it must be neither broad nor vague: *Hanrahan v. Mayor etc. of Baltimore*, 114 Md. 517, 80 Atl. 312; and when the question does not assume that the witness heard all the testimony, and it does not appear what part he did hear, it is properly disallowed: *La Ronde v. Trans. St. Mary's Traction Co.*, 145 Mich. 77, 108 N. W. 365.

³⁹ *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio, 211; *Tefft v. Wilcox*, 6 Kan. 46; *Page v. State*, 61 Ala. 16; *Bishop v. Spining*, 38 Ind. 143; *Guiterman v. Liverpool etc. Co.*, 83 N. Y. 358; *State v. Klinger*, 46 Mo.

224; *Carpenter v. Blake*, 2 Lans. (N. Y.) 206; *Coyle v. Commonwealth*, 104 Pa. 117; *Henry v. Hall*, 13 Ill. App. 343.

⁴⁰ *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169, 85 Am. Dec. 697. See cases cited, *supra*.

⁴¹ *Gracy v. Atlantic etc. R. Co.*, 53 Fla. 350, 42 South. 903.

⁴² *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

⁴³ *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517; *Barber's Appeal*, *supra*; *Central of Georgia R. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 590; *Elgin etc. Tract. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Ditton v. Hart*, 175 Ind. 181, 93 N. E. 961; *D'Arcy v. Catherine Lead Co.*, 155 Mo. App. 266, 133 S. W. 1191; *Shoemaker v. Elmer*, 70 N. J. L. 710, 58 Atl. 940; *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *Williams v. State*, 37 Tex. Cr. 348, 39 S. W. 687; *Manufacturers' Acc. etc. Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620, 7 C. C. A. 581.

⁴⁴ *People v. Le Doux*, *supra*.

unsatisfactory the method of recapitulating the facts may be, it is less objectionable than the general question founded on the evidence, Henshaw, J., summarizes the objections to that form of question: 1. It assumes that every fact which the witness has heard is in his mind, while some may have been forgotten. 2. It allows the expert to assume that unstated evidence upon which he bases his opinion has been proved to his satisfaction, while, to the minds of the jurors, it may not have been proved at all. 3. It permits the expert to base his opinion upon some undeclared fact, or set of facts, to which he may give great weight, yet which in the minds of the jurors may be entitled to little or no consideration whatever. 4. It makes it impossible for the jury ever to determine upon precisely what facts the expert has based his opinion, and thus makes it forever impossible for them to say what weight should be accorded to that opinion.⁴⁵ In a Michigan case we find, "An expert can never be safely permitted to state that he has heard or read the testimony of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence, the facts upon which he rests his conclusion. There is no reputable authority for any such method of examining an expert witness."⁴⁶ In a New York case⁴⁷ occurs the following: "We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which

⁴⁵ "And in this view," says the learned judge, "it matters not whether the evidence in the case be actually conflicting or not. The vice still remains, if it be said that the evidence is unconflicting, since it is for the jurors alone to say what weight shall be given to this, or that, or the other evidence tending to establish a given fact. And where the evidence is unconflicting,

the jurors may hold that the evidence offered is insufficient to prove some particular fact." See, also, *Keyes-Marshall etc. Co. v. St. Louis etc. R. Co.*, 105 Mo. App. 556, 80 S. W. 53.

⁴⁶ *People v. Aiken*, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821.

⁴⁷ *People v. McElvaine*, 121 N. Y. 250, 18 Am. St. Rep. 820, 24 N. E. 465.

the witness based his opinion, and whether such facts were proved or not." The California case cited, however, somewhat modifies the sweeping condemnation of the question "upon the evidence," by stating that it must not be understood as saying that every departure from that method involves error, necessitating the reversal of a case. Cases may arise where the facts upon which the opinion is sought are simple, salient and few. If it be made to appear that the expert has heard the testimony by which those facts have been presented, it would not necessarily be held error that he was asked to state his opinion upon those facts, without a restatement of them.⁴⁸ But the danger in a departure from the approved procedure is that, in the generality of cases, the facts themselves are in question, and disputes are numerous and complicated, and, under these circumstances, injury may be worked to a litigant by an adverse expert opinion so adduced.

§ 375 (377). Opinions based on personal knowledge.—It has now been sufficiently established that in asking a question of an expert witness, it is necessary to base such question upon a hypothesis of fact, either expressed in the question, or founded in the evidence already before the jury, well recognized and easily grasped; and that an expert cannot be called upon to give an opinion upon facts in his mind and undisclosed, or upon matters in part within his observation and in part derived from others, but such facts must be stated to him hypothetically, and his conclusion therefrom obtained. Or, that, in other words, when the expert has not personal knowledge of the facts, the questions calling for his opinion should be hypothetical in form.⁴⁹ But it is not necessary that the question should be hypothetical in form when the opinion of the witness is based, not upon assumed facts, but upon his *personal*

⁴⁸ Howland v. Oakland etc. R. Co., 115 Cal. 487, 47 Pac. 255.

⁴⁹ Southern Bell Tel. Co. v. Jordan, 87 Ga. 69, 13 S. E. 202; West-

ern Union Tel. Co. v. Morris, 67 Kan. 410, 73 Pac. 108; Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

*knowledge or observations.*⁵⁰ A familiar illustration of this practice is where a physician is called to give his opinion as to the mental or physical condition of one whom he has examined.⁵¹ Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land;⁵² or as to the value of a particular breed of horses;⁵³ or upon the value of the professional services of a lawyer;⁵⁴ or on the question of negligence in moving a vessel,⁵⁵ or on the necessity of a jettison,⁵⁶ or in the case of experienced navigators on questions involving nautical skill.⁵⁷ But in cases where the opinion of an expert is based upon his personal knowledge of the facts, *such facts should be first stated by him* so that the court and jury may determine whether the alleged facts on which the conclusions are based are real,

⁵⁰ St. Louis etc. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; Dunham's Appeal, 27 Conn. 192; Louisville etc. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Guinn v. Iowa etc. R. Co., 131 Iowa, 680, 109 N. W. 209; Hunter v. Ithaca, 141 Mich. 539, 105 N. W. 9; Masteller v. Great Northern R. Co., 103 Minn. 244, 114 N. W. 757; State v. Wright, 134 Mo. 404, 35 S. W. 1145; Brown v. Huffard, 69 Mo. 305; Perkins v. Concord R. R., 44 N. H. 223; People v. Koerner, 117 App. Div. 40, 102 N. Y. Supp. 93; Beltinger v. New York etc. R. Co., 23 N. Y. 42; The Clipper v. Logan, 18 Ohio, 375; Bellefontaine etc. R. Co. v. Bailey, 11 Ohio St. 333; Bonner v. Mayfield, 82 Tex. 234, 18 S. W. 305; McKinstry v. Collins, 74 Vt. 147, 52 Atl. 438; Davey v. Janesville, 111 Wis. 628, 87 N. W. 813; Eastern Transp. Line v. Hope, 95 U. S. 297, 24 L. Ed. 477.

⁵¹ State v. Felter, 25 Iowa, 67; Bellefontaine etc. R. Co. v. Bailey, *supra*; McNaghten's Case, 10 Clark & F. 211, 8 Eng. Reprint, 718. See § 378, *post*.

⁵² Clark v. Baird, 9 N. Y. 183; Bearss v. Copley, 10 N. Y. 93.

⁵³ Harris v. Panama R. R. Co., 36 N. Y. Sup. Ct. 373.

⁵⁴ Jackson v. New York Cent. R. Co., 2 Thomp. & C. (N. Y.) 653.

⁵⁵ Moore v. Westervelt, 9 Bosw. (N. Y.) 558.

⁵⁶ Price v. Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645.

⁵⁷ Walsh v. Washington Marine Ins. Co., 32 N. Y. 427. See, also, Drouin v. Wilson, 80 Vt. 335, 13 Ann. Cas. 93, 67 Atl. 825, where a carpenter of thirty years' standing, who had had some experience in setting and repairing plate-glass windows, was treated as an expert. See, also, generally, § 368, *ante*, and as to nautical matters, § 385, *post*.

and whether they justify his conclusions.⁵⁸ In several of the cases last cited, questions were held improper because no foundation had thus been laid. The facts on which his opinion is based should have logical connection with the facts under inquiry.⁵⁹ There is, nevertheless, an irreconcilable conflict on the point, but the weight of authority is with the proposition as stated above. As against the minority, the opinion of the United States supreme court⁶⁰ completely outweighs the opposite doctrine in point of reasoning. A physician was asked, "Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all you know about him yourself, what his condition of mind was?" To that portion of the question which called for an opinion from the witness from "all that you know about him yourself," objection was made and sustained. Chief Justice Fuller said: "We agree with the court of appeals that the trial court did not err in hold-

⁵⁸ Burns v. Barenfield, 84 Ind. 43; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Van Deusen v. Newcomer, 40 Mich. 90; Reid v. Piedmont etc. Life Ins. Co., 58 Mo. 421; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Hitchcock v. Burgett, 38 Mich. 501; Flannagan v. State, 106 Ga. 109, 32 S. E. 80; State v. Simonis, 39 Or. 111, 65 Pac. 595; Easler v. Railway Co., 59 S. C. 311, 37 S. E. 938; Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397; Parrott v. Commonwealth, 20 Ky. Law Rep. 761, 47 S. W. 452; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Van Deusen v. Newcomer, 40 Mich. 90; Scott v. Hay, 90 Minn. 304, 97 N. W. 106; Kinney v. Brotherhood of Am. Yeomen, 15 N. D. 21, 106 N. W. 44; State v. Simonis, 39 Or. 111, 65 Pac. 595; Gibson v. Gibson, 9 Yerg. (Tenn.) 329; Bryan Press Co. v. Houston etc. R. Co. (Tex. Civ.), 110

S. W. 99; Foster v. Fidelity etc. Co., 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; Stewart v. Sloss-Sheffield Steel etc. Co., 170 Ala. 544, Ann. Cas. 1912D, 815, 54 South. 48; Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481; Fowlie v. McDonald, 82 Vt. 230, 72 Atl. 989; Raub v. Carpenter, 187 U. S. 159, 47 L. Ed. 119, 23 Sup. Ct. Rep. 72; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359. If a physician gives an opinion as to the sanity of a person, the symptoms and circumstances should be stated: Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106. See note on "Necessity That Expert Witness State Facts upon Which His Opinion is Based," to People v. Faber, 20 Ann. Cas. 883.

⁵⁹ Taylor v. Sutherland, 24 Pa. 333; Moore v. State, 17 Ohio St. 521.

⁶⁰ Raub v. Carpenter, 187 U. S. 159, 47 L. Ed. 119, 23 Sup. Ct. Rep. 72.

ing that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the existence of facts for which there was no foundation in the evidence." The reason for the opposing view is that such facts may be brought out on cross-examination, but that position overlooks the possibility of the opinion being ill-founded, and the facts not being so brought out. The view that the bald statement of the opinion may be expressed is nevertheless fairly supported, and in a recent New York case ⁶¹ is emphasized by the citation of another New York case in support.⁶² But that case says: "It is undoubtedly the better practice to require the witness to state the circumstances of his examination, and the facts, symptoms or indications upon which his conclusion is based before giving the opinion to the jury." On the whole, then, notwithstanding the respectable authorities which support the view that the opinion of an expert witness, based upon his own observations, is admissible without a statement of the facts upon which it is based,⁶³ the better law undoubtedly is with the majority which calls for the statement of the facts, if for no other reason than that of the unanswerable argument of Fuller, C. J., that when the witness states a conclusion on facts which he alone knows, and does not dis-

⁶¹ *People v. Faber*, 199 N. Y. 256, 20 Ann. Cas. 879, 92 N. E. 674.

⁶² *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460.

⁶³ *Lodge v. Lodge's Will*, 2 *Houst. (Del.)* 418; *State v. Felter*, 25 *Iowa*, 67; *Morrow v. National etc. Assn.*, 125 *Iowa*, 633, 101 N. W. 468; *Commonwealth v. Johnson*, 188 *Mass.*

382, 74 N. E. 939; *Brown v. Hufard*, 69 *Mo.* 305; *People v. Young*, *supra*; *State v. Foote*, 58 *S. C.* 218, 36 *S. E.* 551; *Roraback v. Pennsylvania Co.*, 58 *Conn.* 292, 20 *Atl.* 465. In the useful note to *People v. Faber*, 20 *Ann. Cas.* 883, some of these cases are challenged by references to others in the same jurisdiction.

close, there is an assumption of the existence of facts for which there is no evidentiary foundation. Such a position is, of course, not sustainable.

§ 376 (378). **Opinions based upon hearsay—Conclusions of law, etc.**—The exclusion of hearsay finds, of course, no exception in the testimony of expert witnesses. As a fact, it would be open to more serious objection from them than from other witnesses, seeing that they must form their judgment upon the facts assumed for the hypothetical questions put to them. So that while, as we have seen, the opinions of experts may in some cases be based upon personal knowledge gained from their own observation or examination, they cannot give in evidence opinions based upon information gained from the statements of others outside the courtroom, since in such case the opinions would depend upon *hearsay*.⁶⁴ Thus, when a medical witness is examined as an expert, his opinion is inadmissible if based upon the declaration of nurses or other physicians, made out of court,⁶⁵ although, on grounds elsewhere discussed, the declarations of the patient may, under proper limitations, form a part of the basis of such opinions.⁶⁶ This was well illustrated in a Wisconsin case, where a physician was allowed to state whether in his

⁶⁴ Polk v. State, 36 Ark. 117; Baltimore & O. R. Co. v. Shipley, 39 Md. 251; Hurst v. Chicago & R. I. etc. R. Co., 49 Iowa, 76; Flannagan v. State, 106 Ga. 109, 32 S. E. 80.

⁶⁵ Heald v. Thing, 45 Me. 392; Wood v. Sawyer, Phill. L. (61 N. C.) 251; Wetherbee v. Wetherbee, 38 Vt. 454; Hunt v. State, 9 Tex. App. 166; Louisville etc. Ry. Co. v. Shires, 108 Ill. 617. It must be founded on his personal knowledge or on a hypothetical question: Grand Rapids etc. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Hunt v. State, 9 Tex. App. 166;

Louisville etc. Ry. Co. v. Shires, 108 Ill. 617.

⁶⁶ Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658; Louisville Ry. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 3 L. R. A. 434, 20 N. E. 284; Illinois Central R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Wilson v. Granby, 47 Conn. 59, 36 Am. Rep. 51; Caldwell v. Murphy, 11 N. Y. 416; Denton v. State, 1 Swan (Tenn.), 279; Atchison Ry. Co. v. Johns, 36 Kan. 769; Hatch v. Fuller, 131 Mass. 574. See § 349 *ante*.

opinion a party suffered pain, judging from an examination he had made and *from what she said*.⁶⁷ The trial court has some discretion in regard to the form of questions to be propounded to an expert, but such discretion has never been extended so as to allow an expert to take into account, in answering a question, unsworn statements of facts gleaned apart from the trial.⁶⁸ On the general principle already stated that experts cannot take the place of the court or jury, it is obvious that questions should not call for their opinions upon *conclusions of law*,⁶⁹ or as to abstract questions of *morals or duty*,⁷⁰ or as to mere matters of speculation,⁷¹ or as to whether they agree with or differ

⁶⁷ *Quaife v. Chicago & N. W. Ry. Co.*, 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658. But the opinion cannot be based upon his own observation and the statements of third persons: *Heald v. Thing*, 45 Me. 392.

⁶⁸ *Cobb v. United Engineering etc. Co.*, 191 N. Y. 475, 84 N. E. 395.

⁶⁹ *Gage v. Billing*, 12 Cal. App. 688, 108 Pac. 664; *Connor v. Hodges*, 7 Ga. App. 153, 66 S. E. 546; *Pickham v. Illinois etc. R. Co.*, 153 Ill. App. 281; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Pittsburg etc. R. Co. v. Reich*, 101 Ill. 157; *Williams v. Dewitt*, 12 Ind. 309; *Indianapolis Rapid Transit Co. v. Walsh*, 45 Ind. App. 42, 90 N. E. 138; *Getchell etc. Lumber etc. Co. v. National Surety Co. (Iowa)*, 100 N. W. 1123; *Rozirne v. Ball*, 51 Iowa, 328; *Russell v. Louisville etc. R. Co. (Ky.)*, 124 S. W. 841; *Olmstead v. Koester*, 14 Kan. 463; *Zeringue v. White*, 4 La. Ann. 301; *Wells etc. Council, U. A. M. v. Littleton*, 100 Md. 416, 60 Atl. 22; *May v. Bradlee*, 127 Mass. 414; *Barts v. Morse*, 126 Mass. 226; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *White v. Bailey*, 10 Mich. 155; *Iler v. Miller*, 78 Neb. 675, 14 L. R. A., N. S., 289, 111 N. W. 589; *Ex parte Clark*, 20 N. J. L. 643, 45

Am. Dec. 394; *Trenton Potteries Co. v. Title etc. Co.*, 176 N. Y. 65, 68 N. E. 132; *Murray v. Ellis*, 112 Pa. 485, 3 Atl. 845; *Nashville etc. R. Co. v. Brundige*, 114 Tenn. 31, 4 Ann. Cas. 887, 84 S. W. 805; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Chancey v. State*, 58 Tex. Cr. 54, 124 S. W. 426; *North Point etc. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 40 L. R. A. 851, 52 Pac. 168; *Clough v. Patrick*, 37 Vt. 421; *Life Ins. Co. v. Hairston*, 108 Va. 832, 128 Am. St. Rep. 989, 62 S. E. 1057; *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200; *Wright v. Michigan Cent. R. Co.*, 130 Fed. 843, 65 C. C. A. 327; *Ex parte Chow Chok*, 161 Fed. 627; *Carter v. Boehm*, 1 W. Bl. 593, 96 Eng. Reprint, 342.

⁷⁰ *Allen v. Burlington, C. R. & N. Ry. Co.*, 57 Iowa, 623, 11 N. W. 614; *Missouri Ry. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291.

⁷¹ *Cooper v. State*, 23 Tex. 331; *State v. Pike*, 65 Me. 111; *Sinnott v. Mullin*, 82 Pa. 333. See, also, the Canadian case of *Diffin v. Dow, P. & T.* 107, as to the evidence of one witness being reconcilable with that of another.

from the opinions of other experts.⁷² It is obvious that while conclusions of law may not be stated by the witness, there can be no possible objection to a statement of the facts, irrespective of number and minuteness, from which such conclusion may be drawn. Very often it is difficult to distinguish where fact ends and conclusion begins, and each case calls for the watchfulness of the presiding judge. It would be useless to attempt to illustrate the point in any general application, as it arises wherever a conclusion may be drawn; and the witness should be so guided to state the particular facts, though it may be awkward for him so to do, and though to a limited extent his statements may trench on and contain an almost inseparable reference to the legal conclusion.⁷³ Thus, in an action of forcible entry and detention, a question asked of a witness as to who was in possession of the property was not objectionable, as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions put to witnesses indicating that the word was used in its technical sense as synonymous with "seisin."⁷⁴ Where a plaintiff testified that the use of certain land by the public for the purpose of passage was of common convenience and necessity, and it was objected to as matter of opinion, the court said: "We cannot regard the common convenience and necessity of a proposed highway as a mere matter of opinion, entirely apart from the facts upon which it is based, but as a fact provable by showing the location, the surrounding property, the nature and extent of the business carried on in the neighborhood, the population, etc., supplemented by the judg-

⁷² *Horne v. Williams*, 12 Ind. 324.

⁷³ *Donehoo v. Johnson*, 120 Ala. 438, 24 South. 888; *Eldorado Jewelry Co. v. Hitchcock*, 130 Ga. 778, 61 S. E. 855; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306; *Cleveland etc. R. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa, 551, 87 N. W. 505;

Morris v. Hazelhurst, 30 Md. 362; *Bellows v. Crane Lumber Co.*, 119 Mich. 424, 78 N. W. 536; *Davis v. Peck*, 54 Barb. (N. Y.) 425; *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68.

⁷⁴ *Hier v. Miller*, 78 Neb. 675, 14 L. R. A., N. S., 289, 111 N. W. 589.

ment of practical men residing in the vicinity.”⁷⁵ So where it was objected that a fence was described as “a partition fence,” as such description was a conclusion of law, Peters, C. J.,⁷⁶ said: “It may have been a fence erected by agreement of the parties who owned the lands. The witness might have known this fact. He could then have proved its existence as an existing thing. Its character then, would not have been a conclusion of law, but the result of the agreement of the parties. This evidence would have been competent.” So it is sometimes a point of nicety whether a partnership has been formed, and as to the liability of the parties *inter se*, or in respect to third persons. But whether a number of individuals associated themselves together, with the view of accomplishing a definite purpose, is certainly a distinct fact, and a witness who is informed upon the point may respond affirmatively, or negatively, to such inquiry.⁷⁷ So ownership of property, where the question of title is not involved, may be testified to as a fact;⁷⁸ except when the whole issue of the case turns upon it.⁷⁹ From the decisions with which the text-books and encyclopedias abound, we have selected the above, but the proposition does not call for any profusion of illustration.

§ 377 (379). Form of hypothetical questions.—It is now necessary to consider in what manner the hypothetical question is to be presented—in what language it is to be couched. In a Massachusetts case,⁸⁰ Shaw, C. J., in de-

⁷⁵ *Spencer v. New York etc. R. Co.*, 62 Conn. 242, 25 Atl. 350.

⁷⁶ *Avary v. Searcy*, 50 Ala. 54.

⁷⁷ *Anderson v. Snow*, 9 Ala. 247.

As to the relation of landlord and tenant, the question is frequently easy of solution; but whether the facts be complicated or simple they should be referred to the jury with appropriate instructions upon the law: *Parker v. Haggerty*, 1 Ala. 632.

⁷⁸ *Hunnicutt v. Higginbotham*, 138

Ala. 472, 100 Am. St. Rep. 45, 35 South. 469; *Rasco v. Jefferson*, 142 Ala. 705, 38 South. 246; *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384; *Muller v. Abramson*, 54 N. Y. Supp. 1027; *O'Farrell v. O'Farrell*, 56 Tex. Civ. App. 51, 119 S. W. 899.

⁷⁹ *Pichler v. Reese*, 171 N. Y. 577, 64 N. E. 441.

⁸⁰ *Woodbury v. Obear*, 7 Gray (Mass.), 467.

ciding that a question, "Suppose all the facts stated by the several witnesses to be true, was Mr. Woodbury laboring under an insane delusion or was he of unsound mind?" was not admissible in that form, said that the following was the form in which it would have been right: "If certain facts, assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion upon the facts thus found true, on the question of soundness of mind?" A question should not involve the necessity of the witness finding a controverted fact in order to reconcile conflicting evidence to give his opinion.⁸¹ It should be put to the witness hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is. The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it is, then to give such weight to the opinion resting on it as it deserves; but if the fact is not proved by the evidence, then to give the opinion no weight. This is necessary to enable the jury, upon the true theory of jury trial, to decide all questions of fact, upon competent evidence laid before them.⁸² In an old and well-known case,⁸³ the form of the question was very fully considered, and the following form of question was adopted: "You have all the evidence in this case—supposing the jury to be satisfied that the facts and circumstances testified to by the other witnesses, are true, what is your opinion as a medical man of the state of the prisoner's mind, at the time of the commission of the alleged crime? Was the prisoner, in your opinion, at the time of doing the act, under any and what kind of insanity or delusion, and what would you expect would be the conduct of a person under such circumstances?"⁸⁴ In cases of personal injuries

⁸¹ *Fairechild v. Bascomb*, 35 Vt. 398; *Hathaway v. National Life Ins. Co.*, 48 Vt. 335.

⁸² *McNaghten's Case*, 10 Clark & F. 200, 8 Eng. Reprint, 718; *Dicken-*

son v. Fitchburg, 13 Gray (Mass.), 546.

⁸³ *State v. Windsor*, 5 Harr. (Del.) 512.

⁸⁴ *In Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458,

caused by railroad trains, questions as to the time it would take to stop the train should embody sufficient facts to render the answer of use to the jury. In one case⁸⁵ Lamm, J., said: "A mass of expert testimony was introduced as to the distance in which a train could be stopped that was going at this, that, or the other rate. . . . The ability to stop a train generally—that is, the distance in which it could be stopped—was wholly on the air. The concrete case, even if such question be pertinent at all, was in what distance a passenger train of the length of the one doing the injury, going against such a storm of snow, rain, and wind as then prevailed, could be stopped with safety to the train and its occupants, on a slight upgrade, equipped with the appliances that train had." But there is no exclusive formula.⁸⁶ The authoritative forms given are by way of example only. The object is to obtain the opinion of the expert as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may assume a great variety of form. In another Massachusetts case⁸⁷ there are several useful guides for framing the question: 1. It is important that the form of the question should be such as not to require or permit the witness to draw conclusions of fact from the evidence in the case, and to give an opinion based wholly or in part upon such conclusions. 2. A witness ought never to be permitted to give an opinion upon the effect of evidence in establishing facts which do not de-

Shaw, C. J., adopted the following form: "If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances."

⁸⁵ *Frye v. St. Louis etc. R. Co.*, 200 Mo. 377, 8 L. R. A., N. S., 1069, 98 S. W. 566, followed in *Palmer v. St. Louis etc. R. Co. (Mo.)*, 127 S. W. 96.

⁸⁶ *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169, 85 Am. Dec. 697; *Burnside v. Town of Everett*, 186 Mass. 4, 71 N. E. 82.

⁸⁷ *McCarthy v. Boston Duck Co.*, 165 Mass. 165, 42 N. E. 568.

pend upon his knowledge as an expert. 3. Where the evidence is conflicting or relates to many details, or where inferences of fact must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hypothetically. 4. It is impossible to lay down an absolute rule for all cases, and some discretion must undoubtedly be left to the justice presiding at the trial. Objection to the form of the question must be specific, or it will be held to have been waived.⁸⁸ Since the facts sought to be presented in a hypothetical question may be very numerous, it sometimes happens that objection is made to the *length of the question*. But this is a matter to be regulated largely by the *discretion* of the trial judge.⁸⁹ There are instances, however, in which it has been held error to permit hypothetical questions so long and complicated that they were likely to confuse witnesses or to baffle their memory.⁹⁰ So, too, in framing questions, care should be taken not to involve so much, or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts in order to give his answer. When facts on one side conflict with those on the other, they should not be put in one question, but the witness should be told of their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. Then the jury can know all the facts and grounds upon which the opinion is based.⁹¹ Although, as will be seen, expert witnesses may be asked the grounds and reasons for their opinions,⁹² it is clearly irrelevant on direct examination to ask the witnesses to

⁸⁸ Lake St. etc. R. Co. v. Sandy, 137 Ill. App. 244.

⁸⁹ Forsythe v. Doolittle, 120 U. S. 73, 30 L. Ed. 586, 7 Sup. Ct. Rep. 408; Davis v. Travelers' Ins. Co., 59 Kan. 74, 52 Pac. 67. See, also, § 371, *ante*.

⁹⁰ People v. Brown, 53 Mich. 531, 19 N. W. 172; Haish v. Payson, 107

Ill. 365. To obviate this difficulty the court may require the question to be reduced to writing: Jones v. President etc., 88 Mich. 598, 16 L. R. A. 437, 50 N. W. 731.

⁹¹ Fairchild v. Bascomb, 35 Vt. 398.

⁹² See § 368 et seq., *ante*.

give the facts or details of *other particular cases*, even though similar, which have come within the range of their experience or observation. This would be a violation of the familiar rule that the testimony must be confined to the point in issue.⁹³

§ 378 (380). Physicians and surgeons.—While it would be impracticable to deal with every department of science or art in which expert testimony might be given, we purpose selecting those classes which in the number and range of decisions may be said to cover practically the entire field. Foremost among these is the expert testimony called for from medical and surgical practitioners; and the following details of the various branches, upon which such evidence has been called for and received, will disclose only portion of the area covered by the number of cases which increases with every discovery in either medicine or surgery.⁹⁴ The opinions of physicians and surgeons may be admitted to show the physical condition of a person,⁹⁵ the

⁹³ *Horne v. Williams*, 12 Ind. 324; *St. Louis Gaslight Co. v. American Fire Ins. Co.*, 33 Mo. App. 348; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247.

⁹⁴ The following are some of the most recent decisions: *Western Union Tel. Co. v. Rowell*, 166 Ala. 651, 51 South. 880; *Supreme Lodge etc. v. Baker*, 163 Ala. 518, 50 South. 958; *Arkansas etc. R. Co. v. Wingfield*, 94 Ark. 75, 126 S. W. 76; *Kimie v. San Jose etc. R. Co.*, 156 Cal. 379, 104 Pac. 986; *Jacksonville Elec. Co. v. Cabbage*, 58 Fla. 287, 51 South. 139; *Fox v. Joliet*, 150 Ill. App. 491; *Amann v. Chicago etc. Trac. Co.*, 148 Ill. App. 151; *Lauth v. Chicago etc. Trac. Co.*, 146 Ill. App. 584; *Hirsch v. Chicago etc. Trac. Co.*, 146 Ill. App. 501; *City of Georgetown v. Groff*, 136 Ky. 662, 124 S. W. 888; *Burns v. Brier*, 204 Mass. 195, 90 N. E. 399;

Torreyson v. United R. Co., 144 Mo. App. 626, 129 S. W. 409; *Brown v. Springfield etc. Co.*, 141 Mo. App. 382, 125 S. W. 236; *Gugler v. Omaha etc. R. Co.*, 86 Neb. 586, 125 N. W. 1098; *Hilmer v. Western Travelers' etc. Assn.*, 86 Neb. 285, 27 L. R. A., N. S., 319, 125 N. W. 535; *St. Louis etc. R. Co. v. Taylor* (Tex. Civ. App.), 123 S. W. 714; *Missouri etc. R. Co. v. Graves*, 57 Tex. Civ. App. 395, 122 S. W. 458; *Charron v. Northwestern Fuel Co.*, 143 Wis. 437, 128 S. W. 75.

⁹⁵ *Knox v. Wheelock*, 56 Vt. 191; *Spear v. Hiles*, 67 Wis. 361, 30 N. W. 511; *Myers v. State*, 84 Ala. 11, 4 South. 291; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308; *Jones v. Chicago, M. & St. P. Ry. Co.*, 43 Minn. 279, 45 N. W. 444. In *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76, a person who was a Christian Scientist doctor was allowed to testify as an

nature of a disease, whether temporary or permanent,⁹⁶ the effect of disease or of physical injuries upon the body or mind,⁹⁷ as well as in what manner or by what kind of instruments they were made,⁹⁸ or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death,⁹⁹ the cause, symptoms, nature and peculiarities of a disease, and whether it would be likely to cause death,¹⁰⁰ the probable future consequences of an injury, when the consequences anticipated are such as in the ordinary course of events may be reasonably expected to

expert, it being shown that she had previously been in practice as a physician.

⁹⁶ *Wilt v. Vickers*, 8 Watts (Pa.), 227; *Matteson v. New York Central R. Co.*, 35 N. Y. 487, 91 Am. Dec. 67; *Rowell v. Lowell*, 11 Gray (Mass.), 420; *Noblesville etc. Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224; *Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, 21 N. E. 977; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Filer v. New York C. R. Co.*, 49 N. Y. 42.

⁹⁷ *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Willey v. Portsmouth*, 35 N. H. 303; *Bliss v. New York Central & H. R. Ry. Co.*, 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65; *Montgomery v. Scott*, 34 Wis. 338; *Hardiman v. Brown*, 162 Mass. 585, 39 N. E. 192; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; *Reed v. City of Madison*, 85 Wis. 667, 56 N. W. 182; *Flynt v. Bodenhamer*, 80 N. C. 205; *Filer v. New York C. R. Co.*, 49 N. Y. 42; *Evansville Ry. Co. v. Christ*, 116 Ind. 446, 9 Am. St. Rep. 865, 2 L. R. A. 450, 19 N. E. 310; *Gulf C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556; *State v. Ginger*, 80 Iowa, 574; *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3, 39 Am. St.

Rep. 446, 35 N. E. 95; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363.

⁹⁸ *Gardner v. People*, 6 Park C. C. (N. Y.) 202; *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *Davis v. State*, 38 Md. 15; *Ulrich v. People*, 39 Mich. 245; *Rash v. State*, 61 Ala. 89; *State v. Chee Gong*, 17 Or. 635, 21 Pac. 882; *People v. Hopt*, 4 Utah, 247, 9 Pac. 407; *Johnson v. Steam Gauge Co.*, 146 N. Y. 152, 40 N. E. 773; *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986; *State v. Clark*, 34 N. C. 151; *Jerome v. United R. Co.*, 155 Mo. App. 202, 134 S. W. 107.

⁹⁹ *Lindsay v. People*, 63 N. Y. 143; *State v. Harris*, 63 N. C. 1; *State v. Clark*, 15 S. C. 403; *Shelton v. State*, 34 Tex. 662; *People v. Wilson*, 109 N. Y. 345, 16 N. E. 540; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

¹⁰⁰ *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Batten v. State*, 80 Ind. 394; *Eggler v. People*, 56 N. Y. 642; *Waite v. State*, 13 Tex. App. 169; *State v. Powell*, 7 N. J. L. 244; *Livingston v. Commonwealth*, 14 Gratt. (Va.) 592; *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *Ebos v. State*, 34 Ark. 520; *State v. Jones*, 68 N. C. 443; *Smalley v. Appleton*, 75 Wis. 18,

happen, and are not merely speculative or possible.¹ While it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury,² he may be asked by what kinds of weapons wounds of a given description might be caused,³ or whether wounds of a given character were

43 N. W. 826; Illinois Cent. Ry. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7; Stouter v. Manhattan Ry. Co., 127 N. Y. 661, 27 N. E. 805. So a physician may be asked what was the "exciting cause of the injury": Vosburg v. Putney, 86 Wis. 278, 56 N. W. 480.

¹ Strohm v. New York etc. R. Co., 96 N. Y. 305; Seckinger v. Philibert Mfg. Co., 129 Mo. 590, 31 S. W. 957; Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 46 Am. St. Rep. 849, 27 L. R. A. 365, 61 N. W. 1106; Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051. See note 97 to this section. In Johnson v. Central Vermont R. Co., 56 Vt. 707, a physician was allowed to state that the plaintiff would never be able to do heavy work. But see Kline v. Kansas City R. Co., 50 Iowa, 656. Other cases illustrating the subject in which medical opinions have been admitted: Significance of powder stains: State v. Asbell, 57 Kan. 393, 46 Pac. 770; force required to make instrument penetrate bone: People v. Fish, 125 N. Y. 136, 26 N. E. 319; whether a certain weapon could kill a man: People v. Valliere, 123 Cal. 576, 56 Pac. 433; Perry v. State, 110 Ga. 234, 36 S. E. 781; symptoms which ordinarily and necessarily accompany injury: Cole v. Fall Brook C. Co., 159 N. Y. 59, 53 N. E. 670; probable effect of injury: Stembidge v. Railway Co., 65 S. C. 440, 43 S. E. 968; position of assailant: State v. Buralli, 27 Nev. 41, 71 Pac. 532; excluded, probable position of a person: People v. Hill, 116

Cal. 562, 48 Pac. 711; probable position of deceased's arm: People v. Farley, 124 Cal. 594, 57 Pac. 571; whether a person could live after being struck by a locomotive: Chicago & A. R. Co. v. Lewondowski, 190 Ill. 301, 60 N. E. 497; whether intercourse against a woman's consent was possible: State v. Peterson, 110 Iowa, 647, 82 N. W. 329; Lawlor v. Wolff, 180 Mass. 448, 62 N. E. 973; how a wound could have been inflicted: Missouri R. R. Co. v. Fox, 56 Neb. 746, 77 N. W. 130. See note on "Admissibility of Opinion Evidence as to Future Consequences of Injury," to Cross v. Syracuse, 21 Ann. Cas. 326.

² People v. Hare, 57 Mich. 505, 24 N. W. 843; State v. Rainsbarger, 74 Iowa, 196, 37 N. W. 153. See § 272 et seq., ante. In State v. Lee, 65 Conn. 265, 49 Am. St. Rep. 202, 27 L. R. A. 498, 30 Atl. 1110, the surgical expert was properly allowed to testify whether a certain wound on the interior surface of the womb of the deceased was of such a nature to render its self-infliction impracticable.

³ People v. Hare, 57 Mich. 505, 24 N. W. 843; State v. Rainsbarger, 74 Iowa, 196, 37 N. W. 153; Rowell v. Lowell, 11 Gray (Mass.), 420; Franklin v. Commonwealth, 105 Ky. 237, 48 S. W. 986; Littleton v. State, 128 Ala. 31, 29 South. 390. See, also, many illustrations cited, Rogers, Exp. Ev., § 53. In People v. Willson, 109 N. Y. 345, 16 N. E. 540, a physician was allowed to state whether the injury might have

caused before or after death;⁴ and after having made a post-mortem examination, a physician may testify whether a woman was pregnant at the time of her death,⁵ or whether the conditions disclosed indicated the cause of death.⁶ He may also testify as to the probable effect of a given course of treatment or medicines;⁷ what would be proper treatment under a given state of facts;⁸ the probabilities of recovery from the effects of an injury;⁹ what, under certain

been caused by somebody other than the person injured. They need not have seen the wounds in question or others exactly similar: *State v. Powell*, 7 N. J. L. 244; *Page v. State*, 61 Ala. 16; *State v. Clark*, 12 Ired. (34 N. C.) 151. But the rule is otherwise if the witness is not an expert: *Caleb v. State*, 39 Miss. 721; *State v. Cross*, 68 Iowa, 180, 26 N. W. 62.

⁴ *Ewell*, Med. Juris. 31.

⁵ *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578. A professional nurse having fifteen years' experience in obstetrical cases, and who assisted at the birth of a child, is competent to testify as to her opinion whether or not the child was fully developed at the time of its birth: *Soucek v. Karr*, 78 Neb. 488, 111 N. W. 150; and a graduate nurse who has been constantly engaged as a professional nurse for five years may properly be called upon as an expert to give evidence of why he administered strychnine and brandy to a patient: *Kimie v. San Jose etc. R. Co.*, 156 Cal. 379, 104 Pac. 986; a chemist, if he is shown to be competent to speak as an expert, may testify that he examined certain pus under a microscope and what the examination showed: *United States Health etc. Co. v. Jolly* (Ky.), 118 S. W. 281; a dentist, who treated the plaintiff in a personal injury case and extracted the roots of broken teeth was properly allowed to answer the

question whether it would take a light or heavy blow to leave the mouth in the condition in which he found it: *Gierczak v. Northwestern Fuel Co.*, 142 Wis. 207, 125 N. W. 436.

⁶ *Manufacturers' Acc. Assn. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620, 7 C. C. A. 581. See, also, *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202, 27 L. R. A. 498, 30 Atl. 1110.

⁷ *Matteson v. New York C. R. Co.*, 35 N. Y. 487, 91 Am. Dec. 67; *Linsday v. People*, 63 N. Y. 143; *Barber v. Merriam*, 11 Allen (Mass.), 322; *State v. Slagle*, 83 N. C. 630; *Mayor etc. of Jackson v. Boone*, 93 Ga. 662, 20 S. E. 46.

⁸ *Wright v. Hardy*, 22 Wis. 348; *Hoener v. Koch*, 84 Ill. 408; *Mertz v. Detweiler*, 8 Watts & S. (Pa.) 376; *Heath v. Glisan*, 3 Or. 64; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832.

⁹ *Wilt v. Vickers*, 8 Watts (Pa.), 227; *Rumsey v. People*, 19 N. Y. 41; *Peterson v. Chicago Ry. Co.*, 38 Minn. 511, 39 N. W. 485; *Louisville Ry. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193, 21 N. E. 968; *McClain v. Brooklyn City Ry. Co.*, 116 N. Y. 459, 22 N. E. 1062; *Alberti v. New York L. E. & W. Ry. Co.*, 118 N. Y. 77, 6 L. R. A. 765, 23 N. E. 35; *Griswold v. New York C. Ry. Co.*, 115 N. Y. 61, 12 Am. St. Rep. 775, 21 N. E. 726; *Springfield Ry. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034.

circumstances, might cause death or a physical condition of a given character,¹⁰ and as to questions of sanity or insanity;¹¹ also whether, under a given state of facts, insanity is real or feigned,¹² and whether or not great mental anxiety and suffering would tend to develop insanity, where there is an hereditary predisposition.¹³ Upon the question of the general medical practitioner testifying in mental cases, there is a diversity of decision, the preponderance of authority being in favor of accepting all educated and practicing physicians as experts, whether they have given special attention to the disease of insanity or not.¹⁴ If they are practicing physicians and have studied medical jurisprudence, the courts are inclined to accept them, more especially as the extent of the witness' acquaintance with

¹⁰ *State v. Powell*, 7 N. J. L. 244; *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *Shelton v. State*, 34 Tex. 662; *Curry v. State*, 5 Neb. 412; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *State v. Jones*, 68 N. C. 443. See, also, the late cases: *Empire Life Ins. Co. v. Gee* (Ala.), 60 South. 90; *Missouri etc. R. Co. v. Collins* (Ark.), 153 S. W. 607; *Elward v. Illinois Cent. R. Co.*, 161 Ill. App. 630; *Radel v. Borches*, 147 Ky. 506, 39 L. R. A., N. S., 227, 145 S. W. 155; *Baltimore etc. R. Co. v. Moon* (Md.), 84 Atl. 536; *Willard v. Norcross* (Vt.), 85 Atl. 904; *In re Whiting* (Me.), 85 Atl. 791; *Moran v. Dake Drug Co.*, 134 N. Y. Supp. 995; *Gulf etc. R. Co. v. Abbott* (Tex. Civ. App.), 146 S. W. 1078.

¹¹ *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *In re Blakely*, 48 Wis. 294, 4 N. W. 337; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *State v. Windsor*, 5 Harr. (Del.) 512; *Baxter v. Abbott*, 7 Gray (Mass.), 71; *Hastings v. Rider*, 99 Mass. 622; *Heald v. Thing*, 45 Me. 392; *State v. Felter*, 25 Iowa, 67;

Pigg v. State, 43 Tex. 108. See full note to *Burt v. State*, 39 L. R. A. 305-334.

¹² *State v. Hayden*, 51 Vt. 296.

¹³ *Dejarnette v. Commonwealth*, 75 Va. 867. Many illustrations of miscellaneous cases in which the opinions of medical men have been received will be found in *Rogers, Exp. Ev.*, § 81. The following cases also serve to illustrate the subject of this section: *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539 (physician testified as to the cause of death of a person found in a river); *Tompkins v. West*, 56 Conn. 478, 16 Atl. 237, (as to the effect of external pressure on the lungs); *Johnson v. Castle*, 63 Vt. 452, 21 Atl. 534 (as to whether a boy is capable of begetting a child); *Morgenstein v. Nejedlo*, 79 Wis. 388, 48 N. W. 652 (as to the probable effect of being unable to breathe through the nose); *Hickenbottom v. Delaware Ry. Co.*, 122 N. Y. 91, 25 N. E. 279 (as to whether a person feels pain in an imaginary limb).

¹⁴ 1 Bishop, Crim. Law, § 544.

the subject may always be inquired into, to enable the jury to estimate the weight of his evidence. As we have shown, the qualification is for the court; the weight of the evidence for the jury.¹⁵ On the other hand, there are courts which regard only the evidence of the alienist as of sufficient weight to guide the jury. In Maine, it has been held that the opinion of a physician, called as an expert, who has not made a special study of mental diseases, may be excluded on questions of insanity.¹⁶ In Massachusetts and Mississippi there are similar rulings. In the last-named state it was held essential that the witness should be, or profess to be, an expert in the general subject under discussion, and that an acquaintance with cognate pursuits would not suffice, unless the matter inquired about was common to both professions.¹⁷ In Texas, the expression of opinion is equally strong, founded on the generally unsatisfactory results from expert testimony in insanity cases. In that state, only those who are expert in mental diseases or psychological studies are regarded as authority, "for it is a knowledge rarely attained, and involving much study, observation and experience."¹⁸ It has frequently been held that the training and experience of physicians are such as to give them knowledge superior to that possessed by ordinary witnesses concerning the *diseases of animals*; and partly on this ground and partly because of the difficulty of procuring other expert testimony upon the subject, ordinary physicians are allowed to give opinions as to the causes, nature and effects of diseases among

¹⁵ *In re Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *State v. Windsor*, 5 Harr. (Del.) 512; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Abbott v. Commonwealth*, 107 Ky. 624, 55 S. W. 196; *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *In re Hoyle's Estate*, 162 Mich. 275, 127 N. W. 284; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783;

Flynt v. Bodenhamer, 80 N. C. 205; *State v. Roselair*, 57 Or. 8, 109 Pac. 865; *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

¹⁶ *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832.

¹⁷ *Commonwealth v. Rich*, 14 Gray (Mass.), 335; *Russell v. State*, 53 Miss. 367.

¹⁸ *McLeod v. State*, 31 Tex. Cr. 331, 20 S. W. 749.

animals.¹⁹ As a preliminary question as to his qualification as an expert, a medical witness may be asked whether the examination made by him was careful or merely superficial.²⁰ The evidence of expert *veterinary surgeons* is admissible as to the proper treatment for a sick horse, its condition and the cause of such condition.²¹

§ 379 (381). Same—Testimony of physicians and others as to poisons.—Toxicology is regarded in some jurisdictions as part of the scientific knowledge of physicians, and to a certain extent this is justified by the course of education of medical men. Thus it is that chemists and physicians, who are qualified by proper study and experience, may testify as to the nature of poisons and their effect on the system and the symptoms which they produce.²² But the fact that the witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poison in the human system, since he may be wholly lacking in the requisite knowledge of chemical science. There is conflict on this question, and it has been held in several cases that he is not qualified if his knowledge on the subject has been obtained wholly from medical or scientific books or medical instruction, and not from personal observation or experience.²³ But the contrary rule is adopted in some states.²⁴ Although it is usual for experts

¹⁹ *State v. Sheets*, 89 N. C. 543; *Horton v. Green*, 64 N. C. 64; *House v. Fort*, 4 Blackf. (Ind.) 293; *Pierson v. Hoag*, 47 Barb. (N. Y.) 243; *Kortendick v. Waterford*, 142 Wis. 413, 125 N. W. 945.

²⁰ *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 39 L. Ed. 977, 15 Sup. Ct. Rep. 840.

²¹ *Welch v. Fransioli*, 46 Wash. 530, 90 Pac. 644. The record in this case, however, shows that the testimony was not introduced so much for the purpose of proving the proper treatment from an expert standpoint, as it was to show the condition of the horse and the cause of such condition.

²² *State v. Terrell*, 12 Rich. (S. C.) 321; *People v. Robinson*, 2 Park. C. C. (N. Y.) 235; *Polk v. State*, 36 Ark. 117; *Mitchell v. State*, 58 Ala. 417; *State v. Hinkle*, 6 Iowa, 380.

²³ *Soquet v. State*, 72 Wis. 659, 40 N. W. 391; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *State v. Cole*, 63 Iowa, 695, 17 N. W. 183. The opposite rule was adopted in *Siebert v. People*, 143 Ill. 571, 32 N. E. 431. See, also, § 368, *ante*.

²⁴ *Boswell v. State*, 114 Ga. 40, 39 S. E. 897; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *People v.*

to subject compounds to a *chemical analysis* before testifying whether they are poisonous, or as to their ingredients, and although this has sometimes been held indispensable, the better rule is that the opinion may be received, although this test has been omitted, it being a matter which affects the *weight* rather than the competency of the testimony.²⁵ As to the analysis itself, it is desirable that great caution should be exercised in conducting experiments of this character, and that the most skillful professional aid should be secured. Where the experiments are conducted by such as have not had experience, or by those who, though not practical chemists, give their opinions from knowledge derived from the books upon that science, such opinions would be entitled to less weight than if given by a practical chemist—one who bases his conclusions upon experience as well as books. The means of knowledge are proper to be considered by the jury, and they should give or withhold credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly.²⁶

§ 380 (382). Mechanics and machinists as experts.—When a witness shows himself sufficiently expert in any particular art or craft to admit of an examination properly addressed to persons of skill in that department of industry, he is competent to give an opinion upon matters of which the jury could not be expected to judge accurately from the mere detail of facts.²⁷ Hence it is that the opinions of machinists and artisans may be received as evidence when they have by their experience gained an acquaintance with the subject not common to others, and

Benham, 160 N. Y. 402, 55 N. E. 11; State v. Sheets, 89 N. C. 543; State v. Simonis, 39 Or. 111, 65 Pac. 595.

²⁵ State v. Slagle, 83 N. C. 630.

²⁶ State v. Hinkle, 6 Iowa, 380. The opinion continues: "But to say that none shall be permitted to give their opinions except those of the

highest professional skill, or those who had given their lives to chemical experiments, would, in this country at least, render it impossible, in most cases, to find the requisite skill and ability."

²⁷ Cole v. Clarke, 3 Wis. 323.

which may aid the court or jury in coming to a conclusion.²⁸ Thus, their opinions are admissible as to the proper mode of doing work, as in the erection of buildings,²⁹ the proper mode of constructing machinery,³⁰ and the comparative merits of different machines.³¹ So they may give their opinions as to the value of labor, services or material necessary for a specific work,³² or as to the time necessary to complete or perform it,³³ or as to the proper mode of measuring or estimating such work,³⁴ or as to the mode of doing work in such manner as to comply with a certain contract,³⁵ or as to the amount or kind of work done or capable

²⁸ *Huggins v. Southern R. Co.*, 148 Ala. 153, 41 South. 856; *Punkowski v. New Castle Leather Co.*, 4 Penne. (Del.) 544, 57 Atl. 559; *Warren v. City Electric R. Co.*, 141 Mich. 298, 104 N. W. 613; *Gitlin v. Stone*, 126 N. Y. Supp. 88; *Burroughs v. Curtiss Lumber Co.*, 58 Or. 270, 114 Pac. 103; *Koon v. Southern R. Co.*, 69 S. C. 101, 48 S. E. 86.

²⁹ *Haver v. Tenney*, 36 Iowa, 80, 39 Am. Rep. 674; *Shulte v. Hennessy*, 40 Iowa, 352; *Ward v. Kilpatrick*, 85 N. Y. 413; *Ford v. Tirrell*, 9 Gray (Mass.), 401, 69 Am. Dec. 297; *Prendible v. Connecticut Mfg. Co.*, 160 Mass. 131, 35 N. E. 675. But it must first be shown that he has the requisite knowledge to make him an expert: *Peteler Mfg. Co. v. Northwestern Mfg. Co.*, 60 Minn. 127, 61 N. W. 1024.

³⁰ *Sheldon v. Booth*, 50 Iowa, 209; *Curtis v. Gano*, 26 N. Y. 426; *Carroll v. Welch*, 26 Tex. 147; *Cole v. Clarke*, 3 Wis. 323; *Taylor v. French Lumber Co.*, 47 Iowa, 662; *Hammer v. Janowitz*, 131 Iowa, 20, 108 N. W. 109; *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342. On the general subject of this section see the recent cases: *Stockton Iron Works v. Walters*, 18 Cal. App. 373, 123 Pac.

240; *McCune v. Ratcliff*, 88 Kan. 653, 129 Pac. 1167; *Louisville etc. R. Co. v. Goodwin*, 151 Ky. 149, 151 S. W. 376; *Jewell v. Excelsior Powder Mfg. Co.*, 166 Mo. App. 555, 149 S. W. 1045; *Canham v. Rhode Island Co. (R. I.)*, 85 Atl. 1050; *Texas Traction Co. v. Morrow (Tex. Civ. App.)*, 145 S. W. 1069.

³¹ *James v. Hodsdon*, 47 Vt. 127; *Great Western R. Co. v. Haworth*, 39 Ill. 346; *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

³² *Hough v. Cook*, 69 Ill. 581; *Waco Tap. R. Co. v. Shirley*, 45 Tex. 355; *Simmons v. Carrier*, 68 Mo. 416; *Shepard v. Ashley*, 10 Allen (Mass.), 542; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668; *Kelly v. Rowane*, 33 Mo. App. 440; *Ruppel v. Adrian Mfg. Co.*, 96 Mich. 455, 55 N. W. 995; *Shields v. Norton*, 143 Fed. 802, 74 C. C. A. 254 (laying pipes).

³³ *Swain v. Naglee*, 17 Cal. 416; *Stiles v. Neillsville Co.*, 87 Wis. 266, 58 N. W. 411.

³⁴ *Shulte v. Hennessey*, 40 Iowa, 352 (measuring masonry); *Ford v. Tirrell*, 9 Gray (Mass.), 401, 69 Am. Dec. 297.

³⁵ *Ogden v. Parsons*, 23 How. (U. S.) 167, 16 L. Ed. 410; *Haver v. Tenney*, 36 Iowa, 80; *Stark Grain Co.*

of being done by certain machinery,³⁶ or that which a certain force of men could do,³⁷ or whether a certain mode of operating a given machine would be safe, as well as whether the machine itself was safe.³⁸ So the opinions of masons,³⁹ bridge-builders,⁴⁰ and other mechanics and artisans,⁴¹

v. Harry Bros. Co., 57 Tex. Civ. App. 529, 122 S. W. 947; Hilliard v. King, 134 Ga. 817, 68 S. E. 649.

³⁶ People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074; Union Show Case Co. v. Blindauer, 75 Ill. App. 358; Indiana etc. Coal Co. v. Buffey, 28 Ind. App. 108, 62 N. E. 279; Sheldon v. Booth, 50 Iowa, 209; Hayward v. Draper, 3 Allen (Mass.), 551; Skinner v. Kerwin etc. Glass Co., 103 Mo. App. 650, 77 S. W. 1011; Port Huron Mach. Co. v. Bragg, 77 Neb. 357, 109 N. W. 398; Meiners v. Steinway, 12 Jones & S. (44 N. Y. Sup. Ct.) 369; Burns v. Welch, 8 Yerg. (Tenn.) 117; Bemis v. Central Vermont R. Co., 58 Vt. 636, 3 Atl. 531; Clifford v. Richardson, 18 Vt. 620.

³⁷ Salvo v. Duncan, 49 Wis. 151, 4 N. W. 1074; Allen v. Murray, 87 Wis. 41, 57 N. W. 979.

³⁸ Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Lau v. Fletcher, 104 Mich. 295, 62 N. W. 357; Lang v. Terry, 163 Mass. 138, 39 N. E. 802; McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367. But the question whether a boy is a proper person to put at work upon a machine is not one for an expert: McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682. *Among the more important recent decisions on the subject of expert testimony with regard to machinery are:* McLain v. Dahlstrom etc. Co., 19 Cal. App. 475, 126 Pac. 391; Temple v. Gilbert (Conn.), 85 Atl. 380; Vohs v. A. E. Shorthill Co., 124 Iowa, 471, 100 N. W. 495; La Porte Carriage Co. v. Sullender (Ind. App.), 71 N. E. 922;

Warren v. Jeunesse (Ky.), 122 S. W. 862; Ridge v. Boston etc. R. Co. (Mass.), 100 N. E. 667; Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340; Draper v. Atlantic etc. R. Co. (N. C.), 77 S. E. 231; Britt v. Carolina etc. R. Co., 148 N. C. 37, 61 S. E. 601; Wofford v. Clinton Cotton Mills, 72 S. C. 346, 51 S. E. 918; Cleburne etc. Gas Co. v. McCoy (Tex. Civ. App.), 149 S. W. 534; Gammel-Statesman Pub. Co. v. Montfort (Tex. Civ. App.), 81 S. W. 1029; Gustafson v. A. J. West Lumber Co., 51 Wash. 25, 97 Pac. 1094; Grand Trunk Western R. Co. v. Lindsay, 201 Fed. 836; City of Manchester v. Landry, 199 Fed. 882, 118 C. C. A. 330. See note on "Admissibility of Opinion Evidence as to Whether Work, Situation, Appliance, etc., is Dangerous," to Hamann v. Milwaukee Bridge Co., 7 Ann. Cas. 463.

³⁹ Smith v. Gugerty, 4 Barb. (N. Y.) 614; Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Miller v. Shay, 142 Mass. 598, 8 N. E. 419.

⁴⁰ Washington, C. & A. Turnpike Co. v. Case, 80 Md. 36; Bonebreak v. Board of Huntington County, 141 Ind. 62, 40 N. E. 141; Blank v. Livonia, 79 Mich. 1.

⁴¹ Wintringham v. Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999 (opinion of expert as to cost of repairing a yacht); Excelsior Electric Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553 (as to proper mode of erecting electric lights); Ouillette v. Overman Wheel Co., 162 Mass. 305, 38 N. E. 511 (as to detection of the want of

skilled in their respective trades, may be received as matters pertaining to their occupation.⁴² In an action by the contractor for damages for breach of a contract to drill gas wells, the testimony of witnesses who have had experience in drilling gas wells upon the same farm and other wells in the vicinity where the strata appear to be the same and the conditions similar, is competent to show the cost of doing the work contracted for, and prevented by the owner.⁴³ In an action for negligence in not discovering

repair of a shaft by its jarring the building); *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020 (as to the manufacture of nitro-glycerine); *Louisville, N. A. & C. Ry. Co. v. Berkeley*, 136 Ind. 181, 35 N. E. 3 (opinion of a blacksmith as to the quality of iron in a coupling-pin); *Boettger v. Scherpe Iron Co.*, 124 Mo. 87, 27 S. W. 466 (as to effect of a knot or cross-grain on the strength of a timber); *Kershaw v. Wright*, 115 Mass. 361 (as to the mode of packing hams); *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130 (as to the proper mode of floating logs); *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318 (as to the instrument with which a certain panel was cut); *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, 124 N. Y. Supp. 541 (as to moving heavy bank safe).

⁴² *T. & C. Ins. Co. v. Fouke*, 94 Ark. 358, 127 S. W. 461; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010; *Clark v. Johnson County Tel. Co.*, 146 Iowa, 428, 123 N. W. 327; *Maryland etc. R. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005; *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511, 72 N. E. 61; *Emerson v. Lowell Gas Light Co.*, 3 Allen (Mass.), 410; *Underfeed Stoker Co. v. Detroit Salt Co.*, 135 Mich. 431, 97 N. W. 959; *Owens v. Chicago etc. R. Co.*, 113

Minn. 49, 128 N. W. 1011; *Obermeyer v. Logeman etc. Mfg. Co.*, 120 Mo. App. 59, 96 S. W. 673; *Powell v. Nevada etc. R. Co.*, 28 Nev. 40, 78 Pac. 978; *Scandell v. Columbia etc. Co.*, 50 App. Div. 152, 64 N. Y. Supp. 232; *Garwood v. New York Cent. etc. R. R. Co.*, 45 Hun (N. Y.), 128; *Scott v. Nauss Bros. Co.*, 141 App. Div. 255, 126 N. Y. Supp. 17; *E. C. Fuller Co. v. Pennsylvania R. Co.*, 61 Misc. Rep. 599, 113 N. Y. Supp. 1001; *Younce v. Broad River Lumber Co.*, 155 N. C. 239, Ann. Cas. 1912C, 107, 71 S. E. 329; *Commerce etc. Co. v. Camp (Tex. Civ. App.)*, 129 S. W. 852; *International etc. R. Co. v. Mills*, 34 Tex. Civ. App. 127, 78 S. W. 11; *Evarts v. Middlebury*, 53 Vt. 626, 38 Am. Rep. 707; *Hocking v. Windsor Spring Co.*, 131 Wis. 532, 111 N. W. 685; *Twentieth Century Co. v. Quilling*, 136 Wis. 481, 117 N. W. 1007; *Ruck v. Milwaukee Brewery Co.*, 144 Wis. 404, 129 N. W. 414; *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769; *St. Louis etc. R. Co. v. Farr*, 56 Fed. 994, 6 C. C. A. 211; *Frederick Mfg. Co. v. Devlin*, 127 Fed. 71, 62 C. C. A. 53; *Hunt etc. Packing Co. v. Cassidy*, 53 Fed. 257, 3 C. C. A. 525; *McClaren v. Weber Bros. Shoe Co.*, 166 Fed. 714, 92 C. C. A. 386.

⁴³ *Fredonia Gas Co. v. Bailey*, 77 Kan. 296, 94 Pac. 258.

and repairing defective timbers in a bridge, it was competent for a witness who had had a great deal of experience in the construction and repair of bridges to testify as to the method by which he would examine a bridge to ascertain the condition of its timbers. The information was not familiar to the ordinary jurymen, and the evidence bore on the issues.⁴⁴

§ 381 (383). Expert testimony as to railroads and their management.—It would be impracticable to detail the innumerable illustrations that exist of the application of expert testimony with regard to railroads and their management. The area covered by the questions that call for it is vast, and becomes more extended as new circumstances arise out of new machinery, constructions and improvements. It may be taken, however, that such testimony is properly availed of whenever the superior knowledge—technical or peculiar—of the witness, qualified as an expert by erudition or experience, or both, may be of use in helping a jury to a conclusion. Thus the opinions of those versed in railroad machinery and railway management are admissible as to the proper construction of a track and as to the mode of laying rails,⁴⁵ or proper and safe appliances for cars and tracks,⁴⁶ or engines,⁴⁷ as to the proper mode of managing trains and engines,⁴⁸ electric street-

⁴⁴ *Greenway v. Taylor County*, 144 Iowa, 332, 122 N. W. 943.

⁴⁵ *Carpenter v. Central Ry. Co.*, 4 Daly (N. Y.), 550; *Langfitt v. Clinton etc. R. Co.*, 2 Rob. (La.) 217; *Grand Rapids etc. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Jeffersonville R. Co. v. Lanham*, 27 Ind. 171; *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 South. 40; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744; *Stewart v. Louisville etc. R. Co.*, 136 Ky. 717, 125 S. W. 154.

⁴⁶ *Baldwin v. Chicago etc. R. Co.*, 50 Iowa, 680; *German Ins. Co. v.*

Chicago etc. Ry. Co., 128 Iowa, 386, 104 N. W. 361; *Fitts v. Cream City Ry. Co.*, 59 Wis. 323, 18 N. W. 186; *Bridger v. Asheville etc. R. Co.*, 25 S. C. 24; *St. Louis & S. F. Ry. Co. v. Farr*, 56 Fed. 994, 6 C. C. A. 211. See, also, *Atchison, T. & S. F. Ry. Co. v. Myers*, 63 Fed. 793, 11 C. C. A. 439.

⁴⁷ *Chicago etc. R. Co. v. Shannon*, 43 Ill. 338.

⁴⁸ *Cooper v. Central R. R.*, 44 Iowa, 134; *Cincinnati etc. R. Co. v. Smith*, 22 Ohio St. 227, 10 Am. Rep. 729; *Seaver v. Boston etc. R.*, 14 Gray (Mass.), 466; *Union Pac. Ry. Co. v.*

cars,⁴⁹ as to the distance in which a train could be stopped when the rate of speed and other facts are known⁵⁰ as to the probable cause of a train running off the track, when the facts are stated,⁵¹ as to the comparative danger of running trains forward or backward,⁵² as to the probable effect of a given defect upon the operation of an engine,⁵³ as to the duties of those in the management of trains under given circumstances,⁵⁴ and as to the effect of sparks issuing from engines and the probability of their communicating fires.⁵⁵ Also as to whether a city ordinance had been complied with as to covering the space between tunnels with a shed supplied with smoke escapes;⁵⁶ and as to the sufficiency of

Novak, 61 Fed. 573, 9 C. C. A. 629; *Czezewzka v. Benton-Bellefontaine Ry. Co.*, 121 Mo. 201, 25 S. W. 911. As to proper lookout: *Yeager v. Chicago etc. R. Co.*, 148 Iowa, 231, 123 N. W. 974. See, also, the recent cases: *Nashville etc. R. v. Hinds* (Ala. App.), 60 South. 409; *Birmingham etc. Power Co. v. Saxon* (Ala.), 59 South. 584; *Connecticut Fire Ins. Co. v. Chester etc. R. Co.* (Mo. App.), 153 S. W. 544; *Galveston etc. R. Co. v. Sample* (Tex. Civ. App.), 145 S. W. 1057.

⁴⁹ *Nolan v. Newton etc. R. Co.*, 206 Mass. 384, 92 N. E. 505.

⁵⁰ *Bellefontaine etc. R. Co. v. Bailey*, 11 Ohio St. 333 (engineer); *Maher v. Atlantic etc. R. R.*, 64 Mo. 267 (engineer); *Mobile etc. Ry. Co. v. Blakely*, 59 Ala. 471 (conductor); *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99 (mail agent); *Eckert v. St. Louis etc. Ry. Co.*, 13 Mo. App. 352 (locomotive builder); *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372 (conductor); *Grimmell v. Chicago Ry. Co.*, 73 Iowa, 93, 34 N. W. 758 (fireman). See, also, *Frost v. Milwaukee & N. Ry. Co.*, 96 Mich. 470, 56 N. W. 19; *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa, 565, 61 N. W. 1059. On right of court to decide

question as to quickest means of stopping train, as a matter of common knowledge, see note to *Harris v. Nashville etc. Ry. Co.*, 14 L. R. A., N. S., 261.

⁵¹ *Seaver v. Boston etc. R.*, 14 Gray (Mass.), 466; *Murphy v. New York Cent. R. Co.*, 66 Barb. (N. Y.) 125; *Brownfield v. Chicago etc. Ry.*, 107 Iowa, 254, 77 N. W. 1038.

⁵² *Kuhns v. Wisconsin Ry. Co.*, 70 Iowa, 561, 31 N. W. 868.

⁵³ *Brabbitts v. Chicago etc. Ry. Co.*, 38 Wis. 289.

⁵⁴ *Cincinnati etc. R. Co. v. Smith*, 22 Ohio St. 227, 10 Am. Rep. 729; *Augusta etc. R. Co. v. Dorsey*, 68 Ga. 228; *Reifsnnyder v. Chicago, M. & St. P. Ry. Co.*, 90 Iowa, 76, 57 N. W. 692; *Czezewzka v. Benton-Bellefontaine Ry. Co.*, 121 Mo. 201, 25 S. W. 911.

⁵⁵ *Davidson v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 51, 24 N. W. 324. On distance within which sparks from a properly equipped engine will set fire as a subject of expert testimony, see note to *Potter v. Grand Trunk etc. Ry. Co.*, 22 L. R. A., N. S., 1039.

⁵⁶ *Baltimore etc. R. Co. v. Sattler*, 100 Md. 306, 3 Ann. Cas. 660, 59 Atl. 654.

brakes on gravel cars.⁵⁷ In brief, such evidence is admissible upon almost every matter connected with railroads;⁵⁸ except upon those well-known facts, of course, of which the jury, as members of the community, may be presumed to be cognizant, or, as put by Pope, C. J.,⁵⁹ where it is a question of hard common sense, no reason exists why experts should be called in to aid the jury. Therefore, engineers, conductors and others skilled in railroad matters, like other experts, are not allowed to give their opinions as to whether *ordinary care* or prudence has been exercised

⁵⁷ Chicago etc. R. Co. v. Hale, 176 Fed. 71, 99 C. C. A. 379.

⁵⁸ From the great body of recent cases upon the subject generally, the following have been selected as serviceable references: Brown v. St. Louis etc. R. Co., 171 Ala. 310, 55 South. 107 (qualification); Northern etc. R. Co. v. Shea, 142 Ala. 119, 37 South. 796 (defective and unsafe track); St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27 (proper operation of locomotive); Bowen v. Sierra Lumber Co., 3 Cal. App. 312, 84 Pac. 1010 (strength of timbers); Gorey v. Illinois etc. R. Co., 153 Ill. App. 17 (degree of violence or suddenness on stopping a train); Pittsburg etc. R. Co. v. Nicholas (Ind. App.), 73 N. E. 195 (proper time to give stop signal on electric cars); Guinn v. Iowa etc. R. Co., 125 Iowa, 301, 101 N. W. 94 (cutting embankments and opening ditches); Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884 (speed); South Covington etc. R. Co. v. Weber (Ky.), 82 S. W. 986 (running and stopping electric car); Mayer v. Detroit etc. R. Co., 152 Mich. 276, 116 N. W. 429 (sand appliances to prevent sliding); Dolge v. Northern etc. R. Co., 107 Minn. 242, 26 L. R. A., N. S., 600, 119 N. W. 1066 (throw of split switches); Landers v. Quincy etc. R. Co., 156 Mo. App. 580, 137 S. W. 605 (proper method of loading hand-cars); Zelenka v. Union Stockyards Co., 82 Neb. 511, 118 N. W. 103 (stopping engine); Harrison v. New York etc. R. Co., 195 N. Y. 86, 87 N. E. 802 (effect of shutting off steam as to causing smoke to rise); St. Louis etc. R. Co. v. Neef (Tex. Civ. App.), 138 S. W. 1168 (climbing on loose stirrup of box-car); Gulf etc. R. Co. v. Brooks (Tex. Civ. App.), 132 S. W. 95 (dangers of collision between train and hand-car); Gulf etc. R. Co. v. Belton (Tex. Civ. App.), 122 S. W. 413 (feasibility of grade crossing); St. Louis etc. R. Co. v. Smith (Tex. Civ. App.), 90 S. W. 926 (proper manner of switching train of cabooses); Halverson v. Seattle Electric Co., 35 Wash. 600, 77 Pac. 1058 (speed of electric car); Zarnik v. C. Reiss Coal Co., 133 Wis. 290, 113 N. W. 752 (proper method of fastening car doors); Fisher v. Waupaca Electric Light Ry. Co., 141 Wis. 515, 124 N. W. 1005 (fenders); Troxell v. Delaware etc. R. Co., 180 Fed. 871 (want of derailing switch on siding); Southern Pac. R. Co. v. Bartine, 170 Fed. 725 (reasonableness of freight rates).

⁵⁹ Nickles v. Seaboard Air Line Ry., 74 S. C. 102, 54 S. E. 255.

in the matter in controversy,⁶⁰ or as to the competency of another person to perform his duties,⁶¹ or generally to *usurp the province of the jury* by deciding the real question in controversy.⁶² The distinction between the two classes of testimony is sufficiently obvious.

§ 382 (384). Experts in agriculture.—As illustrations of the same principle, the opinions of those skilled in farming and agriculture may be received as to the proper mode of cultivating⁶³ and fertilizing land,⁶⁴ as well as to the qualities of soil,⁶⁵ the probable amount and value of the products or crops of land under given circumstances, or the yield of a certain crop,⁶⁶ of the values of land,⁶⁷ and of its use,⁶⁸ the probable amount of injury to crops occasioned by trespass or other causes,⁶⁹ also as to the values,⁷⁰ age⁷¹ and

⁶⁰ *Gavisk v. Pacific R. Co.*, 49 Mo. 274; *Hill v. Portland etc. R. R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Dooner v. Delaware & H. Canal Co.*, 164 Pa. 17, 30 Atl. 269.

⁶¹ *Moore v. Chicago Ry. Co.*, 65 Iowa, 505, 54 Am. Rep. 26, 22 N. W. 650; *Langston v. Railway Co.*, 147 Mo. 457, 48 S. W. 835.

⁶² See § 372 et seq., *ante*.

⁶³ *Spiva v. Stapleton*, 38 Ala. 171; *Buffum v. Harris*, 5 R. I. 243.

⁶⁴ *Young v. O'Neal*, 57 Ala. 566.

⁶⁵ *Sarle v. Arnold*, 7 R. I. 582.

⁶⁶ *Phillips v. Terry*, 3 Abb. Dec. (N. Y.) 607; *McLennan v. Lemen*, 57 Minn. 317, 59 N. W. 628; *Townsend v. Bonwill*, 5 Harr. (Del.) 474; *Isaac v. McLean*, 106 Mich. 79, 64 N. W. 2; *Farmers & Traders' Nat. Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520.

⁶⁷ *Finch v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 250, 48 N. W. 915.

⁶⁸ *Cornell v. Dean*, 105 Mass. 435.

⁶⁹ *Tucker v. Massachusetts etc. R. Co.*, 118 Mass. 546; *Townsend v.*

Brundage, 4 Hun (N. Y.), 264; *Sickles v. Gould*, 51 How. Pr. (N. Y.) 22; *Seamans v. Smith*, 46 Barb. (N. Y.) 320; *Slater v. Wilcox*, 57 Barb. (N. Y.) 604; *Chicago, E. R. I. & P. Ry. Co. v. Larsen*, 19 Colo. 71, 34 Pac. 277 (value of crop destroyed); *Madisonville etc. R. Co. v. Renfro* (Ky.), 127 S. W. 508.

⁷⁰ *Smith v. Indianapolis etc. R. Co.*, 80 Ind. 233; *Browne v. Moore*, 32 Mich. 254; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159; *Bischoff v. Schultz*, 5 N. Y. Supp. 757; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93; *Plunkett v. Minneapolis, S. S. M. & A. Ry. Co.*, 79 Wis. 222, 48 N. W. 519; *Missouri Pac. Ry. Co. v. Shumaker*, 46 Kan. 769, 27 Pac. 126; *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323; *Mason v. Patrick*, 100 Mich. 577, 59 N. W. 239 (horse dealer). As to evidence of pedigree, see *Warrick v. Reinhardt* (Iowa), 111 N. W. 983.

⁷¹ *Clague v. Hodgson*, 16 Minn. 329; *Moreland v. Mitchell Co.*, 40 Iowa, 394.

weight of domestic animals,⁷² and as to the diseases⁷³ and proper management⁷⁴ of stock. So they have been allowed to express an opinion as to whether certain land required draining,⁷⁵ and as to the proper time of the year for setting fires upon farming or grazing lands.⁷⁶ On the subject of fences there is a slight conflict, but we see no reason why they should not form the topic of expert evidence.⁷⁷ The evidence of a fruit inspector, an expert, that if certain apples were in merchantable condition when shipped, they could not have been in the condition in which it was alleged they were five days thereafter, was held competent.⁷⁸ And the evidence of an expert as to how long it would take to subdue the cockle-burs on land required for farming purposes was competent in a case of damage by reason of depreciation of rental value on account of their existence.⁷⁹ Milk experts are competent to testify whether certain liquid exhibited to them looked and tasted like milk and water or not.⁸⁰ But on all ordinary and commonly known matters

⁷² *Carpenter v. Wait*, 11 Cush. (Mass.) 257; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Gilbert v. Kennedy*, 22 Mich. 117.

⁷³ *Slater v. Wilcox*, 57 Barb. (N. Y.) 604; *Emrick v. Merriman*, 23 Ill. App. 24; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; *Grayson v. Lynch*, 163 U. S. 468, 480, 41 L. Ed. 230, 16 Sup. Ct. Rep. 1064.

⁷⁴ *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183.

⁷⁵ *Buffum v. Harris*, 5 R. I. 243.

⁷⁶ *Ferguson v. Hubbell*, 26 Hun (N. Y.), 250. As to the width of plow land necessary to stop a fire: *Krippner v. Biehl*, 28 Minn. 139. In other cases their opinions have been rejected as to whether fires were set at proper times: *Fraser v. Tupper*, 29 Vt. 409. See, also, *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.

⁷⁷ In California and Minnesota it has been held that the question of

sufficiency of a fence was for the jury, and was not one of science, or of peculiar or educated skill: *Enright v. San Francisco etc. R. Co.*, 33 Cal. 230; *Sowers v. Dukes*, 8 Minn. 23. In *Trammell v. Turner* (Tex. Civ. App.), 82 S. W. 325, *Rainey, C. J.*, was of opinion that as the plaintiff had qualified himself as an expert on the sufficiency of fences to turn cattle, his testimony was admissible, as the question was not one with which the jury could be presumed to be as conversant as an expert.

⁷⁸ *Jones v. Emerson*, 41 Wash. 33, 82 Pac. 1017. See, also, *Kemendo v. Fruit Dispatch Co.* (Tex. Civ. App.), 131 S. W. 73, as to shipping bananas.

⁷⁹ *Brown Land Co. v. Lehman*, 134 Iowa, 712, 12 L. R. A., N. S., 88, 112 N. W. 185.

⁸⁰ *Lane v. Wilcox*, 55 Barb. (N. Y.) 615.

connected with agriculture, expert evidence is not admissible whenever the jury can be presumed to possess the necessary knowledge of the subject.⁸¹ For further illustrations of the common practice of allowing farmers and stock dealers or graziers to testify as experts concerning matters peculiarly within their knowledge, the notes may be consulted.⁸²

§ 383 (385). Experts in insurance matters.—In insurance matters, as in those already dealt with, the rule is that the testimony is excluded of one said to be an expert in that which is not and cannot be followed as a business, or in that which must necessarily result from observation of a character so general that it must be common to every person. The opinion of a witness who neither knows, nor can know, more about the subject matter than the jury, and who must draw his deductions from facts already in the

⁸¹ *Baker v. Cotney*, 142 Ala. 566, 38 South. 131; *Brink's etc. Express Co. v. Kinnare*, 168 Ill. 643, 48 N. E. 446; *Bills v. Ottumwa*, 35 Iowa, 107; *Wells v. Eastman*, 61 N. H. 507; *Chicago etc. R. Co. v. Johnson*, 25 Okl. 760, 27 L. R. A., N. S., 879, 107 Pac. 662; *Oakes v. Weston*, 45 Vt. 430.

⁸² *Donnelly v. Fitch*, 136 Mass. 558 (where the witness was allowed to state that a horse which had not run away for a year and a half was no more likely to be frightened than if he had not been frightened before); *Wabash Ry. Co. v. Pratt*, 15 Ill. App. 177 (as to the number of hogs which might be safely shipped in one car); *Albright v. Corley*, 40 Tex. 105 (as to the number of cattle of a certain brand running in a range); *Fleming v. McClaffin*, 1 Ind. App. 537, 27 N. E. 875 (as to the pedigree of horses); *Schaeffer v. Philadelphia & R. Ry. Co.*, 168 Pa.

209, 47 Am. St. Rep. 884, 31 Atl. 1088 (as to the cause of injuries sustained by mules in shipment); *Barnum v. Bridges*, 81 Cal. 604, 22 Pac. 924 (as to the cost of clearing land); *Boyer v. Railway Co.*, 123 Iowa, 248, 98 N. W. 764 (that a mare was with foal); *People v. Bane*, 88 Mich. 453, 50 N. W. 324 (that a horse had blind staggers). As to horsemen testifying that safe and ordinarily gentle horses were frightened by operation of steam-shovel: *Heinmiller v. Winston Bros.*, 131 Iowa, 32, 117 Am. St. Rep. 405, 6 L. R. A., N. S., 150, 107 N. W. 1102; as to hobbling and throwing horses: *Staples v. Steed*, 167 Ala. 241, 52 South. 646; subduing noxious weeds: *Borrett v. Petry*, 148 Ill. App. 622; transportation of cattle: *Galveston etc. R. Co. v. Jones* (Tex. Civ. App.), 123 S. W. 737; counting rings in timber as proof of age: *Whitfield v. Rowland Lumber Co.*, 152 N. C. 211, 67 S. E. 512.

possession of the jury, is not admissible.⁸³ But, so soon as the testimony assumes the technical character which only specially acquired knowledge can impart, it becomes "expert," and in that sense is competent and admissible. Thus the opinions of those skilled in insurance have been held admissible to prove whether certain changes, such as the erection of additions,⁸⁴ outbuildings,⁸⁵ or partitions,⁸⁶ or the making of other changes in the buildings increase the risk;⁸⁷ such opinions have also been admitted to show which of different classes or occupations are the more hazardous.⁸⁸ It is admissible to prove that, by the practice of insurers, the knowledge of certain facts would have increased the risk.⁸⁹ There are authorities which receive such testimony to show whether or not a risk would have been taken at any premium on the life of one employed in a given business.⁹⁰ These cases proceed on the theory that those qualified by the requisite experience may give an opinion as to the influence which certain facts material to the risk would have with underwriters generally as an element in the contract and affecting the risk. But there is a decided *conflict of opinion* on this question; and another

⁸³ *Hartman v. Keystone Ins. Co.*, 21 Pa. 466. Were it otherwise, the opinions of jurors upon the most obvious facts might be always shaped for them by the testimony of so-called experts, and thus would a case be constantly liable to be determined, not by the opinions and judgment of the jury, but by the opinions and judgment of witnesses: *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 266. In *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63, it was ruled that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land, was in-

admissible. See, also, *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

⁸⁴ *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19.

⁸⁵ *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

⁸⁶ *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

⁸⁷ *Schenck v. Mercer County Fire Ins. Co.*, 24 N. J. L. 447; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 35 L. R. A. 595, 45 N. E. 255.

⁸⁸ *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *Hobby v. Dana*, 17 Barb. (N. Y.) 111.

⁸⁹ *Hawes v. New England Mut. Ins. Co.*, 2 Curt. (U. S.) 229, Fed. Cas. No. 6241.

⁹⁰ *Hartman v. Keystone Ins. Co.*, 21 Pa. 466.

class of cases will be found in which evidence of this character is rejected.⁹¹ It has been held in numerous cases that expert testimony is inadmissible to prove that it increases the risk to have a building become vacant,⁹² or to increase the number of stoves in use.⁹³ Expert evidence has been rejected in cases in which it was sought to show thereby that one habitually using intoxicating drinks would not be treated as insurable,⁹⁴ or that one building would be considered as an exposure to another.⁹⁵ On the same principle, those who have had such experience in examining and deciding upon risks as to have acquired special skill may give their opinions, when the question becomes material, as to whether certain facts, if known, would have increased the premium.⁹⁶ So insurance experts may give opinions as to the meaning of technical terms according to the customs and usages of insurers,⁹⁷ and whether vessels in a given state are seaworthy.⁹⁸ Expert evidence is also ad-

⁹¹ *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.), 541, 66 Am. Dec. 380; *Thayer v. Providence-Washington Ins. Co.*, 70 Me. 531.

⁹² *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Liverpool etc. Ins. Co. v. McGuire*, 52 Miss. 227; *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. 266; *Kirby v. Phoenix Ins. Co.*, 9 Lea (Tenn.), 142; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.), 541, 66 Am. Dec. 380.

⁹³ *Schmidt v. Peoria Marine etc. Ins. Co.*, 41 Ill. 295.

⁹⁴ *Rawls v. American Mutual Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280.

⁹⁵ *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

⁹⁶ *Martin v. Franklin Fire Ins. Co.*, 42 N. J. L. 46; *Hawes v. New E. Mut. Ins. Co.*, 2 Curt. (U. S.) 229,

Fed. Cas. No. 6241; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Merriam v. Middlesex Mut. Fire Ins. Co.*, 21 Pick. (Mass.) 162, 32 Am. Dec. 252; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257; *Penn. M. L. Ins. Co. v. M. S. B. & T. Co.*, 72 Fed. 413, 38 L. R. A. 33, 19 C. C. A. 286.

⁹⁷ *Child v. Sun Mut. Ins. Co.*, 3 Sand. (N. Y.) 26 (meaning of "whaling voyages"); *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590 (meaning of "reasonable time"); *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87 (meaning of "loading offshore").

⁹⁸ *Thornton v. Royal Exchange Co.*, Peake N. P. 26; *Beckwith v. Sydebotham*, 1 Camp. 117, 10 R. R. 652; *Walsh v. Wash. Marine Ins. Co.*, 32 N. Y. 427 (as to the effect of heavy storms upon vessels); *Lap- ham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1 (as to whether it is more dangerous to carry goods on deck or under deck).

missible to determine the present value of an insurance policy which depends partly on the accuracy of an intricate computation.⁹⁹ It is necessary that the witness have special knowledge of the subject. One does not become qualified as an expert on the nature of risks by the mere fact that he is an insurance agent. "Insurance officers or agents cannot be called as experts in matters of this kind unless it appears that, in the course of their business, they have acquired special knowledge of the subject matter of the inquiry."¹⁰⁰ In a recent case¹ it was held that while a physician was an expert in matters pertaining to his own profession, except he was also an expert in the law of insurance so that he could tell, in reference to different physical conditions when a man would be insurable, his testimony thereon was inadmissible. In a New Jersey case² it was held that a man who, for a long course of years, had been dealing practically with risks, had been for ten years a member of a New York fire company, had been an assistant foreman, and was in the constant habit of attending fires, was a competent expert on the question of whether putting an additional story on the wing of a building did not increase the risk. In addition he was present at the fire which destroyed the building in question, and actively engaged in attempting to extinguish it, thus having an opportunity to observe the arrangement of the buildings, the nature of the additions made, and the progress of the flames.

§ 384 (386). Illustrations of expert testimony by surveyors and engineers.—As with members of the learned professions, so civil engineers and surveyors may give ex-

⁹⁹ *Price v. Connecticut Mut. Life Ins. Co.*, 48 Mo. App. 281.

¹⁰⁰ *Fland. on Ins.*, p. 523; *Stennett v. Pennsylvania Fire Ins. Co.*, 68 Iowa, 674, 28 N. W. 12; *Schmidt v. Peoria Marine etc. Ins. Co.*, 41 Ill. 295. A witness is not qualified to testify as an expert as to expectation of life at a certain age, where he has had but

an experience of six months as a life insurance agent: *Donaldson v. Mississippi etc. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391.

¹ *Reagan v. Union Mut. Life Ins. Co.*, 207 Mass. 79, 92 N. E. 1025.

² *Schenck v. Mercer County Mutual Fire Ins. Co.*, 24 N. J. L. 447.

pert opinions upon matters which involve the use of the special knowledge which their vocation calls for. The hypothetical questions are subject to the same rules as have been discussed, as to being founded on the evidence.³ Surveyors may give their opinions as to boundary lines between different tracts of land,⁴ as to the location of a certain survey,⁵ as to the genuineness of certain alleged survey marks or monuments,⁶ as to whether a certain corner was the true quarter section corner,⁷ and also whether certain corners, alleged to have been found, had been found according to the government survey.⁸ But surveyors are *not* competent to *construe deeds* or other written instruments by testifying as to the controlling calls in descriptions of land or the meaning of the language used in such instruments.⁹ On the same principle the opinions of *civil engineers* are received as to those matters within the range of their profession. Thus, engineers having the requisite skill may testify as to what amount of land would be overflowed if water within certain embankments were kept at a given height;¹⁰ as to the causes and effects of the *overflow* of a stream at given places;¹¹ as to the causes of the filling of a certain harbor;¹² as to the effect of a given dam or embankment in causing an overflow;¹³ or of a given

³ Hopper v. Empire City Subway Co., 78 App. Div. 637, 79 N. Y. Supp. 907; affirmed, 178 N. Y. 587, 70 N. E. 1100.

⁴ Shook v. Pate, 50 Ala. 91; Bridges v. McClendon, 56 Ala. 327; Mincke v. Skinner, 44 Mo. 92; Messer v. Reginnitter, 32 Iowa, 312.

⁵ Jackson v. Lambert, 121 Pa. 182, 15 Atl. 502.

⁶ Davis v. Mason, 4 Pick. (Mass.) 156; Knox v. Clark, 123 Mass. 216; Clegg v. Fields, 7 Jones (N. C.), 37, 75 Am. Dec. 450; McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376.

⁷ Toomey v. Kay, 62 Wis. 104, 22 N. W. 286

⁸ Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737.

⁹ Norment v. Fastnacht, 1 McAr. (D. C.) 515; Schultz v. Lindell, 30 Mo. 310; Blumenthal v. Roll, 24 Mo. 113; Randolph v. Adams, 2 W. Va. 519.

¹⁰ Phillips v. Terry, 3 Abb. App. (N. Y.) 607.

¹¹ Moyer v. New York C. R. R. Co., 98 N. Y. 645; Gurley v. San Antonio etc. R. Co. (Tex. Civ. App.), 124 S. W. 502.

¹² Folkes v. Chadd, 3 Doug. 157, 26 E. C. L. 63, 99 Eng. Reprint, 589. See, also, Grigsby v. Clear Lake Water W. Co., 40 Cal. 396.

¹³ Ball v. Hardesty, 38 Kan. 540, 16 Pac. 808. See, also, cases last cited. But the fact that damage has resulted from the overflow may be

drain in respect to the flow of water;¹⁴ as to the meaning of technical terms;¹⁵ as to the probability that a lake would overflow a given area;¹⁶ as to the customary and proper *modes of doing work* within the line of their profession;¹⁷ as to the cost or value of the same;¹⁸ as to the age of marks on trees;¹⁹ as to how much land was necessary for the use of a railroad company for a right of way;²⁰ as to proper construction of guard-rail on bridge;²¹ as to the feasibility of establishing a grade crossing;²² as to proper construction of elevators,²³ and of platforms;²⁴ and as to whether work done under a contract for river and harbor improvements complied with the specifications.²⁵ On the same principle it has been held that *miners* are competent to testify as experts as to matters connected with the operation of mines.²⁶ An *electrical engineer* may be asked as

proved without expert testimony: *Lincoln & B. H. Ry. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859.

¹⁴ *Buffum v. Harris*, 5 R. I. 243.

¹⁵ *Reed v. Hobbs*, 3 Ill. 297; *Colwell v. Lawrence*, 38 Barb. (N. Y.) 643; *Skelton v. Fenton Elec. Co.*, 100 Mich. 87, 58 N. W. 609.

¹⁶ *Clason v. Milwaukee*, 30 Wis. 316.

¹⁷ *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Stead v. Worcester*, 150 Mass. 241, 22 N. E. 893.

¹⁸ *Bryan v. Branford*, 50 Conn. 246.

¹⁹ *Cochran v. Casey* (Tex. Civ. App.), 128 S. W. 1145.

²⁰ *State v. Superior Court of Spokane County*, 56 Wash. 249, 105 Pac. 639.

²¹ *Dardanelle etc. Turnpike Co. v. Croom*, 95 Ark. 284, 30 L. R. A., N. S., 360, 129 S. W. 280.

²² *Gulf etc. R. Co. v. City of Belton*, 57 Tex. Civ. App. 460, 122 S. W. 413.

²³ *Obermeyer v. Logeman etc. Co.*, 229 Mo. 97, 129 S. W. 209.

²⁴ *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208.

²⁵ *United States v. Greene*, 146 Fed. 801. But he cannot for such purpose rely on any construction of the contract which may have impressed itself upon his mind. He may look to the literal specification and say whether or not the work done is in accordance with it.

²⁶ *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771 (support of a mine); *Monahan v. Kansas City Clay etc. Co.*, 58 Mo. App. 68 (support of a mine); *Bennett v. Morris*, 4 Cal. Unrep. 834, 37 Pac. 929 (operation of a mine); *McNamara v. Logan*, 100 Ala. 187, 14 South. 175 (as to the proper mode of operating a mine); *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 674, 84 Pac. 256 (timbering of mine); *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375. Safe entering mine: *Alabama etc. Co. v. Heald*, 168 Ala. 626, 53 South. 162; examination of mine for safety: *Cotton v. Center Coal Min. Co.*, 147 Iowa, 427, 123 N. W. 381; *Central Coal etc. Co. v. Williams*, 173 Fed. 337, 97 C. C. A. 597.

to how a man who was killed by an electric shock had received such shock, having regard to the position of the wires and the place where he was standing;²⁷ and also as to the purpose of removing the insulation on certain wires and the testing of such wires.²⁸

§ 385 (387). Opinions of nautical men.—"We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross seas and heavy swells, shifting winds and sudden squalls."²⁹ And the opinions of nautical experts are not limited to the subjects referred to in the quotation. It is a common practice to receive in evidence the opinions of persons skilled in the management of boats and vessels. For example, the opinions of nautical men are received as to the proper management of boats and vessels under given circumstances;³⁰ as to the conditions, state of repair or seaworthiness of vessels, and of their machinery and appliance;³¹ as to the proper mode of loading vessels, and

²⁷ *Goddard v. Enzler*, 222 Ill. 462, 73 N. E. 805.

²⁸ *Consolidated Gas etc. Co. v. State*, 109 Md. 186, 72 Atl. 651.

²⁹ In *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using the language quoted in the text.

³⁰ *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. Ed. 497, 8 Sup. Ct. Rep. 534; *Guiterman v. Liverpool etc. Steamship Co.*, 83 N. Y. 358; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477.

In the last-named case, the witness had testified that for many years he had been the captain of a tug-boat, and was familiar with the making up of tows; that he was a pilot, and had towed vessels on Long Island Sound, although he was not familiar with the sound, but that he was familiar with the waters of the Chesapeake bay. He was correctly permitted to answer the question: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake bay, or any other wide water, to tug three boats abreast, with a high wind?"

³¹ *Clipper Steamboat v. Logan*, 18 Ohio, 375; *Beckwith v. Sydebotham*, 1 Camp. 117; *Baird v. Daly*, 68 N. Y. 547; *Patchin v. Astor Mut. Ins. Co.*, 13 N. Y. 268; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *Reed v. Dick*, 8 Watts (Pa.), 479.

as to what cargoes may be safely carried;³² as to the probable causes of collisions or the loss of vessels, and the mode of avoiding such collision or loss under given circumstances;³³ as to the proper mode of repairing vessels, and of raising them when sunk, and the feasibility of so doing;³⁴ as to what constitutes a competent crew for a voyage; as to the course and usage of business in the relations between master and crew;³⁵ as to the proper method of handling a boat in making her slip at the dock;³⁶ and as to the cost of repairs as damages.³⁷ A shipwright should be permitted to answer a hypothetical question upon the condition of a yacht before and after an alleged injury, and calling for his opinion as to the cost of putting the boat into as good condition as it was assumed by the question to be in before the injury.³⁸ The same rule as to form of the question and opinions "upon the evidence," as already discussed, apply to these experts.³⁹

§ 386 (388). Miscellaneous illustrations.—Of the many other instances which might be given of the admission of

³² *Ogden v. Parsons*, 23 How. (U. S.) 167, 16 L. Ed. 410; *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1; *Price v. Powell*, 3 N. Y. 322; *Weston v. Foster*, 2 Curt. (U. S.) 119, Fed. Cas. No. 17,452; *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100 (as to whether a certain mode of loading increased the risk).

³³ *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176; *Fenwick v. Bell*, 1 Car. & K. 312; *Clipper Steamboat v. Logan*, 18 Ohio, 375; *Lambert v. La Conner etc. Co.*, 37 Wash. 113, 79 Pac. 608.

³⁴ *Clipper Steamboat v. Logan*, 18 Ohio, 375; *Sikes v. Paine*, 10 Ired. (N. C.) 280, 51 Am. Dec. 389.

³⁵ *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170, 7 L. Ed. 98; *McCreary v. Turk*, 29 Ala. 244. As

to the size of waves: *Ilfrey v. Sabine etc. Ry. (Smith v. Sabine Ry. Co.)*, 76 Tex. 63, 13 S. W. 165.

³⁶ *Carscallen v. Coeur d'Alene etc. Transp. Co.*, 15 Idaho, 444, 16 Ann. Cas. 544, 98 Pac. 622.

³⁷ *The Umbria*, 148 Fed. 283.

³⁸ *Wintringham v. Hayes*, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999. A shipmaster who was formerly in charge of a yacht, which subsequently received injuries, may be asked whether such injuries were the result of ordinary wear and tear.

³⁹ *Duggan v. New Jersey etc. Co.*, 7 Penne. (Del.) 318, 76 Atl. 636, where the witness was asked, "After hearing all the testimony, in your opinion was the *Ulrica* properly managed and navigated, etc.?" and the objection to it sustained.

the opinions of experts as evidence, only a few of a miscellaneous character will be added as illustrative of the general subject. Thus, practical *millwrights* may testify as to the requisite height of water for the proper operation of a mill under given circumstances,⁴⁰ as to the sufficiency or need of repairs,⁴¹ and as to the adaptability of a given place for a mill site.⁴² So *millers* have been allowed to give opinions as to the effect of dams upon other mills on the same stream,⁴³ as to the capacity of mills and machinery,⁴⁴ and also for the purpose of identifying wheat and flour from certain peculiarities.⁴⁵ The opinion of *artists* may be received as to the genuineness of paintings and as to their value;⁴⁶ and *photographers* may testify as to the quality of work of other photographers, and as to other matters pertaining to their employment.⁴⁷ So the opinions of those having the requisite skill have been received as to the proper and usual modes of packing and shipping⁴⁸ and importing *merchandise*,⁴⁹ as to the results of *computations* in voluminous books or schedules,⁵⁰ as to the genuineness of a *postmark*;⁵¹ of a word after the signature to a

⁴⁰ *Detweiler v. Groff*, 10 Pa. 376.

⁴¹ *Taylor v. French Lumber Co.*, 47 Iowa, 662; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

⁴² *Haas v. Choussard*, 17 Tex. 588.

⁴³ *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808; *Williamson v. Yingling*, 80 Ind. 379.

⁴⁴ *Read v. Barker*, 30 N. J. L. 378; *Allis Co. v. Columbia Mill Co.*, 65 Fed. 52, 12 C. C. A. 511.

⁴⁵ *Walker v. State*, 58 Ala. 393. For other cases in which opinions of millers and millwrights have been received, see *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219 (as to the effect on the machinery of the shutting off the water-power); *Claggett v. Easterday*, 42 Md. 617 (as to the existence of a mill site); *Walker v. Fields*, 28 Ga. 237 (as to the skillfulness of work done in a mill);

Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153 (as to the capacity of a millwright); *Davis v. Mills*, 163 Mass. 481, 40 N. E. 852 (as to the component parts of certain flour).

⁴⁶ *Houston etc. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

⁴⁷ *Barnes v. Ingalls*, 39 Ala. 193.

⁴⁸ *Leopold v. Van Kirk*, 29 Wis. 548; *Kershaw v. Wright*, 115 Mass. 361 (as to whether hams packed in a certain mode would bear transportation); *Shriver v. Sioux City etc. R. Co.*, 24 Minn. 506, 31 Am. Rep. 353 (as to whether marble was properly packed).

⁴⁹ *Richards v. Doe*, 100 Mass. 524.

⁵⁰ *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731.

⁵¹ *Abey v. Lill*, 5 Bing. 299, 130 Eng. Reprint, 1076.

note;⁵² and of XX's and ++'s forming the signature of an illiterate person, inasmuch as signing by mark is a written signature;⁵³ and in explaining letters so poorly written and unintelligible to the ordinary juror that he could not read them.⁵⁴ The testimony of expert witnesses has been admitted to show that at a distance of six inches there would be powder marks on a body at which a pistol had been discharged;⁵⁵ and as to the number of men that would be required to unload a car of timber as described, when both car and timber had ice upon them;⁵⁶ and as to whether certain cotton had been damaged by fresh or salt water;⁵⁷ so where one witness had worked around shingle-mills for seven years as a sawyer and knee-bolter, and another had helped around mills with repairs of machinery and other work, and a third was a millwright and contractor, their testimony as experts on the proper guarding of mill-saws was admissible.⁵⁸ Expert telegraphists may testify as to the probability of errors in rapidly dispatched messages;⁵⁹ and expert dynamiters as to proper distance from persons in the vicinity to explode dynamite,⁶⁰ and expert stock shippers as to proper loading.⁶¹

§ 387 (389). Expert testimony as to values.—The difficulty experienced in most cases where expert testimony is to be considered is the want of any standard by which the knowledge of the expert witness may be measured. Thus it is that the weight of his testimony, according to his

⁵² *Thompson v. Kelsey*, 8 Ga. App. 23, 68 S. E. 518.

⁵³ *Ausmus v. People*, 47 Colo. 167, 19 Ann. Cas. 491, 107 Pac. 204.

⁵⁴ *State v. Sysinger*, 25 S. D. 110, Ann. Cas. 1912B, 997, 125 N. W. 879.

⁵⁵ *Pollock v. State*, 136 Wis. 136, 116 N. W. 851.

⁵⁶ *Alabama etc. R. Co. v. Vail*, 155 Ala. 382, 46 South. 587, even though the expert's experience did not include unloading under such conditions.

⁵⁷ *Houston etc. R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S. W. 55.

⁵⁸ *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588.

⁵⁹ *Postal Telegraph-Cable Co. v. Pace Grocery Co.* (Tex. Civ. App.), 126 S. W. 1172.

⁶⁰ *Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79.

⁶¹ *Colsch v. Chicago etc. R. Co.*, 149 Iowa, 176, Ann. Cas. 1912C, 940, 34 L. R. A., N. S., 1013, 127 N. W. 198.

qualification is left with the jury. In the matter of values, this want is especially apparent, for, as has well been said, there is no rule of law, and there can be none, defining what a witness shall know of property before he is allowed to give an opinion of its value. He must have sufficient knowledge upon which to be able to found an estimate, and the jury must decide the weight to be given to his testimony in that regard.⁶² The value of an expert's opinion may be forfeited on the one hand or reduced on the other by an examination as to his general experience, his means of knowledge in the particular case, and the facts and reasons on which he bases his conclusion. Mr. Justice Mitchell, of Pennsylvania, thus expressed himself on this subject: "It is matter of opinion at best, and the lowest grade of evidence that ever comes into a court of justice. It is permissible only because, bad as it is, there is nothing better attainable. Opinions of this as of other kinds are apt to differ, and their value is not always in proportion to the confidence with which they are advanced. It is proper, therefore, that the jury should have all the aids possible in enabling them to judge of the weight to which any particular opinion is entitled. To assist them to a right conclusion matters are often admissible which are not in themselves separate and independent grounds of damage."⁶³ The view has been maintained in one state that the value of lands within the county, when described to the jury, as well as the values of domestic animals, are matter of such common notoriety that a jury require no evidence on which to base their decision, and that expert testimony upon the subject should not be received.⁶⁴ But this rule was afterward changed by statute, and the practice everywhere prevails of calling experts to prove the values of land and personal property, although, as we have

⁶² *Bedell v. Long Island R. Co.*, 44 N. Y. 367, 4 Am. Rep. 688.

⁶³ *Dawson v. Pittsburgh*, 159 Pa. 317, 28 Atl. 171.

⁶⁴ *Rochester v. Chester*, 3 N. H. 349; *Robertson v. Stark*, 15 N. H.

109; *Low v. Connecticut etc. R. R.*, 45 N. H. 370. For a general discussion of the subject of values, see note to *Hull v. St. Louis*, 42 L. R. A. 767-770.

seen, this is a subject as to which ordinary witnesses may also give their opinions.⁶⁵ It is *not necessary that an expert should have seen the land or article in question or have personal knowledge concerning it.*⁶⁶ His knowledge may be gained by *having dealt in similar property*, although at another place,⁶⁷ or from the *description* of the articles by other witnesses, and hypothetical questions may be asked based on such descriptions.⁶⁸ Accordingly, it has often been held that the values of lands may be proved not only by ordinary witnesses, residents of the vicinity,⁶⁹ but by real estate agents, assessors or other public officers, or persons engaged in private business of such a character as gives them special and peculiar knowledge of the subject.⁷⁰ It is not necessary that the witness should have bought or sold land in that vicinity,⁷¹ or that he should have known

⁶⁵ See § 363, *ante*, and cases there cited.

⁶⁶ *Slocovich v. Orient. Ins. Co.*, 108 N. Y. 56; *Mish v. Wood*, 34 Pa. 451; *Stone v. Covell*, 29 Mich. 359.

⁶⁷ *Mish v. Wood*, 34 Pa. 451; *Whitbeck v. New York etc. R. Co.*, 36 Barb. (N. Y.) 644; *Lawton v. Chase*, 108 Mass. 238; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Miller v. Smith*, 112 Mass. 470; *Beecher v. Denniston*, 13 Gray (Mass.), 354.

⁶⁸ *Mish v. Wood*, 34 Pa. 451; *Whitbeck v. New York etc. R. Co.*, 36 Barb. (N. Y.) 644; *Orr v. Mayor of N. Y.*, 64 Barb. (N. Y.) 106; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 4 L. R. A. 848, 6 South. 143; *Miller v. Smith*, 112 Mass. 470.

⁶⁹ *Kansas City Ry. Co. v. Ehret*, 41 Kan. 22, 20 Pac. 538; *Stone v. Covell*, 29 Mich. 359; *Thomas v. Mallinckrodt*, 43 Mo. 58; *Pennsylvania etc. R. Co. v. Bunnell*, 81 Pa. 414; *Robertson v. Knapp*, 35 N. Y. 91; *West Newbury v. Chase*, 5 Gray (Mass.), 421; *Lehmicke v. St. Paul etc. Ry. Co.*, 19 Minn. 464; *Crouse v. Holman*, 19 Ind. 30; *Brainard v.*

Boston etc. R. Co., 12 Gray (Mass.), 407; *Galena etc. R. Co. v. Haslam*, 73 Ill. 494; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279, 10 Morr. Min. Rep. 205; *Keithsburg etc. R. Co. v. Henry*, 79 Ala. 290; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Hudson v. State*, 61 Ala. 333; *Erd v. Chicago etc. Ry. Co.*, 41 Wis. 65; *Ferguson v. Stafford*, 33 Ind. 162; *Tate v. Missouri K. & T. Ry. Co.*, 64 Mo. 149; *Northeastern N. Ry. Co. v. Frazier*, 25 Neb. 53, 40 N. W. 609; *Pingery v. Cherokee Ry. Co.*, 78 Iowa, 438, 43 N. W. 285; *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434; *Snodgrass v. City of Chicago*, 152 Ill. 600, 38 N. E. 790.

⁷⁰ *Swan v. Middlesex Co.*, 101 Mass. 173; *Bristol Co. Sav. Bank v. Keavy*, 128 Mass. 298; *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407; *Jarvis v. Furman*, 25 Hun (N. Y.), 391.

⁷¹ *Whitman v. Boston etc. R. R.*, 7 Allen (Mass.), 313; *Lehmicke v. St. Paul etc. R. Co.*, 19 Minn. 464; *Mantz v. Maguire*, 52 Mo. App. 136; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279, 10 Morr. Min. Rep.

the actual sales of such tracts as the one in question;⁷² or that his knowledge of sales should have been personal,⁷³ or that it should have been derived from the buyer or seller of the land sold.⁷⁴ The essentials are: "First, a knowledge of the intrinsic *properties* of the thing; secondly, a knowledge of the *state of the markets*."⁷⁵ That knowledge has been interpreted to include a familiarity on the part of the witness with the property in question, its area, and the uses to which it may reasonably be applied, and the extent and condition of its improvements. Another essential is a knowledge of the general selling price of ground in the neighborhood at the time. In fixing this, regard must be had also to the rule that the general selling price is not to be shown by evidence of particular sales of alleged similar lots, but is to be fixed in the mind of the witness from a knowledge of the price at which lots are generally held for sale, and at which they are sometimes actually sold, in the course of ordinary business in the neighborhood.⁷⁶ And in determining the qualifications of such witnesses much must be left *to the*

205; Board of Levee Commrs. v. Nelms, 82 Miss. 416, 34 South. 149.

⁷² Frankfort etc. R. Co. v. Windsor, 51 Ind. 238; Leroy Ry. Co. v. Hawk, 39 Kan. 638, 7 Am. St. Rep. 566, 18 Pac. 943; Kansas City Ry. Co. v. Baird, 41 Kan. 69, 21 Pac. 227.

⁷³ Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279, 10 Morr. Min. Rep. 205. But a mere statement that he has "heard" of sales in the neighborhood is not sufficient: Michael v. Crescent Pipe Line Co., 159 Pa. 99, 28 Atl. 204.

⁷⁴ Whitman v. Boston etc. R. R., 7 Allen (Mass.), 313.

⁷⁵ Whart. Ev., § 447. See, also, Dawson v. City of Pittsburg, 159 Pa. 317, 28 Atl. 171. And the following late cases: Ft. Smith etc. Bridge Dist. v. Scott (Ark.), 147 S. W. 440; City of Geneseo v.

Schultz (Ill.), 100 N. E. 926; Rotlesberger v. Hanley (Iowa), 136 N. W. 776; Sharp v. Niagara Fire Ins. Co., 164 Mo. App. 475, 147 S. W. 154; Close v. Ann Arbor R. Co., 169 Mich. 392, 135 N. W. 346; Petterson v. Thomas, 136 N. Y. Supp. 74; Portland City v. Tigard (Or.), 129 Pac. 755; St. Louis etc. R. Co. v. Wood (Tex. Civ. App.), 147 S. W. 283.

⁷⁶ Friday v. Pennsylvania R. Co., 204 Pa. 405, 54 Atl. 339. Useful illustrations of opinion evidence in regard to real property will be found in Snyder v. Western Union R. Co., 25 Wis. 60; Teele v. Boston, 165 Mass. 88, 42 N. E. 506; Schuylkill River etc. R. Co. v. Stocker, 128 Pa. 233, 18 Atl. 399. See note on "Admissibility of Opinion Evidence as to Marketability of Title to Real Estate," to Buswell v. O. W. Kerr Co., 21 Ann. Cas. 840.

discretion of the trial judge.⁷⁷ It must always be borne in mind that in large cities, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. *A fortiori*, when it is desired to arrive at the value of country lands, the paucity of sales and the varied elements which are forced upon the consideration, all render the task more difficult. The deeper from centers of population, the more formative and speculative are values, and hence it is that the discretion of the trial judge is called into action.⁷⁸ So those who have become experts in respect to the values of *personal prop-*

⁷⁷ *Howland v. Westport*, 172 Mass. 373, 52 N. E. 522; *Fossum v. Chicago etc. Ry. Co.*, 80 Minn. 9, 82 N. W. 979; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

⁷⁸ *Montana R. Co. v. Warren*, 137 U. S. 348, 34 L. Ed. 681, 11 Sup. Ct. Rep. 96, Mr. Justice Brewer, upon whose opinion the text is founded, also said: "The witnesses whose testimony is complained of all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district; and had opinions as to the value of the property. It is true some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the supreme court of the territory to the competency of these witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity

of a farm whose value is in question may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence": See, also, *The Mobila*, 147 Fed. 883; *Railroad v. Hunton*, 114 Tenn. 609, 88 S. W. 182; *Cluck v. Houston etc. R. Co.*, 34 Tex. Civ. 452, 79 S. W. 80.

erty of any kind by means of having dealt in similar articles, or who have gained the requisite knowledge in any other way, may give their opinions as to such values.⁷⁹ Value, whether actual or as regulated by the market, is largely a matter of individual estimate or opinion, and liberality should be allowed in the introduction of testimony to prove it. There are numerous elements and tests of value. Proof of cost, condition of the property when lost, value of similar property, prices at which similar articles are sold, uses to which the property is adapted, opinions of experienced dealers in such property, and opinions of experts, all have more or less probative value; and, in short, any testimony, direct or circumstantial, which tends to throw light on the subject, and which would enable the jury to arrive at a fair conclusion, is admissible as evidence in proof of value.⁸⁰ On the same general prin-

⁷⁹ *Smith v. Frost*, 42 N. Y. Super. (10 Jones & S.) 87 (stock broker); *Jonau v. Ferrand*, 3 Rob. (La.) 364 (stock broker); *Shepard v. Ashley*, 10 Allen (Mass.), 542 (mechanic); *Enos v. St. Paul Ins. Co.*, 4 S. D. 639, 46 Am. St. Rep. 796, 57 N. W. 919 (clerk); *Reed Bros. & Co. v. Davis Milling Co.*, 37 Neb. 391, 55 N. W. 1068 (flour merchant); *Woods v. Gaar, Scott & Co.*, 99 Mich. 301, 58 N. W. 307 (dealer in agricultural implements); *Whitney v. Thacher*, 117 Mass. 523 (broker); *Beecher v. Denniston*, 13 Gray (Mass.), 354 (gunsmith); *clothing and furniture*: *Houghtaling v. Railway Co.*, 117 Iowa, 540, 91 N. W. 811; *household goods*: *Munro v. Stowe*, 175 Mass. 169, 55 N. E. 992; *millinery goods*: *Langdon v. Wintersteen*, 58 Neb. 278, 78 N. W. 501; *sealskin coat*: *State v. Finch*, 70 Iowa, 316, 59 Am. Rep. 443, 30 N. W. 578; *stock of goods*: *State v. Tennehom*, 92 Iowa, 551, 61 N. W. 193; *horses*: *Chicago & N. W. R. Co. v. Calumet*

Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; *Leck v. Chesley*, 98 Ind. 593, 67 N. E. 580; *cattle*: *Galveston etc. R. Co. v. Jones* (Tex. Civ. App.), 123 S. W. 737; *Catheart v. Rogers*, 115 Iowa, 30, 87 N. W. 738; *Choctaw O. & G. R. Co. v. Deperade*, 12 Okl. 367, 71 Pac. 629; *wheat*: *Linde v. Gaffke*, 81 Minn. 304, 84 N. W. 41; *logs*: *Rylander v. Laurssen*, 124 Wis. 2, 102 N. W. 341; *shares of stock*: *Aldrich v. Bay State Const. Co.*, 186 Mass. 489, 72 N. E. 53; *piano*: *Lines v. Alaska C. Co.*, 29 Wash. 133, 69 Pac. 642; *Greene-Grieb-Sherman Co. v. John C. Quillen Co.*, 148 Ill. App. 1; *pearl necklace*: *Porteous v. Adams Express Co.*, 112 Minn. 31, 127 N. W. 429. See, also, *Ft. Worth etc. R. Co. v. Arthur* (Tex. Civ. App.), 124 S. W. 213, on value of farm buildings and implements.

⁸⁰ *Morrow Transfer Co. v. Robinson*, 8 Ga. App. 409, 69 S. E. 317; *Landrum v. Swann*, 8 Ga. App. 209, 68 S. E. 862.

ciple lawyers,⁸¹ physicians,⁸² nurses,⁸³ artists and authors,⁸⁴ as well as persons in other walks of life⁸⁵ having familiarity with the subject, have been allowed to testify as experts as to the value of *services* rendered by those of their *own profession* or occupation. And as to the value of professional services only persons engaged in that profession can give opinions.⁸⁶ Such testimony is, however, not conclusive upon the jury, but merely advisory.⁸⁷ Although no hard-and-fast rule can be laid down as to the qualifications of witnesses as to values, and although the witness may avail himself of many sources of information, *he must have knowledge of the subject* and of the market value if there is one at the place in question.⁸⁸ It has been held in some

81 Central Arkansas etc. R. Co. v. Goelzer, 92 Ark. 569, 123 S. W. 781; Bourke v. Whiting, 19 Colo. 1, 34 Pac. 172; Mut. Life Ins. Co. v. Chambliss, 131 Ga. 60, 61 S. E. 1034; Covey v. Campbell, 52 Ind. 157; Graham v. Dillon, 144 Iowa, 82, 121 N. W. 47; Clark v. Elsworth, 104 Iowa, 442, 73 N. W. 1023; Stevens v. Ellsworth, 94 Iowa, 758, 64 N. W. 668; Kelley v. Richardson, 69 Mich. 430, 37 N. W. 514; Calhoun v. Akeley, 82 Minn. 354, 85 N. W. 170; Gall v. Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Williams v. Brown, 28 Ohio St. 547; Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161; Isham v. Parker, 3 Wash. 755, 29 Pac. 835. See note to Louisville etc. R. Co. v. Wallace, 11 L. R. A. 787. See note on "Admissibility and Necessity of Expert Evidence on Questions of Value of Attorney's Service," to Spencer v. Collins, 20 Ann. Cas. 53.

82 Wood v. Barker, 49 Mich. 295, 13 N. W. 597; Ward v. Ohio River etc. Ry. Co., 53 S. C. 10, 30 S. E. 594; Camp v. Ristine, 101 Tenn. 534, 47 S. W. 1098.

83 Wallace v. Schaub, 81 Md. 594, 32 Atl. 324; Allison v. Parkinson,

108 Iowa, 154, 78 N. W. 845; Ward v. Ohio River etc. Ry. Co., 53 S. C. 10, 30 S. E. 594.

84 Babcock v. Raymond, 2 Hilt. (N. Y.) 61.

85 Heffron v. Brown, 155 Ill. 322, 40 N. E. 583; Lake Shore & M. S. Ry. Co. v. Teeters (Ind. App.), 74 N. E. 1014; McLamb v. Wilmington etc. R. Co., 122 N. C. 862, 29 S. E. 894; Sprague v. Sea, 152 Mo. 327, 53 S. W. 1074; Hiale v. Hiale, 157 Mich. 45, 121 N. W. 463; Edwards v. Fargo etc. R. Co., 4 Dak. 549, 33 N. W. 100; Hart v. Maloney, 101 App. Div. 37, 91 N. Y. Supp. 922; Floore v. Burgher (Tex. Civ. App.), 128 S. W. 1152; Stone v. Tupper, 58 Vt. 409, 5 Atl. 387.

86 Howell v. Smith, 108 Mich. 350, 66 N. W. 218; Mock v. Kelly, 3 Ala. 387.

87 Moore v. Ellis, 89 Wis. 108, 61 N. W. 291. See, also, cases cited in note 77, *supra*.

88 Daly v. Kimball Co., 67 Iowa, 132, 24 N. W. 756; Russell v. Hayden, 40 Minn. 88, 41 N. W. 456; Stevens v. Ellsworth, 95 Iowa, 231, 63 N. W. 683.

cases that such knowledge may be derived from market reports.⁸⁹

§ 388 (390). **Opinions as to amount of damages.**—Since the amount of damages to which a party is entitled is always a matter for the jury, it would seem that it could hardly form the subject of opinion evidence. The question of damages, however, is often so intimately connected with that of the value of property that it becomes necessary to consider whether expert witnesses may ever give their opinions as to the damages which a party has suffered in a given case. On a principle discussed in another section it is evident that, if the witness may give an opinion as to damages, the practice is an exception to general rules, since this is a question for the determination of the jury.⁹⁰ Undoubtedly it is the general rule that witnesses cannot give their opinions as to the amount of damages suffered in a given case. Testimony as to value or loss or injury is nevertheless very frequently testimony as to damages disguised. The witness gives evidence of value before and after the actionable event and the jury use these sums to arrive at a conclusion. Evidence of this character from witnesses who have had personal observation of relevant facts and conditions, and whose opinion is calculated to aid the jury to a correct conclusion, is coming to be more and more regarded as competent, and its reception has been sanctioned and approved.⁹¹ McKelvey, in his useful textbook, thus puts it: “There are questions of damages, dependent, by some rule of law, upon subsidiary questions of value of property, and upon these latter questions per-

⁸⁹ *Whitney v. Thacher*, 117 Mass. 523; *Hudson v. Railway Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; *Texas & P. R. Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476. In other cases information gained by mere inquiry held insufficient: *Norfolk & W. R.*

Co. v. Reeves, 97 Va. 284, 33 S. E. 606; *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452.

⁹⁰ See §§ 363 and 372 et seq., *ante*. See, also, *Carter v. Maryland etc. R. Co.*, 112 Md. 599, 77 Atl. 301.

⁹¹ *Harper v. Town of Lenoir*, 152 N. C., 723, 68 N. E. 228.

sons specially qualified are often called upon for opinions, so that opinions of experts as to values may furnish the basis upon which the jury arrives at a measure of damages. In thus giving an opinion as to value, which value, by rule of law, is imposed upon the jury as a measure of damages, a witness is in substance, if not in form, speaking to the question of damages. Cases where the damage consists in the plaintiff being deprived of property either by breach of contract or tort may involve a determination of the value of the property in order to fix the damages. Expert opinion is in such case admitted.”⁹² And in ex-

⁹² McKelvey, Handbook Ev., 2d ed. rev., 244, to which we are also indebted for the illustrations. In *Vandine v. Burpee*, 13 Met. (Mass.) 288, 46 Am. Dec. 733, Dewey, J., says (page 291 of 13 Met. [46 Am. Dec. 733]): “It seems to us that it would be impracticable to dispense with this species of testimony in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information to enable them to assess damages for the conversion of such a horse.” *Miller v. Smith*, 112 Mass. 470, in which Gray, J., says (page 475): “Whenever the value of any peculiar kind of property, which may not be presumed to be within the actual knowledge of all jurors, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very article in question”: *Vagts v. Utman*, 125 Wis. 265, 104 N. W. 88; *McCroarty v. Lehigh Valley Coal Co.*, 212 Pa. 53, 61 Atl. 570.

In *Roberts v. Railroad Co.*, 128 N. Y. 455, 467, 13 L. R. A. 499, 28 N. E. 486, we find: “And yet in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, ‘What amount of damages has the plaintiff sustained?’ The reason is that the rule of damages is a question of law, and the witness upon such a question might adopt a rule of his own, and hold the defendant responsible beyond the legal measure.” In *Parrott v. Ry. Co.*, 127 Iowa, 419, 103 N. W. 352, the witness was allowed to state the difference between the values of the land before and after the injury, without first having stated the said values: *Union Pac. R. Co. v. Lucas*, 136 Fed. 374, 69 C. C. A. 218.

It is upon this principle that the decisions in the following cases may be rested: *Lake Shore & M. S. Ry. Co. v. Teeters* (Ind. App.), 74 N. E. 1014; *Patterson v. Johnson*, 114 Ill. App. 329; *Enlow v. Hawkins*, 71 Kan. 633, 81 Pac. 189; *Texas & P. Ry. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 87 S. W. 362; *Atchison, T. & S. F. Ry. Co. v. Watson*, 71 Kan. 696, 81 Pac. 499.

ceptional cases, in which by the nature of the circumstances it would be impracticable to state the details on which the estimate of damage could be based, so as to convey an adequate idea of the thing injured, and in such exceptional cases only, testimony as to the extent of the damage has been permitted, on the broad ground that it is the best attainable.⁹³ But there is a class of cases in which there is a decided *conflict* of authority as to the admissibility of opinions as to the amount of damages in *condemnation proceedings*. The courts of many of the states, perhaps a majority, hold that in such cases witnesses cannot state the amount of damages sustained thereby, on the ground that the amount of damages is the very subject referred to the jury.⁹⁴ These courts confine the witnesses to a statement of the value of the property *before* and *after* its condemnation.⁹⁵ But in many states and with much reason

⁹³ Woodbeck v. Wilders, 18 Cal. 131; Cleveland etc. Ry. Co. v. Wood, 90 Ill. App. 551; Chicago etc. R. Co. v. Schaffer, 26 Ill. App. 280; Knapp etc. Co. v. Barnard, 78 Iowa, 347, 43 N. W. 197; Pennsylvania R. Co. v. Henderson, 51 Pa. 315; Clifford v. Richardson, 18 Vt. 620. But leading questions may not be put to the witnesses in such case: St. Louis etc. R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. 408.

⁹⁴ Montgomery etc. R. Co. v. Varner, 19 Ala. 185; Little Rock Ry. Co. v. Haynes, 47 Ark. 497, 1 S. W. 774; Central R. R. v. Senn, 73 Ga. 705; Central R. & Banking Co. v. Kelly, 58 Ga. 104; Metropolitan etc. R. Co. v. Dickinson, 161 Ill. 22, 43 N. E. 706; Harrison v. Iowa Midland R. Co., 36 Iowa, 323; Chicago etc. R. Co. v. Woodward, 48 Kan. 599, 29 Pac. 1146; Illinois C. R. Co. v. Smith, 110 Ky. 203, 61 S. W. 2; Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156; Ohio etc. Ry. Co. v. Nickless, 71 Ind. 271; Wileox v. Leake, 11 La. Ann. 178; Union Ele-

vator Co. v. Kansas City etc. R. Co. (Mo.), 33 S. W. 926; Burlington Ry. Co. v. Beebe, 14 Neb. 463, 16 N. W. 747; Fremont Ry. Co. v. Marley, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; Laing v. United New Jersey R. Co., 54 N. J. L. 576, 33 Am. St. Rep. 682, 25 Atl. 409; Norman v. Wells, 17 Wend. (N. Y.) 136; Lincoln v. Saratoga Ry. Co., 23 Wend. (N. Y.) 425; Teerpenning v. Corn Exchange Ins. Co., 43 N. Y. 279; Cleveland etc. R. Co. v. Ball, 5 Ohio St. 568, 5 Morr. Min. Rep. 333; Elliott v. Wallowa County, 57 Or. 236, Ann. Cas. 1913A, 117, 109 Pac. 130; Sixth Ave. R. Co. v. El R. Co., 138 N. Y. 548, 34 N. E. 400; Watson v. Pittsburgh etc. R. Co., 37 Pa. 469; Boyer v. St. Louis etc. R. Co. (Tex. Civ. App.), 72 S. W. 1038; Bain v. Cushman, 60 Vt. 343, 15 Atl. 171; De Wald v. Ingle, 31 Wash. 616, 96 Am. St. Rep. 927, 72 Pac. 469.

⁹⁵ Alabama Ry. Co. v. Burkett, 42 Ala. 83; Brunswick Ry. Co. v. McLaren, 47 Ga. 546; Yost v. Conroy,

it is held that opinions as to the damage sustained in such cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the processes of subtraction.⁹⁶ The tendency of the later decisions seems to be in favor of this rule. The opinions of

92 Ind. 464, 47 Am. Rep. 156; *Harrison v. Iowa Midland Ry. Co.*, 36 Iowa, 323; *Ottawa etc. Ry. Co. v. Adolph*, 41 Kan. 600, 21 Pac. 643; *Grand Rapids v. Grand Rapids & I. Ry. Co.*, 58 Mich. 641, 26 N. W. 159; *Freemont Ry. Co. v. Whalen*, 11 Neb. 585, 10 N. W. 491; *Cleveland etc. Ry. Co. v. Ball*, 5 Ohio St. 568; *Brown v. Providence etc. Ry. Co.*, 12 R. I. 238; *Kay v. Glade Creek etc. R. Co.*, 47 W. Va. 467, 35 S. E. 973; *Union El. Co. v. Kansas City etc. R. Co.*, 135 Mo. 353, 36 S. W. 1071. See, also, *Mayor of Baltimore v. Smith Brick Co.*, 80 Md. 458, 31 Atl. 423.

⁹⁶ *Texas etc. Ry. v. Kirby*, 44 Ark. 103; *Siskiyou County v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Trook v. Baltimore etc. R. Co.*, 3 McAr. (D. C.) 392; *Orange Belt Ry. Co. v. Craver*, 32 Fla. 28, 13 South. 444; *Spear v. Drainage Commissioners*, 113 Ill. 632; *Brandenburg v. Hittel* (Ind.), 37 N. E. 329; *Snow v. Boston etc. R. R.* 65 Me. 220; *Swan v. Middlesex County*, 101 Mass. 173; *Taft v. Commonwealth*, 158 Mass. 526, 33 N. E. 1046; *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544; *Emons v. Minneapolis etc. Ry. Co.*, 41 Minn. 133, 42 N. W. 789; *Nevada*

etc. R. Co. v. De Lissa, 103 Mo. 125, 15 S. W. 366; *Taylor v. Jackson*, 83 Mo. App. 641; *Evansville etc. R. Co. v. Cochran*, 10 Ind. 560; *Pennsylvania etc. R. Co. v. Root*, 53 N. J. L. 253, 21 Atl. 285; *Rochester Ry. Co. v. Budlong*, 6 How. Pr. (N. Y.) 467; *Portland v. Kamm*, 10 Or. 383; *Lee v. Springfield Water Co.*, 176 Pa. 223, 35 Atl. 184; *Dawson v. City of Pittsburgh*, 159 Pa. 317, 28 Atl. 171; *Schuler v. Board of Supervisors*, 12 S. D. 460, 81 N. W. 890; *Seattle etc. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Railroad Company v. Foreman*, 24 W. Va. 662; *Washburn v. Milwaukee Ry. Co.*, 59 Wis. 364, 18 N. W. 328; *Swift v. Newport News*, 105 Va. 108, 3 L. R. A., N. S., 404, 52 S. E. 821. In these states opinion evidence is held admissible as to the increase in the value of property occasioned by public improvements: *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567. See notes on "Admissibility of Opinion of Witness as to Amount of Damage to Realty," to *Baltimore Belt R. R. Co. v. Sattler*, 3 Ann. Cas. 667, and *Springfield & Northwestern Traction Co., v. Warrick*, Ann. Cas. 1912A, 191.

witnesses as to the amount of damage growing out of sales and breach of contract as to *personal property*, and other contracts and causes of action,⁹⁷ are not admissible.⁹⁸

§ 389 (391). Cross-examination of experts — Latitude allowed.—The subject of cross-examination generally is dealt with in another part of these commentaries,⁹⁹ and is treated here only in its bearing on expert witnesses. Not the least important part of the cross-examination is that which subjects the qualification on which the expert has been permitted to testify to a searching inquiry. He has placed himself in the position of one capable, by reason of his superior or peculiar knowledge, of announcing conclusions, which are of weight according to the thoroughness of the knowledge which prompted and is behind them. Therefore it is that the jury is entitled to know more fully the nature of his qualification, the sources of his knowledge, from which he assumes to speak with special authority, and the grounds and reasons upon which his conclusions and opinions are based. For example, a medical

⁹⁷ *Anderson v. First Nat. Bank*, 6 N. D. 497, 72 N. W. 916; *Tootle v. Kent*, 12 Okl. 674, 73 Pac. 310; *Neilson v. Chicago etc. Ry. Co.*, 58 Wis. 516, 17 N. W. 310.

⁹⁸ As to damages for loss of services: *Butler v. King*, 10 Cal. 342; *Turner v. Railway Co.*, 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243; as to *personal injury*: *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96; *De Wald v. Ingle*, 31 Wash. 616, 96 Am. St. Rep. 927, 72 Pac. 469; *Bain v. Cushman*, 60 Vt. 343, 15 Atl. 171. Other actions: *Illinois Cent. R. Co. v. Smith*, 110 Ky. 203, 61 S. W. 2; *Read v. Valley Land & Cattle Co.*, 66 Neb. 423, 92 N. W. 622. Contrary to the general rule a witness was allowed to give an opinion as to damages in an action for breach of promise of marriage: *Jones*

v. Fuller, 19 S. C. 66, 45 Am. Rep. 761. In that case Mr. Justice McIver said: "It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained? We think it was just one of those cases where in the language of that eminent author, Wharton, the 'facts can best be expressed by the damage they cause.'"

⁹⁹ §§ 820-843, *post*.

witness had stated that his testimony was based upon medical authorities, and he was then asked to state what the medical authorities at the time of the trial held upon the subject. The question was proper. Reese, J., said:¹⁰⁰ "If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper for the purpose of ascertaining his means of knowledge by a reference to the teachings of text-books of his profession and the scientific works from which he had drawn the theories and principles to which he had testified. . . . For the purpose, therefore, of testifying as to his recollection, as well as to his knowledge, it was proper to interrogate him as to the teachings of those authorities; and, in case his testimony was incorrect, to confront him with them, in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because 'the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities.' As we have shown, the testimony entered the domain of science, and the grounds upon which the objection is founded appeal most strongly to the mind of the writer as cogent reasons why the cross-examination was proper." It is proper that an expert witness should be asked whether a certain state of facts, if proved or admitted, indicates insanity for the purpose "of testing the skill of the witness or the soundness of his knowledge."¹ An expert engineer may properly be asked if he is licensed,² and an expert in metals as to whether a metal produced is gold or brass.³ Generally, therefore, the expert is open to every inquiry which is relevant to the subjects named and which tends to enable the jury better to judge the weight and value of his evidence, according to the standard which is established by his

100 *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113.

¹ *Lake v. People*, 1 Park. Cr. Rep. (N. Y.) 495.

² *Pate v. Gus. Blair etc. Coal Co.*, 158 Ill. App. 578.

³ *Coman v. Wunderlich*, 122 Wis. 138, 99 N. W. 612.

qualifications and knowledge after due cross-examination. This tests his competency as an expert, apart from any attack on his credibility.⁴ Having satisfied himself with the cross-examination as to qualification, it is for counsel to consider the mode and extent of the questions arising out of the direct examination of the expert. The party cross-examining an expert witness is by no means confined to the theory on which the adversary has conducted his examination. He may go into the details and may put the case before the expert in all its phases. "He has a right to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved; and he also has the right to add to the question such facts as he thinks the evidence establishes."⁵ The witness may be asked his opinion upon hypothetical questions which present the facts claimed to constitute the case or defense of the party examining him.⁶ As usual in cross-examination, *great liberty is allowed*; and the hypothetical questions may, subject to the reasonable discretion of the court, assume any facts relevant to the case.⁷ The

⁴ Birmingham R. Co. v. Ellard, 135 Ala. 433, 33 South. 276; Davis v. State, 96 Ark. 7, 130 S. W. 547; Central Pacific R. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; Gridley v. Boggs, 62 Cal. 190; West Chicago etc. R. Co. v. Fishman, 169 Ill. 196, 48 N. E. 447; Cooper v. Harvey, 77 Kan. 854, 94 Pac. 213; Pittsburg etc. R. Co. v. Austin, 141 Ky. 722, 133 S. W. 780; Skelton v. St. Paul etc. R. Co., 88 Minn. 192, 92 N. W. 960; State v. Hyde, 234 Mo. 200, Ann. Cas. 1912D, 191, 136 S. W. 316; Kasjeta v. Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874; Carr v. American Locomotive Co., 26 R. I. 180, 58 Atl. 678; Ruck v. Milwaukee Brewery Co., 144 Wis. 404, 129 N. W. 414; Ferry Hallock Co. v. Orange Hat Box Co., 185 Fed. 816. A party cannot put in evidence incompetent facts under the guise of fortifying

the opinion of his witness, even if the evidence might have been properly admitted on cross-examination to test the opinion of the expert: Pierson v. Boston etc. R. Co., 191 Mass. 223, 77 N. E. 769; Hunt v. Boston, 152 Mass. 168, 25 N. E. 82. As to the use of scientific treatises for purposes of cross-examination, see § 579, *post*.

⁵ Thomp. Trials, § 628; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760. As to use of scientific books on cross-examination, see § 579, *post*.

⁶ Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Williams v. State, 64 Md. 384, 1 Atl. 887.

⁷ Dilleber v. Home Life Ins. Co., 87 N. Y. 79; Trull v. Modern Wood-

inquiry on cross-examination should be allowed as wide a range as may be reasonably necessary to test the skill and reliability of the witness.⁸ Even on direct examination expert witnesses are allowed to state the *reasons* for their opinions;⁹ and clearly the same latitude is allowed on cross-examination. In ascertaining the grounds or reasons for such opinions, the cross-examiner is not confined to the scope of the evidence already given in the case, but is allowed to ask questions which would be wholly irrelevant except for the purpose of ascertaining the value of such opinions or the degree of credibility to be attached to the testimony of the witness.¹⁰ Although we have seen that on direct examination the hypothetical questions must be based upon facts proved or which the evidence tends to prove, no such limit is imposed upon the cross-examination. For the purpose of testing the accuracy or credibility of the expert, or the value of his opinions he may be interrogated as to pertinent *hypothetical cases concerning which no evidence has been given.*¹¹ The extent to which the

men of America, 12 Idaho, 318, 10 Ann. Cas. 53, 85 Pac. 1081; Mileham v. Montague, 148 Iowa, 476, 125 N. W. 664.

⁸ Dilleber v. Home Life Ins. Co., 87 N. Y. 79; People v. Augsburg, 97 N. Y. 501; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Geisendorf v. Eagles, 106 Ind. 38, 5 N. E. 743; People v. Sutton, 73 Cal. 243, 15 Pac. 86; McFadden v. Railway Co., 87 Cal. 464, 11 L. R. A. 252, 25 Pac. 681.

⁹ Dickenson v. Fitchburg, 13 Gray (Mass.), 546; State v. Hooper, 2 Bail. (S. C.) 37; Fairchild v. Bascomb, 35 Vt. 398; Lincoln v. Taunton Copper Mfg. Co., 9 Allen (Mass.), 181; Keith v. Lothrop, 10 Cush. (Mass.) 453; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; Chicago &

N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656, 39 N. E. 574.

¹⁰ Erickson v. Smith, 2 Abb. App. Dec. (N. Y.) 64; Louisville Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Davis v. State, 35 Ind. 496; Pensacola Elec. Co. v. Bissett, 59 Fla. 360, 52 South. 367. See, also, the late cases: Denver City Tr. Co. v. Gawley, 23 Colo. App. 332, 129 Pac. 258; Crawfordsville Trust Co. v. Ramsey (Ind.), 98 N. E. 177; Hoffmann v. Cedar Rapids etc. R. Co. (Iowa), 139 N. W. 165; Travelers' Ins. Co. v. Davies, 152 Ky. 600, 153 S. W. 956; Allen v. Boston El. R. Co., 212 Mass. 191, 98 N. E. 618; Galveston etc. R. Co. v. Young (Tex. Civ. App.), 148 S. W. 1113; Brey v. Forrestal, 151 Wis. 245, 138 N. W. 645.

¹¹ Davis v. State, 35 Ind. 496; Louisville Ry. Co. v. Falvey, 104 Ind.

examination may go in respect to such collateral matters rests in the sound *discretion of the court*, and the exercise of such discretion will not be reviewed on appeal, unless abused.¹² In other respects expert witnesses may be subjected on cross-examination, like other witnesses, to such tests as may be necessary to ascertain whether they are accurate, impartial and credible.¹³ Thus, they may be asked if they have not on other occasions expressed opinions different from those given on the stand;¹⁴ and they may be asked the reasons for such change of opinion,¹⁵ and whether they have received a special fee for attending the trial, and if so, what amount.¹⁶

409, 3 N. E. 389, 4 N. E. 908; Dillebar v. Home Life Ins. Co., 87 N. Y. 79; People v. Augsbury, 97 N. Y. 501; Geisendorf v. Eagles, 106 Ind. 38, 5 N. E. 743; People v. Sutton, 73 Cal. 243, 15 Pac. 86; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

¹² People v. Augsbury, 97 N. Y. 501; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072. See § 833 et seq., *post*.

¹³ In those states where the American rule of limited cross-examination is used (see § 820 et seq., *post*), the limitation applies also to experts. When the evident purpose of the examining counsel is to construct his defense under the guise of cross-examination, "sound discretion requires that he should be held strictly within the rule": Ferry-Hallock Co. v. Orange Hat Box Co., 185 Fed. 816; Aeolian Co. v. Standard Music Roll Co., 176 Fed. 811.

¹⁴ Sanderson v. Nashua, 44 N. H. 492. See § 826 et seq., *post*.

¹⁵ People v. Donovan, 43 Cal. 162.

¹⁶ Alford v. Vincent, 53 Mich. 555, 19 N. W. 182; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. See valuable notes as to expert testimony to Hammond v. Woodman, 66 Am. Dec. 228, and

Glidden v. Mechanics' Nat. Bank, 42 L. R. A. 753-774. Other useful cases indicating the scope of cross-examination are abridged from 15 Current Law, p. 1800 as follows: Pensacola etc. Co. v. Bissett, 59 Fla. 360, 52 South. 367 (reason for opinion); Holmes v. Rivers, 145 Iowa, 702, 124 N. W. 801; Reed v. Fireman's Ins. Co., 78 N. J. L. 549, 74 Atl. 477 (as to valuer's prospective interest in result of action); Holden v. Gary Tel. Co., 109 Minn. 59, 122 N. W. 1018 (specific instances of durability of cottonwood telephone poles); Minihan v. Boston El. R. Co., 205 Mass. 402, 91 N. E. 414 (searching examination of medical expert both as to opinion and circumstances of examination in personal injury case); Palestine etc. Co. v. Terminal Warehouse Co., 67 Misc. Rep. 456, 123 N. Y. Supp. 346 (as to valuer's knowledge of cost of goods); In re Clinton St. Police Station Site, 123 N. Y. Supp. 198 (valuer as to construction of hypothetical building on land); Missouri etc. R. Co. v. Farris (Tex. Civ. App.), 126 S. W. 1174 (medical expert as to possibility of certain condition existing without his discovering it).

§ 390 (392). **Infirmity of expert testimony.**—A volume might be filled with illustrations of the weakness of expert testimony, and of the waste of time, energy and words which it only too often entails. So long as the attacks upon it serve the useful purpose of having its admission guarded with extreme judicial caution, they are to be encouraged, and so far as observation of the trend of judicial decision teaches us, there is not only a more careful scrutiny of such evidence now than in former times, but there is a marked diminution in the offers of such testimony. It is the inherent infirmity of expert testimony that it consists largely of matters of opinion. In addition to those elements of weakness and uncertainty which enter into the testimony of those who relate simply what they have seen and heard, we have in expert testimony the *deductions* and *reasoning* of the witness with all the chances of error incident to human reasoning. The notorious fact that experts of equal credibility and skill are found in almost every important cause testifying to directly opposite conclusions illustrates both the fallibility of such testimony and the fact that a conviction for perjury based upon such evidence would be very difficult. It is a matter of common observation in the courts that witnesses of the highest character and of undoubted veracity may be easily led as experts to espouse and defend a theory with all the zeal of the advocate. Again, the practice sometimes prevails of employing expert witnesses and paying them for their services, as *compensation*, amounts depending upon their skill, or, perhaps, the result of the action. These and similar considerations have led to those strictures upon expert testimony so often made in instructions to juries or in judicial decisions.¹⁷ The expert must not usurp the functions of the jury. If his opinion were allowed to be conclusive, we should have a *reductio ad absurdum* if there were two ex-

¹⁷ For a general discussion of the value and uses of expert testimony and opinion evidence, see extended notes to *Hammond v. Woodman*, 66

Am. Dec. 228-246, and *Glidden v. Mechanics' Nat. Bank*, 42 L. R. A. 753-774.

perts, one on each side, with diametrically opposed conclusions. Considered in his true capacity as an aid to the jury, we shall consider in the next section his ability to further the ends of justice.

§ 391 (393). Same, continued.—The marked disfavor shown by the courts is to a great extent the cause of the lessening of the evil. Our judges have been most outspoken on the value they attach to expert testimony, and in vivid contrast to the experts, express themselves so clearly, so concisely and so incisively, that each utterance warns parties to future actions to beware of expert evidence. McSherry, C. J.,¹⁸ said: “The tendency of the medical expert to involve in mystery the simplest unscientific facts, and to cloud them in bewildering technical nomenclature, and then to deduce most irrelevant conclusions from them, is notorious, and is frequently exhibited in trials at *nisi prius*; and it is consequently apparent that these medical experts are no better qualified to draw correct inferences from every-day transactions and nonscientific premises than is the ordinary man of average common sense.” It has been said of expert testimony: “It is not desirable in any case where the jury can get along without it, and is only admitted from necessity, and then only when it is likely to be of some value.”¹⁹ “The evidence of experts is of the very lowest order and the most unsatisfactory character.”²⁰ “These doctors,” said the supreme court of Illinois a few years ago, “were summoned by the contestants as ‘experts’ for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act. They were the contestants’ witnesses, and so considered themselves. The testimony of such is worth but little, and should always be received by juries and courts with great caution. It was said by a

¹⁸ Berry v. Safe Deposit etc. Co., 96 Md. 45, 53 Atl. 720.

²⁰ Whitaker v. Parker, 42 Iowa, 585.

¹⁹ Per Cooley, J., in People v. Morgan, 29 Mich. 4.

distinguished judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinions of his neighbors, of men of good common sense, would be worth more than that of all the experts in the country. . . . It must be apparent to everyone, but few wills could stand the test of the fanciful theories of dogmatic witnesses, who bring discredit on science and make the name of 'expert' a by-word and a reproach. We concur with the judge above referred to. We would not give the testimony of these common-sense witnesses, deposing to what they know and saw almost every day for years, for that of so-called experts, who always have some favorite theory to support."^{20a} All testimony founded upon opinion merely is weak and uncertain, and should in every case be weighed with great caution.²¹ "The unsatisfactory nature of such evidence is well known. The facility with which great numbers of witnesses may be marshaled on both sides of such a question, all calling themselves experts, and each anxious to display his skill and ingenuity in detecting the false or pointing out the true, and equally honest and confident that his own theory or opinion is the only correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received."²² "Such evidence should be received with great caution by the jury and never allowed except upon subjects which require unusual scientific attainments or peculiar skill."²³ "The evidence of witnesses who are

^{20a} *Rutherford v. Morris*, 77 Ill. 397.

²¹ *McFadden v. Murdock*, I. R. 1 C. L. 211.

²² *Daniels v. Foster*, 26 Wis. 686,

per Dixon, C. J.; *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9.

²³ *Grigsby v. Clear Lake Water W. Co.*, 40 Cal. 396. See, also, the Canadian case: *Deschenes v. Langlois*, Q. R. 15 K. B. 388.

brought upon the stand to support a theory by their opinions is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others; and they are selected on account of their ability to express a favorable opinion, which there is great reason to believe is in many instances the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict; and it forms a very proper subject for the expression of a reasonably guarded opinion by the courts.”²⁴ We might quote from many other judicial decisions in which the courts have held it proper to caution the jury in somewhat similar language as to the inherent weakness of expert testimony.²⁵ We cannot close this section without reproducing from two New York cases *dicta* which are convincing expressions of judicial distrust. “We may assume, also, that their [the experts’] minds were affected by that pride of opinion, and that kind of mental fascination with which men are affected when engaged in the pursuit of what they call scientific inquiries.”²⁶ “He [the expert] comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him.”²⁷

²⁴ *Templeton v. People*, 3 Hun (N. Y.), 357, 60 N. Y. 643; *People v. Perriman*, 72 Mich. 184, 40 N. W. 425.

²⁵ As to such testimony in cases of handwriting, see *Foster’s Will*, 34 Mich. 21; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Pratt v. Rawson*, 40 Vt. 183; *United States v. Darnaud*, 3 Wall. Jr. (U. S.) 143, Fed. Cas. No. 14,918; *Whitaker v. Parker*, 42 Iowa, 585; *Moye v. Hernndon*, 30 Miss. 110. See, also, 25 Jour. Juris. 409. As to medical witnesses: *Kempsey v. McGinniss*, 21 Mich. 123; *Carpenter v. Calvert*, 83 Ill. 62; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481. As to other expert wit-

nesses: *American Middlings Co. v. Christian*, 4 Dill. (U. S.) 448, Fed. Cas. No. 307; *Gay v. Union Life Ins. Co.*, 9 Blatchf. (U. S.) 142, Fed. Cas. No. 5282; *Smith v. State*, 2 Ohio St. 511; *Grigsby v. Clear Lake Water W. Co.*, 40 Cal. 396. See valuable notes to *Hammond v. Woodman*, 66 Am. Dec. 228, and *Glidden v. Mechanics’ Nat. Bank*, 42 L. R. A. 753.

²⁶ *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843, 861, dissenting opinion of O’Brien, J.

²⁷ *Roberts v. New York El. R. Co.*, 128 N. Y. 455, 13 L. R. A. 499, 28 N. E. 486, 491.

§ 392 (394). **Expert testimony — When valuable.** — It must not be supposed—as it might be if this chapter had closed with the last section—that expert testimony, on account of the light regard in which it is held, is entirely and utterly without use. It has its uses, which are valuable, just as its abuses have earned for it the suspicion with which it is received in most courts. Nor is it to be inferred that a court or jury has the right to give such testimony no consideration; and when the instructions to the jury lead to the inference that no reliance is to be placed on the evidence of experts,²⁸ or that no aid can be gained from it,²⁹ or that it may be wholly disregarded,³⁰ such instructions are erroneous. But the jury may properly be instructed that they may disregard the evidence, if they deem it unreasonable.³¹ While it is true that the jury are not bound to accept the opinions of experts, and are not concluded by them,³² yet such opinions are *entitled to be considered*, and to receive such weight as in view of all the circumstances reasonably belongs to them.³³ In considering the weight and force of the evidence, the jury may act upon their own general knowledge of the subject of the inquiry.³⁴ There is another class of cases from which many quotations might be made, holding that under some circumstances expert testimony is of great value; and instructions embodying this suggestion have been frequently given to

²⁸ Eggers v. Eggers, 57 Ind. 461; Templeton v. People, 3 Hun (N. Y.), 357, 60 N. Y. 643. As to the general subject, see note to Glidden v. Mechanics' Nat. Bank, 42 L. R. A. 753-774.

²⁹ Pannell v. Commonwealth, 86 Pa. 260.

³⁰ Washburn v. Milwaukee, L. S. & W. Ry. Co., 59 Wis. 364, 18 N. W. 328.

³¹ St. Louis v. Ranken, 95 Mo. 189, 88 S. W. 249.

³² Olson v. Gjertsen, 42 Minn. 407, 44 N. W. 306.

³³ United States v. Glue, 1 Curt. (U. S.) 1, Fed. Cas. No. 15,679; Stone v. Chicago etc. Ry. Co., 66 Mich. 76, 33 N. W. 24. See note to Glidden v. Mechanics' Nat. Bank, 42 L. R. A. 756-767. See, also, the Canadian cases: Regan v. Waters, 10 A. R. 85; Stock v. Ward, 7 C. P. 127; Wm. Hamilton Mfg. Co. v. Victoria etc. Mfg. Co., 20 S. C. R. 96.

³⁴ Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028; The Conqueror, 166 U. S. 110, 41 L. Ed. 937, 17 Sup. Ct. Rep. 510.

the jury and sustained by the appellate courts.³⁵ Nor is there any necessary inconsistency between such instructions and those already alluded to in which the infirmity or weakness of opinion evidence is pointed out. When skilled and experienced experts give their opinions based in part upon facts which have come within their own observation,³⁶ or where they state precise facts in science, as ascertained and settled, or the necessary and invariable conclusion which results from the facts stated,³⁷ such opinions may be entitled to great weight; and it not infrequently happens that such opinions are *indispensable* in furnishing some guide for the determination of questions unfamiliar to ordinary witnesses.³⁸ On the other hand, when the testimony consists of mere inferences from assumed facts, of opinion against opinion, and especially of the opinions of those zealous witnesses who betray the bias of the advocate, it may be highly proper for the court to caution the jury against the dangers of such evidence. The cases already referred to sufficiently illustrate the rule that the jury must, in passing upon expert testimony, like other testimony, finally determine the degree of weight to which, under all the circumstances, it is entitled. It is for the jury to estimate the value of the opinion and accept or reject it; it is for them to find the facts on which it is based, true or untrue; they are to regard the opinion simply as a sort of superstructure imposed upon a hypothetical foundation, which stands or falls with its supporting facts.³⁹ They are to consider such facts—that is, the facts mentioned in the hypothetical question, whether such facts do actually exist, whether there is evidence on which to base them—be-

³⁵ As to the testimony of a family physician: *Baxter v. Abbott*, 7 Gray (Mass.), 71; *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverley v. Walden*, 20 Gratt. (Va.) 147. As to physicians generally: *Flynt v. Bodenhamer*, 80 N. C. 205; *Pitts v. State*, 43 Miss. 472. See note to *Hammond v. Woodman*, 66 Am. Dec. 234. .

³⁶ *Baxter v. Abbott*, 7 Gray (Mass.), 71.

³⁷ *Gay v. Union Ins. Co.*, 9 Blatchf. (U. S.) 142, Fed. Cas. No. 5282.

³⁸ *Getchell v. Hill*, 21 Minn. 464; *Wood v. Barker*, 49 Mich. 295.

³⁹ *Smith v. Missouri & K. Tel. Co.*, 113 Mo. App. 429, 87 S. W. 71.

cause, if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion is valueless. The opinion is given upon a certain state of facts supposed to be true, and the jury cannot tell what the opinion would have been if one of those facts had been withdrawn.⁴⁰ In the light of an aid to the jury, expert testimony is assuredly valuable. The opinions of experts, unchallenged and established in the minds of the jury by proof of the constituent facts, are entitled to consideration the same as other evidence which has gone to the jury. Nevertheless, when the jury are told that the expert evidence is advisory only, and not binding on them, that they are not to surrender their own convictions, but they should accord to such evidence such weight as they believe from all the facts and circumstances in evidence the same are entitled to receive, full justice has been accorded to the class of testimony we are dealing with.⁴¹ An eminent writer has truly said that, to make the opinions of experts admissible in evidence it is necessary, "First, that the subject matter of inquiry should be within the range of the peculiar skill and experience of the witness; and, secondly, that it should be one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts."⁴² Despite the fact that expert testimony may be, and undoubtedly often is, descended to base uses, its value, when experts of integrity, as well as knowledge, testify upon facts which are proven, is great in proportion to their qualifications and to the aid which their testimony affords the jury in arriving at a just determination.⁴³

⁴⁰ *People v. Foley*, 64 Mich. 148, 31 N. W. 94.

⁴¹ *Markey v. Louisiana etc. R. Co.*, 185 Mo. 348, 84 S. W. 61.

⁴² *Rog. Exp. Test.* 18; *Metropolitan Sav. Bank v. Manion*, 87 Md. 80, 6 Am. St. Rep. 412, 39 Atl. 360; *Mul-*

downey v. Illinois Cent. R. Co., 36 Iowa, 462.

⁴³ —"like the toad, ugly and venomous,
Wears yet a precious jewel in its head."

—*As You Like It, Act II, Scene 1.*

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